Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr.A.No.624-P/2020.

J U D G M E N T

Date of hearing ------ 04.05.2023.

Appellants by --- Barrister Aamir Khan Chamkani & Muhammad Waqas Khan Chamkani.

State by --- Mr.Jalal-ud-Din Akbar Azam Gara, A.A.G.

Complainant by --- Mr.Shah Hussain Nasapi, Advocate.

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SAHIBZADA ASADULLAH, J:- Through this judgment we shall also decide the connected Criminal Revision bearing No.93-P/2020 titled "Dost Muhammad etc Vs. Asar Khan etc." as both the matters have arisen out from one and the same judgment, dated, 15.08.2020, of the learned Additional District and Sessions Judge, Charsadda at Tangi, delivered in case FIR No.466 dated 22.08.2016 registered under sections 302/324/34 PPC at police station, Tangi, whereby, the appellants have been convicted under section 302 (b) PPC and sentenced to imprisonment for life as *Tazir* and to pay Rs.1,000,000/- as compensation to the legal heirs of each deceased, within the meaning of Section 544-A Cr.P.C. They have

also been convicted under section 324 P.P.C and sentenced to undergo rigorous imprisonment for a period of five years. Both the sentences were directed to run concurrently, while benefit of section 382-B Cr.P.C. was extended to the convicts.

2. Brief facts of the case are that on 22.08.2016, complainant Nazeer reported the matter to the local police in the Casualty of Tangi Hospital to the effect, that he received information about cutting of poplar trees by Asar Khan and Sartaj (accused-appellants) in his fields. On such information, he along with Inayat-ur-Rehman, Gul Rahman, Jawad and Fawad rushed to the spot and tried to restrain them from cutting the poplar trees, upon which the accused-appellants got annoyed, took their weapons lying there and started firing at them with the intention to kill them. Resultantly, he sustained injuries on his chest, while Inayat-ur-Rehman and Gul Rahman got hit and died on the spot. On report of the complainant, present case was registered against the accused.

3. On arrest of the appellant, and completion of investigation, complete challan

was submitted before the court of competent jurisdiction. The accused were charge sheeted to which they did not plead guilty and claimed trial. As such the learned trial court was pleased to direct the prosecution to produce its evidence. In order to prove its case, prosecution produced and examined as many as 13 witnesses, whereafter statements of the accused were recorded wherein they professed their innocence but did not opt to record their statements under section 340 (2) Cr.P.C. On conclusion of trial, the learned trial court held them guilty and as such they were convicted and sentenced, whereagainst they have filed the instant appeal.

4. The learned counsel for parties as well as the worthy Additional Advocate General, were heard at length and with their able assistance the record was scanned through.

5. The tragic incident claimed the lives of three innocent souls and that the matter was reported by one of the deceased (then injured). The deceased after receiving firearm injuries were shifted to Tehsil Headquarter Hospital, Tangi, where one of the deceased (then

injured) reported the matter to the local police and the relevant police officer drafted the murasila on report of the complainant, and, thereafter the injury sheets and inquest reports of the deceased were prepared. The dead bodies of the deceased and the injured complainant were referred to the doctor where the complainant was examined and his medico legal certificate was prepared. Keeping in view the nature of injuries, the injured complainant was referred to Lady Reading Hospital, Peshawar for further treatment and management, whereas autopsy on the dead bodies of the deceased was conducted. The investigating officer, after receiving copy of the FIR visited the spot and on pointation of the eyewitnesses prepared the site plan. During spot inspection the investigating officer collected blood-stained earth from the places of the deceased and also took into possession the cut poplar trees. It is pertinent to mention that during spot inspection, the investigating officer collected 06 empties of 9-MM pistol and 03 empties of .30 bore pistol from the respective places of the accused. The collected empties

were sent to the Fire Arms Expert and a report was received telling that six empties of 9 MM bore were fired from one and the same weapon and 03 empties of .30 bore were created from one and the same pistol. The injured complainant could not survive and at last died on 24.08.2016 and in that respect the relevant entries were made. The accused were arrested and at the time of arrest, from their respective possessions, pistols were recovered and in that respect 02 different FIRs were registered under section 15 of The Khyber Pakhtunkhwa Arms Act, 2013. The trial commenced and on conclusion of the trial, the accused were convicted vide the impugned judgment.

6. As in the instant case 03 parsons lost their lives and that the matter was reported by one of the deceased (then injured), so this court is to see as to whether the approach of the learned trial court was correct and as to whether the learned trial court fully appreciated the evidence on file. As in the instant case apart from the report of the deceased (then injured), the prosecution has two witnesses, who also witnessed the incident and who

accompanied the dead bodies to the hospital, so in the attending circumstances of the present case, we deem it essential to scan through the record of the case in order to ascertain; as to whether the learned trial court was justified in convicting the appellants and as to whether the evidence on file has properly been appreciated. As in the instant case the prosecution has two eyewitnesses and the statement of a dying man, so extra care is needed to appreciate the available evidence, more particularly the statements of the witnesses, so that guilty could be punished and the innocent could be rescued.

7. The points for determination before this court are; as to whether the incident occurred in the mode, manner and at the stated time; as to whether the eyewitnesses witnessed the incident and that who shifted the dead bodies of the deceased and the injured complainant to the hospital; as to whether the incident occurred because of cutting of the poplar trees and that the same were taken into possession by the investigating officer; as to whether the deceased (then injured) was capable to talk

and that his report inspires confidence. There is no denial of the fact that both, the accused and the complainant party are closely related, having joint property in the vicinity, duly cultivated by them and was in their possession. The record further tells that poplar trees were planted on the ridges (لازپ) of the fields and that it was because of storm that some of the trees had fallen and the fallen trees were claimed by the parties and to settle the dispute several attempts were made, but to no avail. The investigating officer when visited the spot took the same into possession and he also confirmed the same when his statement was recorded before the learned trial court. The investigating officer further confirmed that being perishable item the same were returned on superdari to the lawful owners. In order to ascertain as to whether the incident occurred in the mode, manner and at the stated time, we deem it essential to go through the statement of the eyewitness and to read his statement in juxtaposition with the report made by the deceased (then injured). The eyewitness was examined as (P.W-11), who stated that on the

day of incident he along with deceased left his house and reached to the spot/fields to restrain the accused from cutting trees; that on reaching to the spot, the deceased (then injured) asked the accused to stop cutting trees, as the matter is still to be resolved, which infuriated the accused who picked up their pistols and started firing at the complainant, the deceased and the eyewitnesses as well; that the complainant after receiving firearm injuries fell to the ground and so the deceased, whereas the eyewitnesses escaped unhurt luckily; that the deceased (then injured) was picked up from the spot, with the help of co-villagers, shifted to the hospital, and thereafter the dead bodies were brought to the hospital; that the deceased (then injured) reported the matter to which he verified and that he also identified the dead bodies of the deceased before the police at the time of report and before the doctor at the time of post mortem examination. This witness was cross-examined on different aspects of the case but nothing detrimental could be extracted from his mouth. The witness remained consistent regarding the

manner in which the information was received and regarding the manner in which he along with others reached to the spot and entered into altercation with the accused. As in the instant case, on one hand we have the dying declaration, whereas on the other the statement of an eyewitness who witnessed the incident, so we in order to ascertain as to which one is nearer to the truth and which not, went minutely through the report made by the complainant and the statement of the eyewitness, but we failed to notice substantial contradictions, which would convince this court that either the complainant was telling a lie or that the eyewitness was not present on the spot. The prosecution case gets support from the fact that on one hand the deceased received firearm injuries and also the complainant, whereas on the other the investigating officer noted bullet marks on the poplar trees. The recovery of blood-stained earth from the spot and the collection of empties near from the places of the accused, are the circumstances which support the prosecution case, more particularly, the place

where the incident occurred as is held in case titled ***"Agil Vs. The State (2023 SCMR 831)"*** which reads as:-

> ***"During the course of proceedings, the learned counsel contended that there are material discrepancies and contradictions in the statements of the eye-witnesses but on our specific query he could not point out any major contradiction, which could shatter the case of the prosecution. We may point out that 'discrepancy' has to be distinguished from 'contradiction'. Contradiction in the statement of the witness is fatal for the prosecution case whereas minor discrepancy or variance in evidence will not make the prosecution case doubtful. It is normal course of the human conduct that while narrating a particular incident there may occur minor discrepancies. Parrot-like statements are always discredited by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounts to contradiction, regard is required to be made to the circumstances of***

> ***the case by keeping in view the social status of the witnesses and environment in which such witnesses were making the statement. There are always normal discrepancies, howsoever, honest and truthful a witness may be. Such discrepancies are due to normal errors of observation, memory due to lapse of time and mental disposition such as shock and horror at the time of occurrence. Material discrepancies are those which are not normal and not expected of a normal person."***

8. True that the matter was reported by the deceased (then injured) and equally true that despite the availability of an eyewitness the eyewitness did not report, but this fact cannot be counted to the benefit of the accused, rather it helps the case of the prosecution, as non-reporting of the matter by the eyewitness confirms bona fide of the complainant and all concerned. We are not ready to accept the non-presence of the eyewitness on the spot, at the time of incident and in the hospital when the matter was reported. The record tells that the eyewitness was very much present in the

hospital and that it was he who identified the dead bodies of the deceased before the police at the time of report and before the doctor at the time of postmortem examination coupled with the fact that he verified the report of the complainant. It was voiced by the defence that the complainant at the time of report was all alone and that the attendance of the eyewitness was procured at a belated stage. In this respect the attention of this court was invited to the murasila where the names of the eyewitnesses were noted down in a different fashion. It was submitted that keeping in view the spaces at the tail end of murasila no ambiguity is left that the latter portion was written belatedly, that too, by the time when the availability of the witness was procured. We are not impressed with what was agitated before this court, if we admit to what the learned counsel submitted as correct then instead of the injured complainant P.W Muhammad Jawad would have reported, but besides his availability he did not report and this conduct of the witness by itself is sufficient to hold that it was the injured complainant who reported the

matter. Not only the report, but the relevant columns of the inquest reports and the post mortem reports do confirm the availability of the eyewitness in the hospital at the time of report.

9. We are conscious of the fact that in the inquest reports of both the deceased neither the FIR number, nor the sections of law, has been mentioned so much so, the column pertaining to the time of death has also been left blank, but that by itself is not sufficient to hold that preliminary investigation was conducted and thereafter on arrival of the eyewitness the report was made. In order to resolve the controversy, we deem it essential to go to the inquest report of the deceased (then injured), where too the FIR number and sections of law have not been mentioned, and the same confirms that non-mentioning of same in all the inquest reports was either the incompetency of the relevant police officer or that it went unnoticed. If the case had been preliminary investigated then in the inquest report of the deceased (then injured) the FIR number and the sections of law must find mention as the FIR had already been

registered and this by itself is a sufficient proof that neither preliminary investigation was conducted nor the attendance of the eyewitness was procured at a belated stage. The defence could not convince that either the incident did not occur in the mode, manner and at the stated time or the report was not made soon after the dead bodies were shifted to the hospital. In order to resolve this controversy and to answer the eagerness of the defence, we deem it essential to go through the statement of the concerned police official to whom the report was made, and also that of the doctor who examined the deceased (then injured). The scribe was examined as (P.W-5) who stated that while on *Gasht* he received information regarding the incident; that soon after receiving information he reached to THQ Hospital Tangi, where the deceased (then injured) reported the matter; that after the report was made, he prepared the injury sheets, inquest reports. The injured complainant was referred to the doctor for his medical examination and the dead bodies of the deceased for postmortem examination; that

after the report was made the same was explained to the complainant, who thumb impressed the same and the eyewitness verified the report. This witness was put to the test of searching cross-examination in respect of the arrival of the dead bodies to the hospital, the place where he received information and the time he arrived to the hospital and the matter was reported by the complainant, but the defence failed to extract anything from his mouth, detrimental to the case of the prosecution. The doctor confirmed to what the scribe disclosed. The doctor was examined as (P.W-8) who stated that the deceased (then injured) was produced to him by the police; that he examined the injured and prepared his medico legal certificate. The doctor was questioned regarding the exact time of arrival and examination of the injured, who disclosed that the injured was brought at 09:05 AM and this time gets its confirmation from the medico legal certificate. When the statements of the witnesses i.e. the scribe and the doctor are read in juxtaposition, no ambiguity is left that the matter was reported at the stated time and

that the injured was examined by the doctor, soon after his arrival. An attempt was made to convince this court that preliminary investigation was conducted, and that the matter was never reported by the deceased (then injured), but by the eyewitness when his attendance was procured, but this limb of the argument failed to convince, as the quick succession of events has left no ambiguity that the matter was promptly reported and that the eyewitnesses were present at the time of incident and in the hospital when the report was made.

10. The lack of previous blood feud between the parties is a circumstance which excludes the possibility of substitution. As the motive was an altercation on the fallen trees, so there was hardly an occasion for the complainant to substitute innocent for the actual culprits. We are not convinced that either the complainant or the eyewitness would make substitution, that too, when his real father and real brother are killed. In the like circumstances, substitution is the rarest phenomenon, as is held in case titled

“Aqil Vs The State” (2023 SCMR 831) which reads as:-

> ***“A witness who is a natural one and is the only possible eye-witness in the circumstances of a case cannot be said to be "interested". In the present case, the eye-witnesses, one of whom was an injured eye-witness have spoken consistently and cogently in describing the manner of commission of the crime in detail. The testimony of an injured eye-witness carries more evidentiary value. The Court is not persuaded that their evidence is to be discarded merely because they happen to be related witnesses. Learned counsel for the petitioner could not point out any plausible reason as to why the complainant has falsely involved the petitioner in the present case and let off the real culprit, who has committed murder of her mother and sister. Substitution in such like cases is a rare phenomenon. The medical evidence available on the record further corroborates the ocular account so far as the nature, time, locale and impact of the injuries on the person of the deceased and injured is concerned. Even***

otherwise, it is settled law that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused."

11. Our attention was brought to one of the eyewitness who despite of his availability was not produced, and as such the defence tried its best to reap the harvest, by inviting the attention of this to Article 129 (g) of the *Qanoon-e-Shahadat* Order, 1984, for drawing a negative inference, but we are not impressed, as a real son would in all circumstances support the case of the prosecution, that too, when his real father was killed in the incident. In such eventuality, this court is not in a happy mood to draw an adverse inference and Article 129 (g) would not apply in the circumstances of the present case.

12. The report of the complainant is of prime importance as it was he who reported the matter in injured condition and on his death now that has gained the status of a dying declaration. This court is to see as to whether the same inspires confidence and is in

harmony with the eyewitness account and the physical circumstances of the present case, as it is essential that all the three must make an organic whole. We are conscious of the fact that in the early ages much respect was paid to the statement of a dying man with the sole reason that a dying man will not tell a lie, but with each passing day the behavior changed and so the moral values, so the need was felt that in order to award conviction there must be corroboration and as such in present era the dying declaration is considered and declared a weak kind of evidence, which needs independent corroboration and it by itself is not sufficient to convict. As in the instant case the determining factor is the dying declaration, so this court is constrained to reconsider and re-evaluate its worth in light of the collected evidence. The most crucial point for determination before this court is, as to whether the deceased (then injured) was capable to talk and as to whether it was the deceased (then injured) who reported the matter. The scribe left no ambiguity when he appeared before the learned trial court. He was questioned

regarding the consciousness of the deceased (then injured) and also regarding his capability to talk who confirmed that before making the report the injured complainant was conscious and was oriented in time and space. This witness further confirmed that he put some rational questions to the complainant who replied rationally, and so after getting satisfied regarding the capacity of the complainant, he drafted the murasila. The scribe at the time of report succeeded in getting a certificate from the doctor and the doctor also endorsed the murasila, where the factum of the understanding and capability to talk, of the deceased (then injured) was confirmed. In order to resolve this controversy we went through the statement of the doctor who examined the injured. The doctor was examined as (P.W-8) who confirmed that at the time of examination the injured was conscious and capable to talk and that the same has been mentioned in the medico legal certificate, prepared by him. We cannot forget that the incident occurred on 22.08.2016, the deceased (then injured) remained hospitalized till his

death on 24.08.2016. The survival of the deceased (then injured) for long two days is another circumstance that confirms, that at the time of report the complainant was capable to talk. The doctors were cross-examined regarding the seat of injuries, the organs which got injured in the incident and thereafter the capability of the deceased (then injured) to talk who remained consistent regarding the consciousness and orientation of the complainant. The dying declaration gets further support from the statement of the eyewitness, and when both are read in juxtaposition it confirms our belief that the prosecution succeeded in establishing its case against the appellants to the hilt. Had this been the sole statement of the complainant then both the courts i.e. the learned trial court and this court would take extra care but when the eyewitness account could not be shattered then little was left for both i.e. the learned trial court and as well this court to take a different view, as is held in case titled ***"Hasnat Ahmad Vs. The State and another" (2023 YLR 585)*** which reads as follows:-

> ***"Dying declaration can be made the basis for awarding conviction provided it is free from the menace of prompting and tutoring and is proved to have been made by none other than the deceased himself. The paramount reason for attaching importance and credibility to such a statement is the presumption that a dying person seldom lies."***

13. The medical evidence is in harmony with the ocular account, as the seat of injuries on the bodies of the deceased find support from the site plan. The seat of injuries on the body of the deceased confirms that they were fired from the places assigned to the appellants and that the same supports the case of the prosecution. The medical evidence and ocular account is in harmony and we could not see any conflict between the two. We cannot forget that medical evidence is confirmatory in nature and the same is only and only pressed into service when the ocular account fails, which is not the case in hand.

14. The motive was alleged as a dispute over the fallen trees and that the witnesses succeeded in proving the motive and even the

investigating officer took into possession the fallen trees which were later on returned to its lawful owners by the court of competent jurisdiction. We are fully convinced that the prosecution succeeded in proving the motive and that the same is a factor which can be taken in support of the prosecution. There is no cavil with the proposition that absence or weakness of motive would hardly be a ground for dislodging the prosecution case provided it succeeds in bringing home guilt against the accused charged.

15. The cumulative effect of what has been stated above leads this court nowhere, but to hold that the prosecution has succeeded in bringing home guilt against the appellant and that the impugned judgment is suffering from no irregularity or inherent defects which could call for interference. The impugned judgment is well reasoned and the learned trial court fully appreciated the evidence on file, which call for no interference. The instant criminal appeal, being bereft of any merit, is hereby dismissed.

Now diverting to Cr.R.No.93-P/2020, suffice it to say that as the tragedy occurred

because of timely altercation between the parties and it cannot be held with certainty that the sole purpose was to kill, so in such eventuality the approach of the learned trial court is correct and that it properly appreciated this particular aspect of the case. We are confident in holding that the awarded sentence is in accordance with law and in accordance with the attending circumstances of the present case, which hardly calls for interference. The instant criminal revision failed to succeed, is dismissed as such.

J U D G E

Announced. ***J U D G E***
Dt.04.05.2023.

HON'BLE MR.JUSTICE ISHTIAQ IBRAHIM &
HON'BLE MR.JUSTICE SAHIBZADA ASADULLAH..

(A·K·KHAN Court Secretary)