IN THE PESHAWAR HIGH COURT,
BANNU BENCH

(*Judicial Department*)

Cr.A No. 109-B of 2018

Wakil Khan

Vs
The State etc.

JUDGEMENT/ORDER.

Date of hearing 21.09.2020

Petitioner by: **M/S Anwar-ul-Haq and Sawal Nazir advocate.**

Respondent by: **M/S Muhammad Ashraf Khan Marwat and Haji Hamayun Khan advocates.**

State by: **Mr. Shahid Hameed Qureshi, Addl.AG.**

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SAHIBZADA ASADULLAH, J.- The appellant Wakil Khan assailed the judgment dated 25.05.2018 of learned Additional Sessions Judge-III, Lakki Marwat, whereby the appellant involved in case F.I.R No. 258 dated 27.07.2014, registered at Police Station Ghazni Khel, district Lakki Marwat, has been convicted under section 302(b) P.P.C for life imprisonment alongwith compensation Rs.30,00000/- under section 544-A Cr.P.C. He was further convicted under section 427/34 P.P.C and sentenced to imprisonment for two years with fine Rs.50000/- or indefault to undergo six months SI. Both the sentences are directed to run concurrently and benefit of section 382-B Cr.P.C was also extended in his favour.

2. The complainant also filed criminal revision No.39-B of 2018, for enhancement of sentence of appellant. Both, the appeal and revision petition are going to be decided through this common judgment.

3. Brief facts of the case are that, on 27.07.2014 at 16.40 hours, complainant Sher Nawaz Khan, deceased then injured in Civil Hospital, Lakki Marwat, reported the matter to the local police, to the effect that he after hiring a Taxi from Adda Tajazai were proceeding towards his village Khawaja Khel, when they reached at metal road Zaitoon Khel Bega Tajazai, accused/ appellant Wakil Khan and Sher Azam Khan duly armed with pistols were present, who on seeing started firing at him, as a result of which he got hit and injured, motorcar was also damaged, while the driver escaped unhurt. After commission of offence the accused decamped from the spot. Motive was stated to be previous blood feud. Syed Azam Khan S.H.O reduced the report of complainant in shape of Murasila Ex: PA/1 and sent the same to the Police Station for registration of F.I.R through constable Gul Syed Shah No.270. He prepared injury sheet Ex: PA/2, and sent the injured for medical examination under the escort of constable Nazir No. 6590 (PW-04). On the following day i.e. 28.07.2014 the complainant Sher Nawaz succumbed to the injuries.

4. After completion of investigation the complete challan was submitted before the learned trial Court on 18.08.2014 under section 512 Cr.P.C, as by then the accused were absconding. The convict/ appellant was arrested on

28.02.2017 and after completion of necessary investigation supplementary challan was submitted against him on 25.03.2017. Learned trial Court after complying with the provision under section 265-C Cr.P.C, charge sheeted the accused, to which he pleaded not guilty and claimed trial. The prosecution in order to prove its case against the appellant produced as many as thirteen (13) witnesses. The appellant submitted an application for summoning PW Dr. Muneerullah, which was accepted vide order dated 14.03.2018, he was summoned and his statement was recorded as CW-1. On close of prosecution evidence statement of accused/ appellant was recorded under section 342 Cr.P.C, wherein he professed innocence by refusing the allegations. He submitted that he wanted to be examined on oath as provided under section 340 (2) Cr.P.C and to produce defence evidence. appellant was examined as DW-02, he produced Muhammad Khan SI (DW-1) and Noor Aslam Khan (DW-03). After hearing arguments of learned counsel for the parties, vide impugned judgment dated 25.07.2018 the accused/ appellant was convicted as mentioned above. Feeling aggrieved the appellant assailed the same through instant criminal appeal, while the legal heirs of deceased preferred criminal revision petition No.39-B of 2018.

5. The learned counsel representing the appellant submitted that it was a blind murder and no witness came forward to confirm the testimony of the deceased; and that despite the fact the injured while reporting the matter disclosed of a driver who was driving the motorcar at the time when the tragedy occurred but his name was not mentioned and even the

Investigating Officer could not collect the driver to record his statement in this respect. He further submitted that the injured received firearm injuries on vital parts of his body and that he could not talk, what to talk of reporting the matter.

6. Conversely, the learned counsel representing the complainant stated that the matter was promptly reported; that the injured was oriented in time and space and that the concerned doctor issued a certificate in that respect. He lastly submitted that a dying person will not tell a lie and that in case in hand substitution is a rear phenomenon.

7. Arguments of learned counsel for the parties, learned Addl: A.G representing the State heard and record perused with their valuable assistance.

8. The tragic incident occurred when the deceased was travelling in a motorcar along with a driver when the accused/ appellant along with the absconding accused opened indiscriminate firing at them, which resulted into injuries on person of the deceased who got injured and was taken to D.H.Q Hospital Lakki Marwat, where the deceased then injured reported the matter to one Syed Azam Khan ASI, charging the accused. The deceased succumbed to his injuries on the following day, in which respect section 302 P.P.C was added and as such the charge was altered.

9. The prosecution story is resting upon the dying declaration with no further evidence and in such a situation the courts of law must be cautious and vigilant while awarding

punishment, so to avoid miscarriage of justice. In case in hand the learned trial Court based its decision mainly on the testimony of the complainant who by then was injured, but this court is to see as to whether the incident occurred in the mode, manner and the time and as to whether the report was in fact made by the complainant while injured.

10. The incident occurred at 15.50 hours, whereas the matter was reported at 16.40 hours, and this promptness weighed heavily with the trial court, resulting into conviction. The core issue before us to resolve is as to whether the deceased then injured was oriented in time and space and as to whether both the doctor as well as the police official, who recorded the report observed all the legal and codal formalities. The scribe was examined as PW-06, who stated that while on *gusht* he received information and he rushed to the hospital, where he found the deceased then injured lying in injured condition who reported the matter to him. This is pertinent to mention that despite the fact that the complainant was seriously injured with having multiple firearm injuries on his person but the scribe did not feel the need to consult the doctor and to request a certificate as to whether the injured by then was capable to talk and oriented in time and space. The scribe (PW-06) stated that as the patient was conscious and capable to talk so he did not feel the need either to consult a doctor before the report or to ask for a certificate, the conduct of the scribe is not only abnormal but unnatural as well. There is no denial to the fact that the matter was reported in the emergency room of D.H.Q Hospital, Lakki Marwat but despite

the availability of doctor and other concerned the scribe went reckless knowing the fact that his this conduct will put a greater impact to the prosecution case, as the only available evidence was the statement of the complainant. The report was penned down and the injury sheet was prepared where after the injured was taken to the doctor for his medical examination under the escort of one Constable Muhammad Nazir and as such the Medical Officer examined the injured at 04.45 p.m. The medico-legal report was prepared but the column meant for relatives was left blank and it finds mention that the injured was brought by constable Muhammad Nazir. We have gone through the medico-legal report but to our utmost surprise neither the puls nor the blood pressure finds mention, to ascertain there from as to whether the injured was capable to talk and even the doctor did not take the pains to opine regarding the physical condition of the injured and to explain that whether at the time when the injured was produced before him for medical examination, he was oriented in time and space. The doctor was examined as PW-05, where he admitted that neither any certificate was asked from him nor he endorsed the injury sheet in that respect, he went on to say that as at the time of report his opinion regarding the capability of the injured and his physical condition was not requested, so he did not endorse the *Murasila.* The injured travelled from the spot to D.H.Q Hospital Lakki Marwat where he was examined by PW-05, who after realizing the serious condition of the injured referred him to Civil Hospital Bannu, where one Dr. Munirullah (CW-01) operated him. This is

pertinent to mention that when the injured was received in Civil Hospital, Bannu entries were made in the relevant register regarding his arrival to the hospital and also the time of his admission has been mentioned as 04.46 p.m. In this respect the abstract from the relevant register are placed on file and duly exhibited. We are yet to see that when the interse distance between D.H.Q hospital, Lakki Marwat and Civil Hospital Bannu, is more than 40 K.M, then how the injured was received in Bannu at 06.46 p.m. where PW-05 has stated that at 04.45 p.m. he examined the injured in D.H.Q Lakki Marwat. Another important aspect of the case is that PW-05 did not mention the inner injuries of the injured rather he assessed the condition from having a cursory look over the wounds, whereas Dr. Munirullah who operated the injured explained that which vital organs of his body were damaged. CW-01, was examined as Court witness and both the sides were provided equal opportunity to cross-examine him and both the sides tested the veracity of this witness through cross-examination. The witness admitted the arrival of the injured to the hospital and took the entries in the relevant register as correct. He was further cross-examined regarding the nature of injuries, who admitted that the injuries were received on vital parts of body and that the patient could go into shock within 30 minutes. The post mortem was conducted where the doctor mentioned nearly all the major organs of his body as damaged, and we are yet to assess as to whether a patient with such injuries could make a coherent statement. The autopsy was conducted on the dead-body of the deceased where the doctor

after post mortem examination declared all major vital organs of the body, as damaged. There is another aspect of the case, which cannot be ignored that subsequently an application was submitted to the doctor at D.H.Q Hospital, Lakki Marwat regarding the capability of the patient to talk. We are surprised that what need was felt either to the scribe or to the Investigating Officer who requested a certificate in this respect, which while writing down the report he did not feel the need. When PW-06, i.e. the scribe was examined he stated that as the patient was oriented time and space, so he did not feel the need to ask for a certificate. This fact takes up to hold that in fact the investigating agency realized the blunder at a belated stage that's why the need was felt to fill up the lacunae, which could go deep to the roots of the prosecution case. The endorsement made by the doctor and the opinion given on the application submitted for the purpose tells that the doctor referred to what he previously examined and stated that he had earlier examined the patient, where he was conscious and could talk. We scanned the record to see as to whether any other document apart from the medical report was also prepared, where PW-05 had given such opinion but we failed to come across any such document, however, it was the medico-legal report which was prepared by the doctor but he did not mention the physical condition of the patient and the capability to talk, therein.

11. No doubt, dying declaration is an important piece of evidence and that sanctity is attached to the dying declaration, because a dying man is not expected to tell lie, but it is equally

true that it is always considered as weak type of evidence being un-tested by cross-examination, therefore, it puts the Courts on guard and great care is demanded to ascertain that:-

1. Whether the maker has the physical capacity to make the dying declaration.
2. Whether the maker had opportunity to identify the assailant/assailants.
3. Whether there was a chance of mis-identification on the part of dying man in identifying and naming the attacker/attackers.
4. Whether it was free from prompting from any outside quarter; and.
5. The witness who heard the deceased making his statement, heard him correctly and whether this evidence can be relied upon.

12. It is universal principle of criminal justice that dying declaration by itself is not a strong evidence being not tested by way of cross- examination. The only reason for accepting the same is the belief phenomenon of the court of law that a person apprehending death due to injuries, caused to him, is ordinarily not expected to speak a falsehood. To believe or disbelieve a dying declaration thus is left to the ordinary human judgment, however, the Courts always insist upon strong, independent and reliable corroboratory evidence for the sake of safe dispensation of justice. Relying blindly and without proper scrutiny on such statement, would be no less dangerous approach on the part of the Courts of law.

In case titled ***Mst. Ghulam Zohra and another Vs. Malik Muhammad Sadiq and another (1997 SCMR 449)***, it has been held that:-

"Police Officer had not obtained certificate from the Doctor before recording the statement of the deceased in an injured condition that he was in a fit condition to give the statement, nor he had given a plausible explanation for such omission and fitness of the deceased to make the statement, thus, remained doubtful".

13. The prosecution case is shrouded in mystery as to who brought the injured to the hospital soon after the incident; and that who was driving the motorcar when the deceased was fired at, but despite thorough search we could not come across any such evidence. The Investigating Officer visited the spot and prepared the site-plan and also took into possession the motorcar in which the incident had occurred. The Investigating Officer was examined as PW-12, who stated that when he reached to the place of incident the motorcar was left abandoned; and that nobody was present in the surroundings. He further stated that he took all measures to trace out the owner of the motorcar and the person who was driving the motorcar at the time of incident, and towards the end he succeeded to locate the owner of the motorcar and that he disclosed the name of the driver, who was driving the motorcar when the deceased received firearm injuries. We are surprised that the Investigating Officer did not move an inch in this respect, he did not try to record the statement of the owner as well as driver of the motorcar and he did not mention his name in the calendar of witnesses. The Investigating Officer displayed an abnormal conduct despite the fact that he knew that it was the

driver who could tell the truth but he did not take the pains to investigate the case on that lines. The driver was not examined and even he was not associated with the investigation of the case, had he been examined he would have been the best evidence to dig out the truth, but the Investigating Officer kept mum for reasons best known to him. There is no cavil to the proposition that the prosecution is to produce the best available evidence and when disinterested evidence is not produced then the inference is always drawn against the prosecution that had he been produced he would have not supported the case of the prosecution. Article 129 (g) of the Qanun-e-Shahadat Order 1984, caters for the situation.

In case titled ***"Riaz Ahmad Vs the State" (2010 SCMR 846)***, wherein it is held that:

> ***"One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been***

examined in the Court his evidence would have been unfavourable to the prosecution."

14. This is intriguing to note that two persons are charged for effective firing upon the deceased, but the post mortem report tells that the dimension of all entry wounds is one and the same. The doctor who conducted autopsy on the dead-body of the deceased was examined, who confirmed the dimension of injuries on the person of the deceased as one and the same, in such eventuality the possibility cannot be excluded that in fact it was the job of one person and this conflict between the medical and ocular account is another blow to the prosecution case.

15. The appellant soon after his arrest submitted an application regarding his innocence to the police high ups which was marked to the concerned Investigating Officer with directions to inquiry into the matter in light of the grounds taken in the application. The investigation was conducted and the police official recorded statements of independent witness in that respect where it was laid open that the accused/ appellant was not present at the place of occurrence at the time of incident. Furthermore, the accused was examined under section 342 Cr.P.C, where too, he explained his innocence and his nexus with the murder of the deceased. Be that as it may, once a prosecution could not prove its case against the accused to the hilt then the defence plea if taken by the accused whether proved or unproved turns ineffective.

16. The learned counsel for the complainant vehemently argued that the accused / appellant soon after commission of the offence went into hiding and that it was in the year 2017, he surfaced and was taken into custody. He submitted that the long unexplained abscondence must be taken in favour of the prosecution and should be considered a strong circumstance to help in conviction. True that long unexplained abscondence weighs against the accused, but it never absolves the prosecution of the liability to prove its case against the accused beyond reasonable doubt, as the prosecution is always under the bounden duty to prove its case to the hilt and when it proves its case through disinterested and convincing evidence then the abscondence is taken and considered as a corroborative piece of evidence, but in case in hand the prosecution could not succeed in proving its case against the appellant and in such eventuality abscondence alone plays no role.

In case titled ***"Liaqat Hussain and others Vs Falak Sher and others" (2003 SCMR 611(a)***, *wherein it has been held:-*

> **"(a) Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation for being present on the scene of occurrence and were chance witnesses---Prosecution case did not inspire confidence and fell for short of sounding probable to a man of reasonable prudence---Abscondence of accused in such circumstances could not**

offer any useful corroboration to the case of prosecution"

17. The motive was given as blood feud between the parties and it was stressed time and again that the appellant had the motive to commit the offence, but we cannot ignore that motive is a double edged weapon which cuts either way. The prosecution could not produce convincing evidence in this respect and even the Investigating Officer did not record the statements of independent witnesses which could prove the motive on record. True that in each and every case the prosecution is not required to prove the motive and that its absence or failure will not help the accused/ appellant but equally true that once the prosecution alleges a motive then it is under obligation to prove the same failing which none else but the prosecution will suffer, as is held in case titled "**Hakim Ali Vs. The State" (1971 SCMR-432)**, that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence. The above view has been reiterated in the case of "**Amin Ullah Vs. The State" (PLD 1976 SC 629)**, wherein, it has been observed by their lordships, that motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story. It was again re-enforced by the august Supreme Court in the case of "**Muhammad Sadiq Vs. Muhammad Sarwar" (1997 SCMR 214)**. Again on the same principle, case laws titled **Noor Muhammad Vs. The State and**

another" (2010 SCMR 997) and "Amin Ali and another Vs. The State" (2011 SCMR-323) can also be referred.

18. After evaluating the evidence from all angles this Court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against accused/appellant. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the learned trial court is set-aside and he is acquitted of the charges by extending him the benefit of doubt, he shall be released forth with from jail, if not required to be detained in connection with any other case. As the appeal has been allowed so Cr. R No.39 -B of 2018 stands dismissed.

19. Above are the reasons of our short order of the even date.

Announced.
21.09.2020

JUDGE.

JUDGE.

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