

**IN THE PESHAWAR HIGH COURT,
BANNU BENCH**

(Judicial Department)

Cr.A No.249-B/2017

**Asmatullah Khan
Vs
The State etc.**

JUDGEMENT/ORDER.

Date of hearing 22.01.2019.

Appellant-Petitioner: **By Farman Ali Wazir,**
Advocate.

Respondent: _____

MUHAMMAD NASIR MAHFOOZ, J.- The

complainant Asmatullah has filed the present appeal against the judgment and order dated 25.10.2017 passed by learned Additional Sessions Judge-III, Bannu, whereby he acquitted accused/respondent No.2 of the charges leveled against him in case FIR No.499 dated 05.8.2015 under section 302 PPC registered at police station Ghoriwala, Bannu.

2. Charge under section 302 PPC was framed on 10.12.2015 against the accused/respondent to which he did not plead guilty and the prosecution produced its evidence.

PW-1 is Laiq Shah FC police station Ghoriwala, Bannu, who had escorted the dead body of Hameedullah deceased along with relevant documents to the doctor for post mortem examination. His statement was recorded by the I.O under section 161 Cr.P.C.

PW-2 Akhtar Nawaz had identified the dead body of deceased Hameedullah before the police as well as before the doctor at the time of post mortem examination. Both these witnesses were not subjected to any detailed cross-examination.

PW-3 Muhammad Nawaz Khan ASI police station Ghoriwala stated that on 07.8.2015 when on Gasht, he received information that one motorcycle is parked near Elementary College, IDPs Camp, Bannu in suspicious conditions. He along with staff of Bomb

Disposal Squad requisitioned for the purpose went to the spot and after checking the said motorcycle model Superstar No.6986 chassis No.674511. It was taken into possession vide Mud No.19. He is marginal witness to the recovery memo Ex.PW3/1 vide which one mobile Samsung having sim No.03359939168 Ex.P-1 produced by the accused. He stated that through the said mobile phone, the accused had contacted the deceased on the day of occurrence on his cell phone No.03325017720. Pointation memo is Ex.PW3/2, prepared on the pointation of accused at the place of occurrence on 06.10.2015, when addition was made with red ink in the already prepared site plan as the accused has pointed out different places to the I.O Mir Qabaz Khan. In this respect the pointation memo Ex.PW3/3 was prepared. He was subjected to cross-examination on different aspects of accompanying the accused to the place of occurrence from police station Ghoriwala, after his arrest, along with the time and date of the return from the place of occurrence. He

expressed his inability to remember that what time and date the cell phone was produced by brother of the accused but the same was produced in the police station. No other material question has been put to him.

PW-4 Rehmatullah ASI police station Miryan, who was at the time of occurrence posted at police station Ghoriwala, prepared murasila Ex.PW4/1 at the time when he was present in the hospital which was stated to be thumb impressed by the complainant. The injury sheet and inquest report Ex.PW4/2 and Ex.PW4/3 forwarded to the doctor concerned.

Haji Saadullah Khan SHO police station City, who had arrested accused Kashifullah, appeared as PW-5. One PW Abdul Nasir was abandoned on 12.11.2016.

PW-6 Habibullah ASI affirmed his signature on the recovery memo Ex.PW6/1 vide which the blood stained earth was recovered from the place of deceased Hameedullah. Two empty shells of .30 bore from mark A and mark B of the site plan were recovered and

sealed into parcel vide recovery memo Ex.PW6/2 while the documents of motorcycle of deceased produced by complainant Asmatullah is Ex.PW6/3. He also stated that one 4 GB USB was taken into possession, which contained confessional statement of Kashif accused and the same is Ex.PW6/4. He was not cross-examined about the details of examination-in-chief.

Dr. Atta-ur-Rehman, Senior Medical Officer, Khalifa Gul Nawaz Hospital appeared as PW-7, who was then serving in DHQ Hospital Bannu. On 05.8.2015 he conducted autopsy on the dead body of Hameedullah deceased. The post mortem report Ex.PW7/1 reveals the following injuries.

Condition of subject:

Young stout. Clothed man. PM staining present. Rigor Mortis developed.

Wounds:

- 1- FAI entry wound on right ear size 1/4x14``.

- 2-FAI exit wound on right temporal area size 1/2x1/2``
- 3-One FAI entry wound on left eye lid size 1/4x1/4``.
- 4-One FAI exit wound on occipital area size 1/2x1/2``.

Cranium and spinal cord. All injured.

Thorax: All healthy.

Abdomen: All healthy.

Muscles bone joints: Muscles injured at the site of injuries.

Remarks.

In his opinion, the cause of death was injured to skull and brain.

Probable time between injury and death:
instantaneous.

Probable time between death and PM. 08-10 hours.

In cross examination he admitted that relevant column of time of death is left blank, but stated that date is given. He was not able to answer direction of injuries as to whether the victim and assailant were at parallel position at the time of firing or not.

PW-8 was entrusted with execution of warrants issued under section 204 and section 87 Cr.P.C which are Ex.PW8/1 to Ex.PW8/4.

PW-9 Asmatullah complainant stated that he received information that his deceased son Hameedullah is murdered and his dead body has been shifted to the DHQ Hospital, Bannu by the nearby people, on which he rushed to the hospital. Later on he came to know that his son was murdered in the fields of Gul Dar Ali Khan, situated at Pir Wali Shah, Shamshi Khel, so he lodged the report against unknown accused as he has no dispute with any one which is Ex.PW4/1. On 06.8.2015 he recorded his supplementary statement, wherein he charged the present accused on the information conveyed by his daughter Mst. Shabana Bibi. He added that the accused has taken away the motorcycle and mobile set belonging to his deceased son and on 08.8.2015 he produced the documents of said motorcycle and mobile set to the I.O.

In his cross-examination he admitted that he has charged the accused only on the information conveyed by his daughter and has got no other evidence to connect the accused with the commission of offence. He had also admitted that there is no eye witness of the occurrence.

PW-10 Mst. Shabana Bibi, sister of the deceased Hameedullah stated that on 04.8.2015 the deceased was busy in ablation and preparing for Isha prayer when his mobile set rang and the name of Kashif appeared on the screen. She received the call who asked her about deceased Hameedullah to which he replied that he is busy in ablution, so she was asked to hand over the cell phone to her brother which she accordingly handed over to him and after short conversation, her brother stated that he is going with the accused and will return soon. He left the house on the motorcycle and had left the mobile set at home, but on the following day, the news about death of her brother was received by her and then her father lodged

report against unknown person. She added that she is satisfied about the guilt of accused/respondent and confirm that the Judicial Magistrate and the I.O recorded her statement.

In cross-examination she admitted that the Judicial Magistrate recorded her statement after 12 days of the occurrence, but she did not disclose any reason for the delay in recording of her statement and similarly, no motive has been disclosed but has charged the accused due to the reason that he had called her brother on the night of occurrence. No other source of information has been divulged by her and no eye witness has come forward.

PW-11 stated to have found dead body of some unknown person on 05.3.2015, when he came to his landed property, where many other persons were also present. The dead body was shifted to DHQ Hospital Bannu with the help of co-villagers. He is marginal witness to the recovery memo Ex.PW11/1 vide which the I.O took into possession the dead body of the

deceased. He is also marginal witness to recovery of 02 empty shells, recovered from points A and B of the site plan, it is Ex.PW11/1. Only one single question has been asked in cross-examination that the empties are planted in the instant case, to which he replied in negative.

PW-12 Asmat Ullah Khan SI stated that on 19.8.2015 he has submitted challan against the accused under section 512 Cr.P.C.

PW-13 is the material witness, who has conducted investigation of the case while conducting investigation he has narrated the details when he proceeded to the place of occurrence and prepared site plan Ex.PW13/1 on the pointation of Abdul Nasir, the abandoned witness. Further added that he has prepared recovery memos of blood stained earth, empty shells, motorcycle model Superstar recovered from the fields near Kacha Bachak entered in Mud No.19 dated 07.8.2015, as case property vide recovery memo Ex.PW13/2. The CDR data of some number of the

deceased and the accused are Ex.PW13/3 which alleges to reveal the contacts between the accused and the deceased before the occurrence and after the occurrence. Ex.PW13/4 are the photographs of the place of occurrence and Ex.PW13/5 is application for producing the complainant and Mst. Shabana (PW-10) for recording her statement under section 164 Cr.P.C before the Judicial Magistrate. Proceedings under sections 204 and 87 Cr.P.C are produced as Ex.PW13/6 and Ex.PW13/7 while the report of FSL about the blood stained earth and empties recovered from the spot are Ex.PW13/8 and Ex.PW13/9. Accused was arrested on 30.10.2015, who allegedly confessed the guilt before him. The said investigation report is Ex.PW13/11. The accused is stated to have produced his mobile phone set Samsung. He has further affirmed the contents of pointation memo and USB Ex.P.Z.

In cross-examination he stated that the accused was arrested on 03.10.2015 while in examination-in-chief he disclosed the date as 30.10.2015. The accused

allegedly confessed his guilt on 06.10.2015 before him and his statement was not recorded before 06.10.2015.

He further added that the accused was charged by the complainant and Mst. Shabana in their statements under section 161 Cr.P.C recorded on 17.8.2015, but again added that the statements were recorded on 06.8.2015 while the occurrence had taken place on 03.8.2015. He has supported the statement of PW-10 Mst. Shabana to the extent of handing over of mobile phone by her to her deceased brother. He admitted that the accused has not confessed his guilt before the Court and it is an unseen occurrence. He denied to have planted the recoveries in connivance with the complainant and that the confessional statement of accused is concocted and obtained by torture.

3. We have heard arguments of learned counsel for the parties and perused the record.

4. Analysing the statements of complainant PW-9 and PW-10, father and sister of deceased Hameedullah are consistent on the point of lack of

motive or any previous ill will or enmity between the parties. The source of information of murder is alleged to be information of PW-10 as disclosed by complainant. PW-10 has stated that the phone call of accused Kashif was received on the mobile phone of deceased because they were friends but no covert or overt act is brought forth to suggest involvement of the accused/respondent in the murder of deceased Hameedullah. Receiving a phone call ipso facto is not an incriminating act for conviction provided it is coupled with other incriminating circumstances as recovery of crime weapon and duly matching with the empties recovered from the spot that are proved to be fired from the crime weapon. Preparation of site plan on the pointation of accused too is not proved through any other independent and disinterested witnesses so that it may be confidence inspiring and lend strong support and corroborate the medical evidence. There are substantial contradictions in the statements of witnesses of prosecution that has rendered the case of

prosecution highly doubtful. The alleged call data record (CDR) and USB Ex.P.Z consisting of alleged recording of confession of guilt by the accused/respondent being part of electronic devices data requires stringent procedure to be proved as incriminating evidence to connect the accused with the commission of offence.

5. At the first instance the admissibility of Ex.PW13/4 alleged interrogation report consisting of confessional statement would be considered. Article 38 of Qanoon-e-Shahadat Order, 1984 provides that no confession made to a police officer shall be proved as against the person accused of any offence, makes the said statement inadmissible in evidence. Even admissibility of a document would not absolve the maker thereof to prove its contents. Prosecution has tried to prove the same through Ex.P.Z which is a USB allegedly having recording of confession by accused/respondent, but production of a document and proof thereof has to be proved in accordance with

Article 78 of Qanoon-e-Shahadat Order. Before a conviction is to be recorded on a confessional statement its true and voluntary character must be satisfied besides some other independent piece of direct, substantial and circumstantial evidence that corroborates the recording of confession. No effort whatsoever has been made to confront the accused with the recording in USB by playing the same in Court. It amounts to acquiescence on the part of prosecution that is sufficient to discard the same.

6. The next evidence alleged to be incriminating evidence is call data record (CDR) as stated by PW-10 Mst. Shabana, sister of deceased that when he was having ablution while preparing for Isha prayers she received the call of accused Kashif and then handed over the phone to her deceased brother who attended the call and left the house to meet the accused. CDR data is electronically prepared record that can be proved through concerned expert official that is legally authorized to record such data. No such

official has been produced in evidence in order to conform to the requirements of Articles 46-A and 78-A of Qanoon-e-Shahadat Order and in absence thereof it may be a relevant fact but not an evidence.

7. Another important aspect is alleged recovery of motorcycle owned by deceased but the same is neither recovered from the accused, on the pointation of accused or from the place proved to be owned by the accused. PW-3 Muhammad Nawaz has recovered the motorcycle vide Mud No.19 dated 07.8.2015 Ex.PA near Elementary College IDPs Camp Bannu when he was on routine Gasht. The date of occurrence is 05.8.2015 two days prior to the recovery. No effort has been made to prove that accused had left the same at the relevant place. If an accused person is connected with the commission of any offence unseen and un-witnessed he may face conviction and statement of complainant might be used as corroborative evidence as laid down by Hon'ble Supreme Court in case reported as **(2006 SCMR 1786)**

and (2006 SCMR 1801) though sometimes corroborative evidence further requires corroboration through independent source. It is held that medical evidence is not substitute of direct evidence rather is only a source of corroboration in respect of nature of injury, the kind of weapon used, the duration between injury and death and may confirm the ocular account but would not establish the identity of accused or connect him with the commission of offence, therefore, in the absence of medical evidence may not be fatal if the charge of murder is otherwise proved.

8. Interference with an order of acquittal could not be ruled out if it is proved that material evidence is disregarded, evidence is misread and such evidence is received illegally. Obvious result of such case would be that no reasonable person would conveniently reach such conclusion. Having considered all the evidence and judgment of acquittal passed by learned trial Court, no illegality or material irregularity or violation of settlement norms required

for appreciation of evidence has been pointed out so as
to arrive at a different conclusion other than acquittal.

Hence the instant appeal stands dismissed.

Announced.
22.01.2019

J U D G E

J U D G E

(D.B)
Hon'ble Mr. Justice Muhammad Nasir Mahfooz
and Hon'ble Mr. Justice Shakeel Ahmd.