

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

*[Judicial Department].*

**Cr.A No. 151-B of 2011**

***Naqibullah***

**Vs.**

***The State***

**JUDGMENT**

*Date of hearing* \_\_\_\_\_ **05.12.2017** \_\_\_\_\_.

*Appellant-Petitioner:*     **Nqib Ullah By Noor Zada**  
   **Khan Ahmadzai, Advocate.**

*Respondent :*           **State By Shahid Hameed Qureshi,**  
                                 **Addl: AG.**  
                                 **Others By Muhammad Anwar**  
                                 **Khan Maidad Khel, Advocate.**

**SHAKEEL AHMAD, J.---** Through the instant appeal,  
  
the appellant Naqibullah s/o Kazim Khan has assailed  
  
the judgment dated 28.06.2011, passed by the learned  
  
Sessions Judge, Bannu, whereby the respondent /  
  
accused Shah Alam s/o Umar Din was acquitted of the  
  
charges after a full dressed trial, in case FIR No. 179  
  
dated 29.10.2006 registered U/Ss-302/324/148/149  
  
PPC, PS, Haved, Bannu.

2. The facts of the prosecution case as set forth in the FIR (Ex.PW-3/1) are that Gul Wali/PW-8 on 29.10.2006 at 16:45 hours reported the matter to Abbas Khan ASI/PW-2 in injured condition along-with dead body of his brother namely-Kazim Khan in Emergency Ward of Civil Hospital Bannu and stated that on the eventful day he along-with his deceased brother namely-Kazim Khan and Shah Baraz/PW-7 were sitting in their clinic, meanwhile, at 15:45 hours, the accused Shah Alam duly armed with .30 bore pistol, Amratullah and two others sons of Malik Jan and Malik Jan, armed with Kalashni-kovs, came to the spot and fired from their respective guns with intention to kill the complainant party, as a result of the firing of the accused, the complainant party while coming out of the clinic, Kazim Khan was hit and fell down on the ground, Shah Baraz/PW-7 escaped unhurt, whereas, the complainant also sustained injuries by unknown means.

After commission of the offence, the accused decamped from the spot, when they attended the injured Kazim Khan, he succumbed to his injuries. Motive as alleged in the FIR is dispute over the landed property. The occurrence was witnessed by Shah Baraz and Kiramatullah besides the complainant.

3. It is pertinent to mention here that in earlier round, the co-accused namely-Arifullah, Hamedullah and Malak Jan were put to trial and they were acquitted of the charges vide judgment dated 14.7.2010, while respondent Shah Alam, and Amratullah were declared as proclaimed offenders.

4. After arrest, supplementary challan was submitted against the accused Shah Alam. After compliance of Section.265-C Cr.P.C, formal charge was framed against accused on 24.01.2011 to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution produced as many as eleven

witnesses, the gist of their respective deposition is highlighted hereinbelow. However, statement of Suhail Khan/PW-7 recorded in earlier trial was transposed.

5. Muhammad Akram appeared as PW-1 and stated that he escorted the dead body of Kazim Khan deceased and injured Gul Wali along-with their injury-sheets and inquest reports to the Doctor for PM and medicolegal examination, respectively. After examination the Doctor handed-over PM report, blood-stained garments of the deceased as well as medicolegal report of the injured.

6. Abbas Khan ASI appeared as PW-2, he reduced the report of the complainant into writing in shape of murasila Ex.PW.2/1, prepared injury sheet of complainant Ex.PW-2/2 and injury-sheet of deceased Kazim Khan Ex.PW-2/3, his inquest report Ex.PW.2/4.

7. Dr.Bashir Hussain Shah appeared as pW-3 stated that he examined the injured Dr.Gul Wali Khan,

he also conducted PM examination of the dead body of Kazim Khan.

8. Mir Sardar SHO appeared as PW-4 and stated that, he arrested the accused Shah Alam on 28.11.2010 and submitted supplementary challan against him on 02.12.2010.

9. Sher Muhammad retired SI appeared as PW-3 and stated that on receipt of murasila he incorporated it into FIR Ex.PW-3-A/1.

10. Abdul Majid ASI/PW-4 stated that he is marginal witness to the recovery memo: Ex.PW-4-A/1, vide which the I.O secured blood-stained earth from the spot, packed and sealed into parcel No.1 and one .30 bore pistol P-1 along-with empty magazine, one empty of .30 bore P-2 along-with a piece of bullet P-3. He is also marginal witness to the memo: Ex.PW-4-A/2 vide which the I.O secured blood through cotton from the place of injured Gul Wali packed and sealed it in parcel

No-4, recovery memo: Ex.PW-4-A/3 vide which the I.O took into possession blood-stained garments of the deceased Kazim Khan having corresponding cut marks.

**11.** Muhammad Ajmal (PW-5) stated that he was entrusted with warrant of arrest issued U/S-204 Cr.P.C against accused Shah Alam, Malik Jan, Amratullah and Hamedullah. He endorsed the warrant Ex.PW-5/1 to Ex.PW-5/4. He also took the proclamation notices issued U/S-87 Cr.P.C against the afore-mentioned accused Ex.PW-5/5 to Ex.PW-5/8.

**12.** Abdul Aziz ASI/PW-6 stated that after receipt of copy of FIR, he proceeded to the spot and investigated the case, prepared the site-plan Ex.PW-6/1, and the recovery memos: effected recovery of .30 bore pistol. Three empty chargers, one empty of .30 bore and a piece of bullet from near the place of deceased.

**13.** Dr.Shah Baraz/PW-7 , eye-witness of the occurrence, he supported the instance of the complainant/PW-8.

**14.** Gul Wali complainant appeared as PW-8 and narrated the story as disclosed in the murasila Ex.PW-2/1, subsequently, incorporated into FIR Ex.PW-3/1.

**15.** Ghulam Muhammad SI /PW-9 stated that he is well conversant with the hand-writing and signature of the then ASI Nabi Shah, PS, Haved Bannu and verified the content of EX.PW-9/1 and Ex.PW-9/2, to be in his hand writing and duly signed by him.

**16.** Suhail Khan/PW-10 stated that he had identified the dead body of the deceased before the police as well as before the Doctor.

**17.** After closure of prosecution's evidence, statement of accused was recorded U/S-342 Cr.P.C

wherein he denied the allegations as set-forth by the prosecution, but declined to be examined on Oath or to produce defence witness.

**18.** On the conclusion of trial, vide judgment dated 28.06.2011, the learned Sessions Judge, Bannu, acquitted the accused of the charge, hence, this appeal.

**19.** The learned counsel for the appellant contended that the respondent / accused has specifically been named as offender in the FIR for committing murder of deceased Kazim Khan and causing injuries to the complainant; that the role of respondent is distinguishable from the role of acquitted co-accused; that after commission of offence, the accused remained at large for quiet sufficient time and was declared as proclaimed offender, viz-a-viz recovery of one discharged empty of .30 bore along-with pistol of the same bore and positive FSL report of Fire-arm Expert Ex.PW-6/5; that the version of the complainant, site-



plan and medicolegal report and PM report, are placed in juxta position, are consistent inter-alia. He lastly contended that the PWs were cross-examined at length but no dent could be caused in their statements and prayed for setting-aside the impugned judgment.

**20.** Conversely, the learned counsel representing the respondent argued that the co-accused namely-Arifullah, Hamedullah and Malik Jan were acquitted by the learned Additional Sessions Judge-I Bannu vide judgment dated 14.7.2010 and the role attributed to the respondent and acquitted co-accused are one and the same; that the prosecution miserably failed to prove that the recovered pistol belonged to the respondent; that abscondence is not a proof of guilt of the accused as the people abscond out of fear to be killed in retaliation; that criteria of interference in the judgment of acquittal is not the same, as against involving conviction. He lastly contended that the

prosecution miserably failed to prove the guilt of the accused beyond a ray of doubt; therefore, he was rightly acquitted by the learned trial court.

**21.** The learned Additional Advocate General representing the State supported the contentions of the learned counsel for respondent.

**22.** This is an appeal against acquittal as argued by the learned counsel for the respondent and rightly so. The scope of interference in appeal against acquittal is most narrow and limited because in acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence. The court is always slow in interfering with an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from errors of grave misreading or non-reading of evidence on record. The criteria of interference in the judgment of acquittal is not as against cases involving a conviction. This

is the consistent view of the superior courts in plethora of judgments, the dicta are:-

*“Bashir Ahmad v. Fida Hussain and 3 others (2010 SCMR 495), Noor Mali Khan v. Mir Shah Jehan and another (2005 PCr.LJ 352), Imtiaz Asad v. Zain-ul-Abidin and another (2005 PCr.LJ 393), Rashid Ahmed v. Muhammad Nawaz and others (2006 SCMR 1152), Barkat Ali v. Shaukat Ali and others (2004 SCMR 249), Mulazim Hussain v. The State and another (2010 PCr.LJ 926), Muhammad Tasweer v. Hafiz Zulkarnain and 2 others (PLD 2009 SC 53), Farhat Azeem v. Asmat ullah and 6 others (2008 SCMR 1285), Rehmat Shah and 2 others v. Amir Gul and 3 others (1995 SCMR 139), The State v. Muhammad Sharif and 3 others (1995 SCMR 635), Ayaz Ahmed and another v. Dr. Nazir Ahmed and another (2003 PCr.LJ 1935),*

*Muhammad Aslam v. Muhammad Zafar and 2 others (PLD 1992 SC 1), Allah Bakhsh and another v. Ghulam Rasool and 4 others (1999 SCMR 223), Najaf Saleem v. Lady Dr. Tasneem and others (2004 YLR 407), Agha Wazir Abbas and others v. The State and others (2005 SCMR 1175), Mukhtar Ahmed v. The State (1994 SCMR 2311), Rahimullah Jan v. Kashif and another (PLD 2008 SC 298), 2004 SCMR 249, Khan v. Sajjad and 2 others (2004 SCMR 215), Shafique Ahmad v. Muhammad Ramzan and another (1995 SCMR 855), The State v. Abdul Ghaffar (1996 SCMR 678) and Mst. Saira Bibi v. Muhammad Asif and others (2009 SCMR 946).”*

In this respect reliance can also be placed on the case

***“The State and others Vs. Abdul Khaliq and others” (PLD 2011 SC 554).***

**23.** Perusal of the record reflects that on the same set of evidence co-accused namely:-Arifullah, Hamedullah and Malik Jan were acquitted by the learned Additional Sessions Judge-I, Bannu vide judgment dated 14.7.2010 and no appeal was filed against their acquittal order, it has achieved finality.

**24.** The learned counsel for the appellant was asked time and again to distinguish the role of the accused Shah Alam from the role attributed to the acquitted co-accused, but he remained answerless.

**25.** Role of utilization of .30 bore pistol was given to the respondent as is reflected from FIR Ex.PW-3/1 and recovery of pistol bearing No. 29025413 of the same bore and discharged empty of .30 bore from the venue of crime, but the prosecution failed to prove that the pistol in question belonged to the respondent, even a single word has not been uttered by the PWs showing that the said pistol

was left by the respondent on the venue of crime. Gul Wali Khan/complainant PW-8 alleged that he sustained injuries during the incident, but does not know that how and by what means he sustained the same. Perusal of medicolegal report Ex.PW-3/1 and injury sheet Ex.PW-3/2 reveals that he had sustained one lacerated wound 1 ½ " x ½ " on the occiput and the kind of weapon as stated by the Doctor is blunt.

**26.**           Regardless to above, admittedly, Gul Wali complainant PW-8 not received any bullet injury. Scanning of the statement of complainant and alleged eye-witness Dr.Shah Baraz/PW-7 reflects that they in their examination-in-chief stated that, all the assailants started firing at us with their respective Fire-arms, at the moment we all were going out from the clinic during the firing their deceased brother Kazim Khan was hit. When analytical thought on such deposition is put, at the eventful occasion, allegedly five assailants

launched sudden attack on the complainant party with their deadly weapons in the small dimension of room of clinic, but none hit from complainant side, inside the room seems to be illogical rather based on unaccepted general principle of prudence, because such immediate attack by using automatic Fire-arms, in such continuation, admittedly, the injury sustained by Gul Wali/PW-8 is not of bullet but unknown reasons for such injury was advanced by the prosecution. The relevant portion of statement of PW-7 is reproduced below:-

***"All the accused started firing at us with their respective Fire-arms."***

27. The afore-said deposition in examination-in-chief is also reiterated by complainant Gul Wali Khan/PW-8. This complainant cross-examination peculiarly termed that except Shah Alam/respondent no other accused had entered in the clinic and he had

made firing inside the clinic. Accused Shah Alam made single fire at PW-7/Shah Baraz, no other firing was made inside the clinic. Accused Shah Alam had made no firing at him or deceased Kazim Khan. This deposition in cross-examination of Gul Wali Khan complainant PW-8 who is the star witness of the prosecution is nugatory to the statements of the other alleged eye-witnesses namely-Shah Baraz/PW-7, which falls within the definition of improvement as he attempted to connect the respondent with the alleged recovery of pistol, however, such expression of the complainant/PW-8 release the respondent/accused from the charge of murder of deceased Kazim Khan or attempt to commit murder of alleged eye-witness. Last but not least, the site-plan Ex.PW-6/1 is also not corresponding to the direction given thereof by comparison the situation furnished by the alleged eye-witness/PW-7 Shah Baraz and because of this reason



the probatory value of the site-plan Ex.PW-6/1 too were frustrated by not corroborating the prosecution's stance.

28. Coming to abscondence of the respondent / accused, perusal of the card of arrest reveals that the accused Shah Alam was arrested on 28.11.2010 i.e. after four years and one month of the occurrence It is now settled law that abscondence per se does not constitute guilt of the accused. Normally the accused abscond out of fear to be killed in retaliation. Reliance is placed on ***Rahimullah Jan V. Kashif PLD 2008 Supreme Court 298***, wherein it was held as under:-

*“Abscontion of accused  
...evidentiary value...Mere abscondance  
would not be taken as conclusive proof of  
guilt of accused and same being a  
suspicious circumstances against him  
could not take the place of proof.”*

29. For what has been discussed above, we found no illegality or legal infirmity in the impugned judgment, the learned trial court rightly acquitted the accused by extending benefit of doubt, after properly appraising the evidence on record, calling for no interference by this court, therefore, the same is upheld and the appeal in hand being bereft of merit is dismissed.

Announced:  
05.12.2017

**J U D G E**

\*Imranullah\*

**J U D G E**