

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 252-M/2015

(1) *Tajay alias Tajbar*
(2) *Taj Muhammad sons of Sher Alam Khan (Appellants)*
Versus

(1) *The State through A.A.G.*
(2) *Mst. Hasina Bibi daughter of Sarzamin*
(Respondents)

Present: *Mr. Sajjad Anwar, Advocate, for the appellants.*
Mr. Rafiq Ahmad, Astd: Advocate General
Sardar Zulfiqar, Advocate for the
complainant/respondent.

Cr.R No. 56-M/2015

Mst. Haseena Bibi D/O Sarzamin
(Petitioner)
Versus


1) *Tajay alias Tajbar*
2) *Taj Muhammad son of Sher Alam Khan*
3) *State through A.A.G.*
(Respondents)

Present: *Sardar Zulfiqar, Advocate for the petitioner.*
Mr. Rafiq Ahmad, Astd: Advocate General.
Mr. Sajjad Anwar, Advocate for the
respondents/convicts.

Date of hearing: **23.10.2018**

Date of announcement: **13.11.2018**

CONSOLIDATED
JUDGMENT


SYED ARSHAD ALI, J.- Through this single
judgment, we propose to decide this criminal
appeal bearing No. 252-M/2015 as well as
the connected Criminal Revision bearing No.

56-M/2015, as both these matters emanate from one and the same judgment dated 11.11.2015 rendered by the learned Additional Sessions Judge/Izafi Zilla Qazi, Matta Swat, in case F.I.R No. 270 dated 31.7.2014 under sections 302,34 PPC read with section 13 A.O. registered at Police Station Chuprial, Tehsil Matta District Swat, whereby the appellants Taj Muhammad and Tajay alias Tajbar were convicted under section 302 (b) PPC and sentenced to life imprisonment alongwith payment of compensation of Rs.200,000/- (two lacs) payable to the legal heirs of the deceased under section 544-A, Cr.P.C, or in default thereof, they were ordered to undergo further 6 months S.I. The said compensation shall be recovered as arrears of land revenue. The accused/appellant Taj Muhammad was further convicted u/s 13 A.O and sentenced to one year simple imprisonment alongwith fine of Rs. 2,000/-, or in default thereof, he shall further undergo one month S.I. However, both the

accused/appellants were extended the benefit of section 382-B Cr.P.C.

2. The complainant Mst. Husina Bibi, PW-6 on 31.7.2014 at 13:00 hours reported the matter to Said Ahmad Khan, ASHO PS Chuprial, PW-5 when she was accompanying the dead body of her mother wherein she charged the present accused/appellants Tajbar Khan and Taj Muhammad Khan for the murder of her mother Mst. Sakina, whereas acquitted accused Aqalmand and absconding accused Sher Baz Khan were given the role of catching-hold of the deceased. The occurrence in addition to the complainant was witnessed by Maiz Rahman son of Sher Zaman, PW-8, Mst. Shafiqah and Mst. Sahira, PW-7 sisters of the complainant. The motive was disclosed to be a dispute over property.

3. Investigation in the case was entrusted to Wazir Muhammad Khan, CIO PS Chuprial, PW-9, who inspected the spot alongwith other police officials on 31.7.2014.

He has prepared site plan Ex. PW-9/1 on the pointation of the eyewitness/complainant Mst. Husina Bibi. He has taken into possession 4 empties of 30 bore in presence of witnesses from the spot vide recovery memo Ex. PW-2/2. Likewise, he has also taken into possession blood stained earth from the spot in presence of witnesses vide recovery memo Ex. PW-2/1 and recorded statements of the witnesses under section 161 Cr.P.C. The Investigation Officer has prepared list of legal heirs of the deceased Ex. PW-9/2. In the present case, the ASHO during search of residential house of the accused Tajbar has recovered a rifle, in which respect, this PW has prepared a site plan Ex. PW-9/3 on the pointation of ASHO concerned and other witnesses of the said recovery of memo. He has also recorded statements of the witnesses under section 161 Cr.P.C. He has prepared correction memo Ex. PW-9/4 in respect of correction of the name of accused. He has taken into possession blood stained *Qameez*

and *Shalwar* of the deceased in presence of witnesses vide recovery memo Ex. PW-1/1 being handed over to him by one Hazrat Shah on 02.8.2014. On 03.8.2014, he has sent the blood stained clothes of the deceased to the FSL vide application Ex. PW-9/5. During interrogation, the accused have confessed their guilt before the Investigation Officer, therefore, on their pointation necessary additions were made in the already prepared site plan Ex. PW-9/1. In this regard, in presence of witnesses pointation memo Ex. PW-4/1 has already been prepared. During investigation, on pointation of accused Taj Muhammad in presence of witnesses, the Investigation Officer had recovered a 30 bore pistol alongwith 2 cartridges from Baitak of the accused, which was stated to be the said pistol upon which a firing was made upon deceased Mst. Sakina, in respect of the recovery of the pistol alongwith 2 cartridges (Ex. P-1), pointaiton memo Ex. PW-4/2 was prepared. Upon recovery of pistol from



accused Taj Muhammad Khan addition memo Ex. PW-9/6 in respect of section 13 A.O. was issued by the Investigation Officer. He has also prepared sketch memo Ex. PW-9/7 in presence of witnesses in respect of the said weapon of offence. He has produced the accused before the Court for custody vide application Ex. PW-9/10. On 05.8.2014 vide application Ex. PW-9/8 the accused were produced before the Court for recording of their confessional statements but the accused refused to record their confessions, therefore, they were sent to judicial lock up. On 06.8.2014 vide application Ex. PW-9/9 the recovered pistol alongwith 4 empty shells were sent to FSL. Since the accused Aqalzada and Sherbaz were avoiding their lawful arrest, therefore, the Investigation Officer vide application Ex. PW-9/11 had obtained warrants against them under section 204 Cr.P.C and handed over the same to DFC Irfanullah for compliance. He has recorded statement of the DFC concerned u/s 164



Cr.P.C after compliance of the warrants and vide application Ex. PW-9/12 had obtained proclamations u/s 87 Cr.P.C from the Court. Vide application Ex. PW-9/13 the eyewitnesses Shafiq Bibi, Maiz Rahman and Sahira Bibi were produced before the Court for recording of their statements u/s 164 Cr.P.C and after recording of their statements the same were placed on record. Upon receipt of the FSL report in respect of blood stained clothes of the deceased, the same was placed on record as Ex. PW-9/14 alongwith report of FSL with regard to weapon of offence i.e. 30 bore pistol Ex. PW-9/15. He has also issued card of arrest memo Ex. PW-9/16 of the accused Aqalzada and vide application Ex. PW-9/17 the said accused Aqalzada was produced in the Court for obtaining custody. Likewise, the said accused Aqalzada was also produced before the Court for further custody vide application Ex. PW-9/18. Upon completion of the investigation, complete *challan* was forwarded to the SHO concerned for onward submission.

4. During the course of trial, the prosecution has examined as many as 11 witnesses whose statements were recorded and placed on file. On closure of the prosecution evidence, accused were examined under section 342, Cr.P.C, wherein they denied the charges, claimed innocence and stated to have falsely been implicated in the case.

5. On conclusion of the trial, the learned Additional Sessions Judge/ Izafi Zilla Qazi Matta, Swat convicted and sentenced the accused/appellants Tajay alias Tajbar and Taj Muhammad Khan vide the judgment impugned herein, whereas the co-accused Aqal Zada was acquitted of the charges by extending him the benefit of doubt, hence these connected matters.

6. The learned counsel appearing on behalf of the appellants has argued that all the prosecution witnesses were interested, therefore, their testimony was wrongly believed by the trial Court in respect of guilt of the accused/appellants. He has further

argued that the complainant while appearing in the Court had made dishonest improvements in her statement, therefore, she was an untruthful witness, hence, reliance on her statement was illegal for awarding life imprisonment to both the accused/appellants. He has also referred to the contradictions in the ocular testimony and the medical evidence because all the witnesses had stated that accused Taj Muhammad had put the pistol on the head of the deceased and then fired at her, whereas the medical evidence does not show that there were any charring marks on the head of the deceased. He went on arguing that although the complainant had stated that they were bringing household articles but no such household articles were recovered from the spot and lastly he referred to the main contradiction in the statement of the complainant by stating that in her FIR she had stated that the accused were accompanying them in the vehicle/ Suzuki carrying them to the place of occurrence, whereas in her Court

statement she did not say about company of the accused and the deceased in the vehicle.

He has placed reliance on "2017 MLD 883, 2017 P Cr. LJ 235, 2017 P Cr. LJ 779, 2017 SCMR 344 and 2017 SCMR 160".

Conversely, the learned counsel for the complainant and learned A.A.G appearing on behalf of State while rebutting the arguments of learned counsel for the appellants have stated that in presence of the motive it is not expected from the complainant to substitute the accused-appellants who are her cousins for actual culprits. They have further stated that it was a daylight occurrence, duly witnessed by an independent eyewitness Maiz Rahman. Lastly, they have argued that the prosecution version is supported by medical evidence, recovery of empties from the spot and a pistol on the pointation of the appellant, therefore, the accused/appellants were rightly convicted by the trial Court. They have placed reliance on the case law cited as "Mir Muhammad and 3 others vs the State (1972 P Cr. LJ

1108), Saeedullah Khan vs The State (1986 SCMR 1027), Mst. Roheeda vs Khan Bahader and another (1992 SCMR 1036), Zarif Khan vs The State (PLD 1994 Peshawar 176), Mir Muhammad vs the State (1995 SCMR 614), Moazam Shah vs Mohsan Shah and another (PLD 2001 Supreme Court 458), Farmanullah vs Qadeem Khan and another (2001 SCMR 1474), Ijaz alias Billa and 3 others vs The State (2002 SCMR 294), Muhammad Tufail vs The State (PLD 2002 Supreme Court 786), Abdul Majeed vs the State (2008 SCMR 1228), Ali Khan and another vs The State (2010 P Cr. LJ 11 Quetta) and Muhammad Ilyas and others vs The State (2011 SCMR 460).

7. Arguments of the learned counsels were heard at length and record of the case was perused with their valuable assistance.

8. The close perusal of record would unfold that the complainant Mst. Husina, PW-6 alongwith other witness while

accompanying the dead body of her mother in a vehicle met Said Ahmad Khan, ASHO, PW-5 at 13:00 hours on 31.07.2014 wherein she reported that she alongwith her mother Mst. Sakina had gone to Rodingar. On return when reached at kacha road Asharay, accused Tajbar Khan, Taj Muhammad Khan (present appellants), Aqalmand (acquitted accused) and Sher Baz (absconding accused) who were also in the vehicle and when they alighted from the vehicle the accused Taj Muhammad Khan, made firing on her mother, due to which her mother was hit at the head and died. Similarly, Tajbar Khan also made firing at her mother from which she received firearm injury and died, however, the accused Aqalmand and absconding accused Sher Baz caught-hold of her mother. The occurrence was stated to be witnessed by Maiz Rahman, PW-8, Mst. Shafiq and Mst. Sahira, PW-7. Motive behind the occurrence was stated to be a dispute over property.

9. Lady doctor Sufia Khan, PW-3 on 31.07.2014 at 04:00 P.M examined the dead body of Mst. Sakina and found the following injuries on her dead body:-

“ On examination eyes and mouth closed. Lying straight single wound of entry of about 2-3 cm in size on the right eye, lateral side with underlying bone exposed.

A single wound of exit of about 4 cm in size with underlying bone and brain tissue exposed on the right temporal bone. Bony edges everted outwards.

Another single small wound of entry of about 1 cm in size is present on the right breast. In the middle with single wound of exit of about 1 cm is present on the back with edges everted outwards.

Internal post mortem done, brain damaged. All chest + abdominal organs are normal in size, and texture.

Nature of injury:- firearm

Cause of death: Hemorrhage to brain + lungs, shock.

The duration between the death of the deceased and examination was provided as less than six (6) hours in the said Ex.PW-3/1.

10. The record further discloses that edifice of the entire prosecution case is based on the ocular evidence of Husina Bibi, the

complainant, PW-6, Sahira her sister, PW-7 and Maiz Rahman, PW-8. Regarding the mode and manner of occurrence, that at the place of occurrence the accused Aqalzada and Sher Baz had caught-hold of the deceased and both the appellants had fired at her and as result of their fire shots the deceased sustained injuries, who died on the spot, all the three (3) witnesses are consistent and unanimous, however, the complainant Husina Bibi in her First Information Report had stated that all the accused were travelling with them in the same vehicle and when they alighted from the vehicle the incident took place. Whereas in the Court statement she did not say about the company of the accused in the vehicle. Furthermore, during cross-examinations all the witnesses have stated that the accused/appellant No. 2 Taj Muhammad put the pistol on the head of the deceased and fired at her, however, this statement was not given in the examination-in-chiefs. The question arises as to whether this variation

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would discard testimony of all three (3) witnesses. In order to appreciate the aforesaid variation, we can draw wisdom from the law laid down by the august Supreme Court of Pakistan in 'Roshan vs The State PLD 1977 Supreme Court 557' wherein the following principles have been laid for appreciating the testimony of witnesses where there are certain variations in their statements:-

" To my mind the primary consideration in appraising the evidence given by witness is to determine firstly why has he offered to testify? Has he seen the occurrence? If so has the witness a motive to implicate a person who was not among the culprits or to exaggerate the part played by any of them? If a witness satisfies these two tests then the Court should watch the general demeanor of the witness in order to fudge the quality of his perception and his faculty to recall the past incidents. A witness may make contradictory statements on some of the details of the incident in respect of which he is deposing in Court. The variation may be due to mere lapse of memory or the confusion caused in his mind by a relentless cross-examination. Very often a witness gives an incorrect statement because he must answer every question regardless of the fact whether he answer to it or not. It is not uncommon that the cross-exam words in the mouth of witnesses and the presiding officer is not vigilant enough to check it. It is also common experience that,

without any particular intent, even educated people exaggerate when describing an event. Some witnesses may be prone to it more than others. Mere contradictions therefore do not lead to the result that whatever the witness has said on the salient features of the case and which conforms to the other evidence on the record is to be thrown overboard". (Emphasis supplied).

The aforesaid law laid down by the august Supreme Court of Pakistan was re-affirmed in 'Mushtaq alias Shaman vs The State (PLD 1995 Supreme Court 46) and Farmanullah vs Qadeem Khan (2001 SCMR 1474). Therefore, the evidence of a witness more particularly a related witness has to be seen with care and caution. If it gives impression that the witness has made dishonest improvement in his/her statement only in order to implicate the accused then his/her evidence is to be discarded. However, if the witness has omitted some part of her/his earlier testimony, which were recorded in the FIR or in the Court statement then the same may not fatal to the prosecution case, however, there can be no uniform standard of evaluation of the evidence of every witness. It

depends on the ability, age and demeanor of a witness to reach at a conclusion that the said omissions were deliberate else it cast doubt on his/her presence on the spot.

11. The complainant Husina Bibi as evident from the record her age in the Court statement is given as 25 years, however, it also discerns from record and the statement of Said Ahmad Khan, ASHO, PW-5 that at the time of registration of FIR her age was 16/17 years. Similarly her sister Sahira who is another eyewitness to the occurrence is admittedly at the time of recording of her statement was 17/18 years of age. It is also evident from record that the father of complainant had earlier died and they had a property dispute with their cousins, the present appellants. Keeping in view her age and illiteracy non-mentioning of the fact that the accused were also travelling with them in the vehicle carrying them would not render her untruthful witness as there is a probability

that she could not explain the minute details in her Court statement.

12. Even otherwise, conviction of the appellants was not solely based on the statement of complainant, she is supported by her sister Sahira (PW-7) and there is yet another independent witness to the occurrence i.e. Maiz Rahman, PW-8. Since the occurrence has taken place in a public place/passage and the said Maiz Rahman has given justification for his presence at the spot, therefore, he cannot be termed as chance witness in strict sense. Regarding the presence of a witness at public passage the august Supreme Court of Pakistan in case of "Muhammad Ahmad and another vs the State & another reported as 1997 SCMR 89" formed the following view:-

"Passerby not always a chance witness. Presence of a passerby at the place of occurrence taking place at a public thoroughfare or at a place frequented by the public generally cannot be rejected by describing him as a mere chance witness unless he fails to satisfactory explain his presence at or near the spot at the relevant time or his testimony suffers from any inherent weakness or contradiction."

The aforesaid law laid down by the august Supreme Court of Pakistan was also follow in case of "Iftikhar Ali vs the State reported as 1998 P Cr. LJ 2022", wherein it was held by the Hon'ble High Court:-

"Passerby is not a chance witness if the crime is committed on a public thoroughfare or at a place frequented by the public generally."

Although, in his cross-examination he has admitted that he had a property dispute with acquitted accused Aqalzada and absconding accused Sher Baz but that dispute relates to a period 8 years before the occurrence which was settled, therefore, this witness has no interest to falsely implicate the present appellants, thus, his testimony is confidence inspiring and support the statement of complainant and her sister.

13. The FIR has been promptly lodged and the time of occurrence is also corroborated by the medical evidence. In the FIR the time of occurrence was given as 12

o clock and the FIR was registered at 13:00 hours, whereas according to the medical report the deceased was examined at 04:00 P.M and the time between death and examination was given as less than 6 hours. Therefore, there is no doubt in the time of occurrence, hence medical report support the prosecution case.

14. As far as the objection of the learned counsel for the appellants that it is in the evidence of all the three (3) eyewitnesses that appellant Taj Muhammad put pistol on the head of the deceased and fired at her, however, the lady doctor in her report could not refer to any blackening or charring marks on the body of the deceased. This objection is not worth consideration because it is quite possible that in cases where the pistol is stressed tightly against the skin of the body, then the gases of the explosion and the flame, smoke and particles of gunpowder will all follow the track of the bullet in the body and will not necessarily cause charring marks or blackening on the body of victim.

In Mir Muhammad's case 1972 P Cr. LJ 1108, the Hon'ble High Court while relying on the accepted treaties, "the Identification of Firearms and Forensic Ballistics" by Major Sir Gerald Burrard (in 1956 Edition) has elaborately discussed this aspect of the case as follow:-

However, Mr. Abdul Hafiz Memon, the learned Assistant Advocate-General, contended that no blackening or burning was discovered on the wound of the deceased Noor Ahmad. We would not go as far as that, but would say that the medical evidence is silent on this point. But this omission does not prove that the fatal gunshot was not fired at contact or close range to the body. According to Modi's Medical Jurisprudence and Toxicology (13th Edn, page 224), the blackening and burning may be absent if the weapon is pressed tightly against the skin of the body, as the gases of the explosion and the flame, smoke and particles of gunpowder will all follow the track of the bullet in the body. In the present case, it would appear that the shot-gun, when fired, was pressed tightly against the body of Noor Ahmad."

Therefore, the said objection of the learned counsel for the appellants is misconceived.

15. The prosecution case also lends support from recovery of 4 firearm empties of 30 bore which were recovered from the spot

vide recovery memo Ex. PW-2/2 and on pointation of the accused/appellant Taj Muhammad from his *Baitak* a 30 bore pistol alongwith 2 cartridges Ex. P-1 was recovered vide recovery memo Ex. PW-4/2 on 09.8.2014. Both of the recovered items were sent to the Forensic Expert, which he received on 07.08.2014 and according to his report Ex. PW-9/15 only one crime empty marked as C1 was fired from 30 pistol which was recovered from appellant Taj Muhammad whereas 3 empties did not match with the said pistol, which gives inference to the fact that both the accused fired at the deceased.

16. Moving further to the objection of the learned counsel for the appellants regarding the non-recovery of household articles from the spot, suffice it mention that such discrepancy reflects on the working and lethargy of the Investigation Officer which would obviously not cause any harm to the prosecution case when it is otherwise established through ocular evidence. Reliance

is placed on the case of august Supreme Court of Pakistan cited as “ Abdul Majeed vs the State (2008 SCMR 1228).

17. Regarding the acquittal of accused Aqalzada on the same set of evidence, the learned trial Court in its judgment has distinguished his role and has held that it was improbable that at the time of actual commission of offence he was holding the deceased and thus he was acquitted of the charges by extending him the benefit of doubt. Even otherwise, the role of Aqalzada is distinguishable from the present appellants, therefore, from his acquittal the appellants cannot be extended any benefit.

18. In view of the above discussion, we do not find any merits in the appeal on the question of guilt both the accused/appellants, therefore, the judgment of conviction and sentence recorded by the learned trial Court is maintained and this appeal is dismissed accordingly.

19. Likewise, the connected criminal revision bearing No. 56-M of 2015 preferred

by the complainant/petitioner, we have noted that in view of the present facts and circumstances of the case the conviction of life imprisonment awarded to the accused/respondents is justified and does not warrant further enhancement. Therefore, the criminal revision in hand for enhancement also stands dismissed.

Announced
Dt. 13.11.2018


JUDGE


JUDGE

Other
27/11/2018
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