

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

Crl. Appeal No.526-P/2016

Khadim Nabi son of Muhammad Umar,
r/o Kurvi Akbarpura, District Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :-	<u>Mr. Shabbir Hussain Gigyani, Advocate.</u>
State :-	<u>Mr. Arshad Ahmad AAG.</u>
For Respondent :-	<u>Mr. Noman ul Haq, Advocate.</u>

Date of hearing: **02.10.2019**

JUDGMENT

ROOH-UL-AMIN KHAN, J:- At a trial held by learned trial Court/Additional Sessions Judge-IV, Nowshera, accused Khadim Nabi, having been found guilty of committing murder of Saifullah deceased has been convicted under section 302 (b) PPC and sentenced to undergo imprisonment for life as Ta'azir and to pay Rs.2,00,000/-, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C., in case FIR No.168 dated 28.03.2010, registered under sections 302/324/34 PPC, at Police Station Akbarpura, District Nowshera vide judgment dated 27.07.2016.

2. The convict has filed the instant appeal against his conviction and sentence, whereas, Rasheed-ur-Rehman, the petitioner/complainant has filed connected Cr.R. No.

105-P/2016, seeking enhancement of sentence of the convict/respondent from life imprisonment to normal penalty of death as provided for the offence under the statute.

3. As, both the matters are arising out from one and the same judgment of the learned trial Court dated 27.07.2016, therefore, we propose to decide the same through this common judgment.

4. The prosecution case is that on 28.03.2010 at 19.15 hours, Rasheed-ur-Rehman complainant (PW.5), in company of Wali Ullah (PW.6) and dead body of his son Saifullah deceased reported in Police Station Akbarpura to the effect that on the eventful day i.e. 28.03.2010, he along with his deceased son and PW Wali Ullah was going to his relative's house, namely, Hazrat Umar. At 0815 hours, when they reached *Maskin Chowk of village Kurvi Akbarpura*, the appellant and his co-accused Fazal Nabi, duly armed with firearms already present there, opened fire at them, as a result, the deceased got hit and died at the spot, whereas, he (the complainant) and PW Wali Ullah luckily remained unscathed. A dispute over landed property has been advanced as motive behind the occurrence. His report was incorporated into FIR (Exh.PW.11/1) by Safdar Khan S.I. (PW.11), which was verified by PW Wali Ullah.

5. Safdar Khan SI (PW.11), prepared injury sheet and inquest report of the deceased and sent the dead body of the deceased to the mortuary for post mortem examination under the escort of Constable Ajmal No.788. Dr. Muhammad Hanif Sadiqui (PW.3), conducted autopsy on the dead body of the deceased on the same day at 10.30 a.m. and furnished autopsy report Exh.PM. He opined the probable time between injuries and death as “Instantaneous” while between death and autopsy as 02 hours. According to his opinion, the deceased died due to firearm injuries to his vital organ i.e. heart.

6. Shabir Hussain SI (PW.10) conducted investigation in the case. He proceeded to the spot and prepared site plan Exh.PW.10/1 on the pointation of the eyewitnesses. During spot inspection, he secured bloodstained earth from the place of the deceased Exh.P.2 vide recovery memo Exh.PW.9/1 and 16 crime empties of 7.62 bore Exh.P.4 freshly discharged from the places of the accused vide recovery memo Exh.PW.9/3. Vide recovery memo Exh.PW.9/3 he took into possession the last worn bloodstained garments of the deceased vide recovery memo Exh.PW.9/2. He sent the bloodstained articles to the FSL, report whereof is Exh.Pw.10/3, recorded statements of the PWs u/s 161 Cr.P.C., initiated proceedings under section 204 and 87 Cr.P.C. against the accused and on completion of investigation, handed over case file to the

SHO who submitted challan against the accused under section 512 Cr.P.C..

7. On arrest of the appellant and completion of investigation *challan* was submitted against him before the learned trial Court where he was charge sheeted to which he pleaded not guilty and claimed trial. To prove its case the prosecution examined as many as eleven witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed innocence. He wished to be examined on oath, however, refused to produce evidence in defence. His statement on oath under section 340 (2) Cr.P.C. was recorded and on conclusion of trial, the learned trial Court, after hearing both the sides convicted and sentenced the appellant as mentioned above.

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

9. Record divulges that the occurrence has taken place on 28.03.2010 at 0815 hours, which has been reported by complainant Rasheed-ur Rehman (PW.5) with promptitude at 0915 i.e. within one hour wherein he has directly charged the appellant and co-accused Fazal Nabi with specific role of firing at them and the deceased. Report of the complainant has been verified by eyewitness

Wali Ullah (PW.6). The promptly lodged report is the first circumstance which not only eliminates the probability and possibility of consultation and deliberation on the part of the complainant party in charging the accused but also lends support to the statement of complainant and eyewitness viz PW.5 and PW.6, respectively. Being a broad daylight occurrence and parties closely related to each other, diminish the possibility of mistaken identity. Both complainant Rasheed-ur-Rehman (PW.5) and Wali Ullah (PW.6), have furnished the ocular account of the incident. The former while appearing as (PW.2) reiterated the same episode/version of the occurrence as set forth by him in his initial report/FIR and charged the appellant and his co-accused for murder of the deceased and an attempt at their lives with firearms.

10. Eyewitness Wali Ullah, while appearing as (PW.6) corroborated the testimony of complainant (PW.5). He disclosed the fact that complainant is his maternal uncle while the accused/appellant is his paternal cousin. He deposed that on the day of occurrence he along with Safiullah deceased and Rasheed ur Rehman was going to the house of their relative, namely, Umar and when reached the place of occurrence i.e. *Miskeen Chowk village Kurvi*, the appellant and his co-accused duly armed with firearms already present there opened fire at them, as a result, the deceased got hit and died on the spot, whereas,

they narrowly escaped unhurt. He charged the appellant and co-accused for commission of the offence. His un-shattered statement regarding shifting of the dead body of the deceased to Police Station where complainant lodged report in the shape of FIR and his verification of the same established his presence at the spot. In the same manner his undeniable assertion about equal relation with both the parties precludes the curiosity and concern of interested witness. It is also on record that he identified the dead body of the deceased before the police and doctor and to this effect he signed the inquest report which further supplements his association with the dead body from the place of occurrence to the Police Station.

11. We have noted that both the eyewitnesses have been subjected to lengthy and taxing cross-examination by the defence but nothing beneficial to appellant could have been be extracted from them. They remained stuck to their stance and corroborated each other on all material events of the incident such as the day, date, time and place of occurrence and firing of the accused at them and the deceased. Certain un-explained events of the occurrence were clarified in their cross-examination by the defence itself. Motive as alleged in the FIR was also proved by the defence itself by putting a positive suggestion to PW Wali Ullah to which he replied that the accused had a land dispute with the deceased which was not resolved till the

date of occurrence. The appellant while making statement on oath under section 340(2) Cr.P.C. has also affirmed that the deceased Saifullah was demanding share of his maternal grandmother from him and his brother co-accused. The relevant part of his statement is reproduced below:-

“The deceased had dispute with me upon the land that is jointly owned by my father along with his brothers and sister Iqbala i.e. on undivided land. Mst. Iqbal my aunt was the maternal grandmother of deceased Saifullah. The deceased Safiullah was demanding share of his maternal grandmother from me and my other brothers”.

The promptly lodged report of complainant verified by PW Wali Ullah coupled with the fact that the latter has identified the dead body of the deceased before the police and doctor at the time of occurrence are sufficient strong circumstances which proves presence of the complainant and eyewitness Wali Ullah at the spot at the time of occurrence. So far as the question as to why only the deceased was targeted and the PWs were let off is concerned, if the available evidence is scrutinized it would reveals that the appellant had direct motive with the deceased Saifullah. The appellant Khadim Nabi in his statement recorded as DW.1 under section 340 (2) Cr.P.C.

has categorically admitted that deceased had dispute with them on the land jointly owned by his father, his brothers and sister Mst. Iqbala. The said Mst. Iqbala was the aunt of the appellant and maternal grandmother of deceased Saifullah. The appellant further deposed that Saifullah deceased was demanding the share of his maternal grandmother from him and his brothers. This part of statement of the appellant proves the motive part of the prosecution case and does appeal to a prudent mind that deceased was the only target of the accused and not the complainant and PW Wali Ullah. Even in cross examination of PW Wali Ullah it has been brought by the defence itself that appellant is his paternal cousin of PW Wali Ullah and he has cordial relation with him. The ocular account furnished by the complainant and PW Wali Ullah is trustworthy and confidence inspiring and the defence failed to shatter their veracity and credibility. Both the eyewitnesses are consistent with each other on all material particulars of the occurrence.

12. No doubt, PW Rasheed-urRehman complainant is father of the deceased and PW Wali Ullah is his maternal cousin, but it is now almost a trend that public is reluctant to appear and depose before the court, especially against the culprits in criminal cases due to fear of enmity etc. It is well established principle of law that testimony of a witness which is trust worthy and inspiring confidence

cannot be discarded on the ground of his close relation with the deceased. A close relative, if proved to be the natural witness of the occurrence, cannot be termed as interested witness. The term “interested” postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or for some other reasons. Thus, mere relationship of PWs with the deceased would not detract from their veracity, as they had absolutely no motive of his own to involve the appellant falsely by letting off the real culprits. Reliance in this regard can be placed on the judgments of the august apex court in case, titled, **“Saeed Akhtar and others Vs the State” (2000 SCMR 383)**. In case titled, **“Amal Sherin and another Vs the State through A.G.” (PLD 2004 Supreme Court 371)**, the Hon’ble Supreme Court while dilating upon the evidentiary value of statement of related witnesses has ruled as under:-

“The trial Court was not justified to reject eyewitness account furnished by complainant Khan Amir PW and Hakim Gul PW merely on the ground of being related and interested particularly when appellants had not been able to establish on record that the above mentioned witnesses had nourished any grudge or ill will against them and deposed with a specific motive”.

No doubt, 16 crime empties of 7.62 bore recovered from the crime spot, have not been sent to the FSL but this pieces of evidence corroborative in nature would not advance the case of defence because after the occurrence the appellant went into hiding thereby making the recovery of crime weapon difficult, while on the other hand, the ocular account furnished by the eyewitnesses being trust worthy and confidence inspiring is believable, therefore, in such eventuality there would be hardly any need of any corroboratory pieces of evidence which are always taken into consideration as a matter of caution. In support of our findings we would rely upon the judgment of the Hon'ble apex court in case titled, **“Amal Sherin and another Vs the State 22 through A.G. NWFP” PLD 2003 Supreme Court 371**), wherein it has been held that:-

“Conviction in a criminal case can be recorded even on the statement of eyewitnesses alone without there being any corroboration provided their evidence inspires confidence”.

Similar view has been reiterated by the Hon'ble Supreme Court in case titled, **“Mst. Sughara Begum and another Vs Qaisar Pervez and others” (2015 SCMR 1142)** in the following words:- “

“Ocular account in case of ‘Qatl-eAmd’ plays a decisive and vital role and once its intrinsic worth is accepted and believed then the rest of the evidence, both circumstantial and

corroboratory in nature, is required as a matter of caution, but to the contrary, once the ocular account is disbelieved, then no other evidence, even of a high degree and value, would be sufficient for recording conviction on a capital charge, therefore, probative value of the ocular account is to be seen in light of the facts and circumstances of each case”. **(emphasis supplied).**

13. Recovery of blood from the place of the deceased and his last worn bloodstained garments coupled with positive Serologist report in respect thereof corroborates the ocular account. Similarly, the supporting evidence i.e. autopsy report of the deceased according to which the deceased has sustained fourteen firearm entrance wounds with corresponding exit on various parts of his body, resulting, his unnatural death, supports the ocular account.

14. Deriving wisdoms and guidance from the principles laid down by the August Apex Court in cases of Amal Sherin and another and Mst. Sughara Begum (supra), we, while accepting the intrinsic worth of the ocular account furnished by PW Raheed-ur-Reham (PW.5) and Wali Ullah (PW.6), are of the considered view that the learned Trial Court has rightly held the appellant guilty of the offence. In this regard, the findings of the learned Trial Court are well reasoned and based on proper appreciation of evidence to which no exception can be taken.

15. Now the moot question for determination would be the quantum of sentence to be awarded to the appellant to

meet the ends of justice. The learned trial Court has awarded life imprisonment to the appellant but has not furnished any reason within the meaning of section 367 (5) Cr.P.C. for not awarding the normal penalty of death provided for the offence. On the record, there is no reason to constitute a mitigating circumstance that's the learned trial Court too was unable to advance the same. From the prosecution evidence it is not discernible as to fire shots of which of the accused has hit which part of the body of the deceased but it would not create a mitigating circumstance because common intention can be proved through direct or circumstantial evidence. It may also depended upon the nature of an act done or motive possessed and a joint action of more than one person itself, is an evidence of common intention. Common intention generally involves element of common motive, pre-plan preparation and actual pursuant to such plan. In this case, the appellant and his co-accused are brothers inter-se. As stated earlier the deceased was demanding land/share of his maternal grandmother from them, therefore, the accused had direct motive with the deceased to remove them from the way. Arrival of the appellant with co-accused at the spot armed with deadly weapons, waiting for the arrival of the deceased and then doing him away by indiscriminate firing are sufficient strong circumstances to prove motive in the mind of the accused and their pre-plan to commit the murder, which

leaves no room for any mitigating circumstance to warrant lesser sentence. The learned Trial Court has, therefore, erred in law by awarding lesser sentence to the appellant. The prosecution has proved the guilt of the appellant upto the hilt through cogent and confidence inspiring ocular/direct evidence. There exists no mitigating circumstance, to warrant lesser sentence, therefore, award of normal penalty of death to the appellant, as provided for the offence, would meet the ends of justice.

16. For the reasons discussed above, Cr.A. No. 526-P/2016 filed by the appellant/convict is hereby dismissed, his conviction and sentence under section 302 (b) PPC is maintained, whereas, Cr.R. No.105-P/2016, filed by Rasheed ur Rehman petitioner/complainant is allowed, resultantly, the sentence of convict is enhanced from life imprisonment to normal penalty of death as Ta'azir. He be hanged by the neck till he is dead. The sentence of fine and period of imprisonment in default thereof shall, however, remain intact.

Announced:

02.10.2019

M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Muhammad Naeem Anwar.

