THE PESHAWAR HIGH COURT, BANNU BENCH.

[Judicial Department].

Cr.A No.137 -B of 2019

Faheemullah

Vs.

The State & Jehanzeb Khan

JUDGMENT

Date of hearing: *11.11.2019*

For Appellants: ***Mr. Siffat Ali Khan Khattak Advocate.***

For State: ***Mr.* Shahid Hameed Qureshi Addl: A.G.**

For Respondents: ***Mr. Sultan Mehmood Advocate.***

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SAHIBZADA ASADULLAH, J.— We would like to decide instant criminal appeal No. 137-B of 2019 filed by the convict/ appellant Faheemullah alias Muhammad Fahim and Cr. R No.40-B of 2019,filed by the complainant Jehanzeb Khan for enhancement of sentence against the appellant, through this single judgment, as both the appeal and revision petition are filed against the same judgment dated 07.05.2019, rendered by learned Additional Sessions Judge-I, Karak, whereby accused/ appellant involved in case F.I.R No. 213 dated 08.08.2009 registered at Police Station Latamber, District

Karak was convicted under section 302(b) PPC and sentenced to life imprisonment with compensation of Rs.200000/-, payable to the legal heirs of deceased within the meaning of section 544-A Cr.PC, in default whereof he shall further suffer six months S.I. He was also convicted under section 324 PPC, and sentenced to undergo three years RI alongwith fine of Rs.20000/- in default whereof to further undergo six-month SI.

2. The facts as gleaned from the F.I.R are that on 08.08.2009 at 12.30 hours, Jehanzeb Khan complainant in the company of his cousin Hanifullah brought the dead-body of his son Muhammad Junaid to KDA hospital, Karak, where he reported the matter to the local police that at 10.45 hours, he alongwith his son Muhammad Junaid and cousin Hanifullah were sitting on the spot for looking after Maize crop, meanwhile at about 10.45 accused/ appellant Muhammad Faheem duly armed with Kalashnikov, appeared and fired at them, as a result of which his son Muhammad Junaid was hit and sustained injuries, while the complainant and his cousin Hanifullah escaped unhurt. The accused/ appellant after commission of the offence decamped from the spot. While on their

way to the hospital the injured succumbed to the injuries. Motive behind the occurrence alleged to be a dispute over the property, that is the spot field.

3. Report of the complainant was reduced into *Murasila*. Injury sheet was prepared and the dead-body was forwarded to mortuary under the escort of constable Zafran No.488 for post mortem examination, while the *Murasila* was sent to police station concerned through constable Razaq No.555. After completion of investigation, initially challan was submitted under section 512 Cr.PC, but subsequently after his arrest, supplementary challan was submitted against him before the learned trial Court and after complying with the provision under section 265-C Cr.PC, he was formally charge sheeted to which he pleaded not guilty and claimed trial

4. The prosecution in order to prove guilt of accused/ appellant produced and examined as many as twelve (12) witnesses. After closing prosecution evidence, statement of accused /appellant was recorded under section 342 Cr.PC, wherein he professed his innocence. He did not wish to produce defence nor opted to be

examined on oath as provided under section 340(2) Cr.P.C. Learned trial Court after hearing arguments of learned counsel for the parties, vide impugned judgment dated 07.05.2019 convicted and sentenced the accused/ appellant as mentioned above. Feeling aggrieved the convict/ appellant filed instant criminal appeal, while the complainant filed criminal revision petition for enhancement of sentence. Both are going to be decided through the instant common judgment.

5. We have heard learned counsels for the parties as well as learned A.A.G representing the state at length and have gone through the evidence available on record carefully.

6. The incident occurred on 08.08.2009, where the deceased namely Junaid was done to death by receiving firearm injuries. The matter was reported by the complainant Jehanzeb Khan, who was examined as PW-4, and the report was entered by PW-7, Muhammad Rahim SI in the KDA Hospital, Karak. In the report the complainant explained that he alongwith deceased Junaid and PW Hanifullah were sitting in the shadow of a tree in their field for looking after, when in the meanwhile the accused/ appellant

appeared and started indiscriminate firing which resulted into the death of the deceased, where they luckily escaped unhurt by lying down on the ground. The incident occurred at 11.45 a.m. whereas the matter was reported to the local police at 12.30 p.m with an abnormal delay of two hours. The witnesses tried their level best to condone the delay by advancing several explanations and they stated that the delay occurred as the house of the enemies were in close proximity so in order to avoid an untoward incident they adopted different routes to reach to the hospital, if their stance is taken to be correct, we find ourselves with disagreement that a father would rush his son to the hospital even at the cost of his life without fail, with utmost promptitude to save the life of his son. The presence of witnesses is doubtful at the place of occurrence, because one of the witness i.e. the complainant was a professor and PW Hanifullah was a teacher by profession and their presence in such scorching heat in the shadow of a Keeker tree does not appeal to a prudent mind. The purpose of their presence is after thought and surprised us that on one hand the land in which they were sitting was barren and on the other it was fenced with a barbed wire and

already protected, so the reason for look after was unfounded and had it been so then the two elderly persons instead of themselves to stop stray goats, sheep etc would depute a servant / tenant or any young person of the family. The overall situation leads us nowhere but to hold that the deceased was all alone at the time when he was done to death and none witnessed the occurrence. The complainant and PW Hamidullah were in total conflict with each other as one stated that they were chatting with one another, when in the meanwhile the accused/ appellant appeared and warned them of their presence in the spot field and thereafter started firing, which resulted into the death of the deceased, had this been so, then the witnesses were sitting in close proximity with the deceased and a burst fire would have definitely hit them and there were no chances of escape. If the statement of the witness to the extent of talking to one another and the warning from the accused is taken to be correct then the deceased was facing the accused so the injuries on the back of his skull without exit on front finds no support. The presence of the witnesses was further doubted when a question was put that whether in routine they used to look after the fields, their reply was

an emphatic "**NO**", so it can easily be held that the witnesses are chance and interested. In case titled, ***"Mst. Anwar Begum Vs Akhtar Hussain alias Kaka and 2 others" (2017 SCMR 1710)***, wherein it is held that:-

> ***"Both the witnesses of ocular account are chance witnesses and had no residence or place of business near the place of occurrence. Ghulam Jaffar (PW3) in his cross-examination stated that by chance he came at the spot 2/3 minutes prior to 8.00 p.m. The Investigating Officer (PW.11) was cross-examined on this aspect of the case and he candidly stated during his cross-examination that the shops or house of the eye witnesses had not been shown in the site plan. He further stated that he had not seen the house of the complainant. He also stated that he had not seen the house of the other eye-witness. It is well settled by now that in order to maintain conviction of a convict on capital charge on the basis of testimony of chance witnesses the court has to be at guard and corroboration is to be sought for relying upon any such evidence. But no corroboration is available in this case."***

7. The presence of the witnesses on the spot further disturbs the mind of this Court when the complainant stated that

after receiving firearm injuries the deceased fell to the ground and PW Hanifullah took him in his lap and he himself went to arrange a vehicle for shifting the deceased then injured to the hospital and the complainant further stated that when he reached to the spot after arranging the vehicle the blood had stopped oozing as sufficient time had elapsed, he further stated that he shifted the deceased then injured to vehicle but when PW Hanifullah was examined, he stated that the deceased then injured was lying on the ground and that he never took him in his lap, if we take it correct that Hanifullah was holding the deceased in his lap then why his clothes and hands were not besmeared with blood and so that of the complainant. The witnesses went pole a part on taking the deceased to the hospital, the witnesses were specifically questioned that numerous police stations and police post Ahmad Abad was lying on the way, and that why they did not take the dead-body to the Police Station to report the matter despite the fact that the deceased had already succumbed to his injuries that too within ten (10) minutes after receiving the fire shots but no plausible explanation was given. The witnesses are not in harmony with one another and who reported, where reported is

shrouded in mystery and no one was ready to give straight forward explanation rather every one tried his level best to twist and conceal the facts. The KDA hospital Karak admittedly has its own reporting center but surprisingly the complainant stated that when he reached no one from the police was present in the hospital and when the scribe was examined he stated that being on routine *gusht* he was informed by the *Moharrir* to reach the hospital, as a dead-body was lying there. The scribe was questioned that why the report was not made to the incharge Reporting Center in KDA hospital as the purpose of the center was to enter medico legal cases, he replied that the incharge was not available, so he rushed to pen down the matter, his this explanation presents him an interested witness as he too with the complainant was trying to cover the delay. The overall situation indicate that the dead-body was brought by the co-villagers and later on an attempt was made to procure the complainant being father to report and to implicate the people of his choice. Neither the complainant nor the eyewitness are shown as identifiers, both before the police when the inquest report was prepared and before the Doctor at the time of postmortem examination, so this reflects that

in fact it was a blind murder. The case is one of preliminary investigation, as first the deceased was examined, documents prepared and when the complainant was procured the report was made. The conduct of PW Hamidullah tells a lot regarding the veracity of this witness, when he stated that on the way the complainant asked him to get down and inform the villagers regarding the incident and to make further arrangements, the situation was so tense that none of the witness had the leisure time to think for arrangements in fact their target should have been either the hospital or Police Station.

8. The investigating officer was examined as PW08 and he stated that after receipt of the copy of the F.I.R he visited the spot and on the pointation of the complainant and PW Hamidullah recovered 15 empties of 7.62 bore alongwith blood stained earth and prepared the site-plan, this witness stated that he reached to the spot from the Police Station within 30 minutes, so we are surprised that why the complainant took two hours to reach to the hospital. In fact, there was no need to go to the hospital, as the deceased then injured had already died and the police post and Police Station falling on the

way were not touched, so it cast an impression that in fact preliminary investigation was conducted in the case. Even the presence of the identifiers in the hospital keeps us on guard that how they reached the hospital, when the complainant had not asked anybody to accompany and even till that time no information was conveyed to the village. The empties recovered from the spot, were sent to the F.S.L where it was opined that all the empties were fired from one weapon but this alone was not sufficient to single out the accused to have committed the offence, when other evidence miserably failed to connect. 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."

9. The learned counsel for the prosecution stressed time and again that the accused/ appellant had strong motive to commit the offence, but he went in error as the prosecution could prove the motive and nothing was brought in black and white which was the urging factor for the accused/ appellant to commit the murder of the deceased and if this was so then instead of deceased the father i.e. the complainant would have been the prime target. The superior Courts of the country are consistent in their approach that when motive was alleged the prosecution was duty bound to prove the same, failing which the prosecution will suffer. In case titled ***"Muhammad Ashraf alias acchu Vs the State" (2019 SCMR 652),*** wherein it is held that:

> ***"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."

10. Though the stress of the learned counsel representing the complainant was that the accused/ appellant soon after the occurrence absconded and to him the abscondence is a sufficient indicator towards guilt of the accused, we are unable to understand that how in absence of positive and convincing evidence the abscondence alone can lead to conviction and if we accede to the submissions so forwarded, we are afraid of drastic results. There is no cavil to the preposition that abscondence alone cannot be a substitute, of the direct evidence and this aspect has been beautifully dealt with by the apex Court 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."

11. Be that as it may, the prosecution failed to convince this court that it was non-else but accused who killed the deceased.

12. After thoroughly evaluating the evidence available on file 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 charge 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. So far as the connected ***Criminal Revision No.40-B/2019*** is concerned, the same stands dismissed.

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

Announced:
11.11.2019

JUDGE

JUDGE

**Azam/P.S* (D.B) MS. Justice Ikramullah Khan, & Mr. Justice Sahibzada Asadullah.*