

*Judgment Sheet*  
**IN THE PESHAWAR HIGH COURT, ABBOTTABAD  
BENCH  
JUDICIAL DEPARTMENT**

*Cr.Appeal No. 104-A/2019*

***JUDGMENT***

Date of hearing.....**12.10.2022**.....

Appellant (Noor Habib Shah) By Mr. Shad Muhammad Khan,  
Advocate.

Respondents. (State) Sardar Ali Raza, AAG and (Complainant) By  
Qazi Muhammad Arshad, Advocate.

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**WIQAR AHMAD, J.-** After being indicted for the murder of Noor Alam Shah (deceased) in case FIR No. 120 dated 24.08.2015 registered under Section 302 PPC at Police Station Banna Tehsil Allai District Battagram, learned Additional Sessions Judge-I Battagram has also found appellant (Noor Habib Shah) guilty, convicted him under Section 302 (b) PPC and sentenced to life imprisonment with a fine of Rs.2,00,000/-, payable as compensation under Section 544-A Cr.P.C, or in default to suffer six (06) months S.I with benefit of Section 382-B Cr.P.C vide judgment dated 04.04.2019

Aggrieved from ibid judgment, complainant (Muhammad Hassan Shah) has also filed **Cr.Revision No. 17-A/2019** for

enhancement of sentence of the appellant from life imprisonment to normal penalty of death, therefore, through this single judgment both these matters are proposed to be decided together.

2. According to the prosecution story, as explained in the murasila (Ex.PA), on 24.08.2014 at 14:39 hours complainant namely, Muhammad Hassan Shah (PW-03) while accompanying dead body of his brother (Noor Alam Shah) at Emergency Ward of Tehsil Headquarter Hospital Banna lodged report of the crime to Imtiaz Ali Shah, ASI (PW-01) where he alleged that on the fateful day at 14:00 hours appellant (Noor Habib Shah) had been cutting maize crops near his house. He (complainant) and his deceased brother (Noor Alam Shah) had prevented him from doing so, upon which the appellant started firing at his brother as a result of which the latter had sustained injuries on left side of his chest and died on the spot. The appellant was stated to have decamped from the spot. The occurrence was also witnessed by his brother namely, Syed Hameed Shah

(PW-04) besides him. Motive for the crime was shown the dispute that arose because of cutting maize in their field. On report of complainant (PW-03), Murasila (Ex.PA) was drafted by Imtiaz Ali Shah, ASI (PW-01) and same was sent to Police Station, whereupon the ibid FIR (Ex.PA/1) was registered at the Police Station.

3. After completion of investigation, challan was submitted before the learned trial court. Formal charge was framed against appellant, to which he pleaded not guilty and claimed trial. In order to prove its case, prosecution produced twelve (12) witnesses, whereafter accused was examined under Section 342 Cr.P.C, wherein he denied the allegations and professed innocence. At the conclusion of trial, learned trial Judge convicted and sentenced the appellant as mentioned above vide impugned judgment. Aggrieved from the ibid judgment, appellant has filed the instant appeal.

4. We have heard arguments of learned counsel for the parties as well as the learned

Additional Advocate General and gone through the record.

5. Perusal of record reveals that appellant was solely charged for commission of the offence by the complainant, to whom he had not been inimical earlier. The place of occurrence was in front of complainant's house. Complainant has stated in his first report that the appellant had been cutting maize crops in their landed property near their house, when he came out of his house alongwith his deceased brother (then alive) namely, Noor Alam Shah, for preventing the appellant from cutting the crop. When his deceased brother reached near the appellant, he made firing on him, as a result of which, his brother received injury on left side of his chest and died at the spot while the appellant fled away from the scene. The occurrence was also stated to have been witnessed by their third brother Syed Hameed Shah (PW-04). The time of occurrence was shown as 14:00 hours on 24.08.2015 while report thereof was lodged at 15:45 hours on same day. Distance between spot of occurrence

and police station was shown to be 10 / 11 kilometers in the mountainous area of Allai, District Battagram and, therefore, the report can be considered as a promptly lodged one by keeping in view the distance through which the complainant had to take dead body to the hospital or police station both of which were situated nearby. The doctor was examined as PW-10, who has given the following narrations of injuries;

*1. No mark of ligature on neck.*

*2. A healthy body of young man wearing the brown color shalwar kameez which was stained with blood. The clothes were signed and handed over to the police.*

*3. Rigor mortis developed.*

*4. Wounds.*

*A. Entry wound. A 1x1 cm wound on left shoulder joint anteriorly just above the axilla. The wound is bleeding.*

*B. Exit wound. No exit wound present. Bullet present in chest cavity as shown in X-Ray chest.*

*Note: Bullet not recovered after trying my best from chest.*

*5. Scalp, skull and vertebrae. Skull not opened.*

*6. Left lung and blood vessel of thorax were damaged.*

*7. Pericardium full of blood. Other organs of chest were normal as mentioned in my report.*

*In my opinion the cause of death was due to damage to the heart vessel (aorta) and left lung, as the bullet traveled in medial direction towards the heart vessels. The probable time between injury and death is sudden and between death and post mortem 4-10 hour.*

He was also subjected to cross-examination but nothing beneficial to the case of appellant could be solicited from his mouth. Statement of the complainant was found fully corroborated by medical evidence.

6. The other eyewitness namely, Syed Hameed Shah, was examined as PW-04. He has also given similar narration of the occurrence in his examination-in-chief. In his cross-examination no major contradiction could be solicited from his mouth. The witness has, however, stated in reply to one of the question in cross-examination that it was a vacant place (not covered by maize crops) where occurrence had taken place. He has also stated in the sentence following thereafter that when his brothers had gone to refrain the appellant from cutting maize crops,

he had been present at home. He has kept on saying that the appellant had made firing from the maize crops. It was also stated that he might have cut 3 / 4 maize plants by then. The complainant while deposing in his cross-examination had also stated that they, at the time of spot inspection, had shown the appellant in an open place and not in the field of maize crops. Taking these two excerpts from statements of the eyewitnesses learned counsel for the appellant had tried to develop an argument that the eyewitnesses had not been consistent in respect of the place where the accused had been present at the time of occurrence. He has also contended that the other witness i.e. PW-04 (Syed Hameed Shah) was not present at the spot of occurrence, but was rather present in his home. We would not be able to agree with the learned counsel for the appellant in this regard. When the statement is read in its context, things becomes manifestly clear. Regarding the former mentioned objection of the learned counsel, it is apparent that site plan shows the appellant at margin where the

maize crop starts. He had not been shown inside the maize crop and same was the statement given by complainant that they had shown accused at open place and not inside maize crops, in the site plan. The other witness had also given a similar narration for the reason that outside the margin of maize crops there was open field and appellant was present there. Even otherwise, a part of site plan where the investigating officer tries to re-enact happening of an occurrence is not a substantive piece of evidence. Reliance in this respect may be placed on the judgment of Hon'ble Supreme Court of Pakistan in the case of *"Taj Muhammad Vs. Muhammad Yousaf & 02 others"* reported as **PLD 1976 SC 234** wherein it has been held;

*"It was hardly realized that the site plan itself is not a substantive piece of evidence which, could be used to contradict or discredit the unchallenged evidence of the three eye-witnesses."*

Further reliance in this respect may also be placed on the judgment delivered by Hon'ble Supreme Court of Pakistan in the



case of “*Javed Ishfaq Vs. The State*” reported as **2020 SCMR 1414**.

7. Objection of learned counsel for the appellant that the eyewitness Syed Hameed Shah (PW-04) had not been present at the spot, is also arising from misinterpretation of the relevant sentence in his cross-examination. It is important to be noted that it was in reply to a question of the cross-examiner where also the witness had stated that when the two brothers i.e. complainant and deceased had been leaving their house, he had been present at home. It means that he was not absent from his house but present therein. The time of leaving the house was slightly prior to the occurrence. From this, it cannot be detected that he had not followed his two brothers even when there was likelihood of the dispute and when the place of dispute was just in front of their house. Statement of this witness had also remained fully consistent with the complainant regarding all the facts that had taken place at the time of, prior and after the occurrence. Both the witnesses had stated that their sister

had brought cot for taking the deceased to hospital. Both have stated that they had not attempted to catch the appellant after the occurrence and that they had rather attended to their falling brother. Both the witnesses had also stood consistent in rest of their testimonies. Besides, manufactured inconsistencies created in statements of eyewitnesses due to efforts of a relentless cross-examiner should not be overweighed. When presence of a PW is believable at the spot, intrinsic worth of his testimony is acceptable and the witness is not found inimical and biased but truthful in respect of his narrations made in his examination in chief, then statement of such witness should not be discarded for any inconsistency that is crafted during course of his cross-examination through skills of a learned cross examiner. Honourable Supreme Court of Pakistan, while giving its judgment in the case of *“Roshan & 04 others Vs. The State”* reported as **PLD 1977 SC 557** has laid down the following principle for appreciation of evidence in such cases:-

*“Some counsel devotes all their energies to create contradictions, and to this end lengthy cross-examination is conducted for hours and days which is intended to confuse, even an intelligent person, and is not calculated to elicit any useful information. This exercise is undertaken because Courts give undue importance to contradictions found in the statements of the prosecution witnesses. The primary consideration in appraising the evidence given by a 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 judge 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-examiner. Very often a witness gives an incorrect statement because he must answer every question regardless of the fact whether he knows the answer to it or not. It is not uncommon that the cross-examiner puts 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 over-board.”*

8. Learned counsel for the appellant has also relied upon judgment of Hon’ble Supreme Court of Pakistan delivered in the case of “*Rehmatullah Vs. Muhammad Iqbal & others*” reported as **2006 SCMR 1517** and contended that both the brothers i.e. PW-03 and PW-04 stood as spectators and had not tried to save their brother or catch the

appellant after commission of the offence and, therefore, their conduct should be dubbed as unnatural one. In this respect it is important to be noted that there had not been an enmity earlier and the complainant party may not be expecting such a reaction from the appellant. It is mentioned in first report of the occurrence that the moment the deceased (then alive) went towards the appellant, he was fired at. The occurrence had taken place all of a sudden where both the witnesses stated that they had attended to their deceased brother immediately after the occurrence. This was very much natural that they would have rushed towards their brother so as to save him. There were also maize crops in the vicinity as apparent from the evidence, therefore, the appellant would not have faced much difficulty in disappearing from the spot of occurrence. In the given circumstances of this case, we do not find any unnatural conduct, being displayed by any of the eyewitnesses.

9. Learned counsel for the appellant has also taken a stance that the appellant was

alleged to have been fired with a 30-bore pistol, and the fact that the bullet had remained stuck inside the body of deceased, could not be sufficiently explained because 30-bore pistol was supposed to be a powerful weapon and the bullet should have gone through and through. The doctor in his examination in chief stated that despite efforts he could not extract the bullet. It is not clear which organs the bullet had touched inside body of the deceased besides his main artery. Sticking of the bullet might be because of its confrontation with the bone or because of substandard ammunition used in making of the bullet. No hard and fast rule can be laid in this regard, moreso, when the weapon and ammunitions (used) are locally manufactured for which there are no settled standards. The phenomena of bullet going through and through depends on lot of factors which varies from case to case.

10. Prosecution has also been relying on recovery of pistol and its matching report with the empty recovered at the spot but in that respect it is important to be noted that the

pistol had not been recovered from or on pointation of the appellant rather same had been shown recovered from house of the appellant on 29.09.2015 while he had been arrested on 24.08.2016. After his arrest, identification memo has been prepared by the Investigating Officer, showing that he had identified the pistol to be his own but marginal witness to the recovery memo namely, Gul Faraz while appearing in the witness box as PW-12 has stated that when the appellant was being confronted with the pistol same had not been in sealed form. Such evidence of recovery from a house which could not be proved to have been in exclusive possession of the appellant cannot, therefore, be called to be believable. It is, however, important to be noted that it was a corroboratory piece of evidence and case of the prosecution which was otherwise based upon direct testimony of two eyewitnesses was found well established. Testimony of both the eyewitnesses were confidence inspiring, consistent and coherent. Intrinsic worth of the direct evidence of prosecution was sufficient for bringing home

guilt of the appellant. Besides, there were ample corroborations from medical evidence and the factum of absconsion. After commission of the offence appellant had gone in absconsion. He could not deny knowledge of the occurrence because the deceased was his near relative. Prosecution has also examined Fayaz-ud-Din (PW-06) who has stated that he had obtained warrant under Section 204 Cr.P.C and searched appellant in the locality but he could not be found whereafter the warrant was returned unexecuted. He had also been entrusted with the Proclamation under Section 87 Cr.P.C. He stated that he had affixed copies of the Proclamation on the outer door of appellant's house and notice board of the court while third copy thereof had been returned to Investigating Officer of the case with his report (Ex.PW-6/2A). It was on 26.08.2016 after almost a year of the occurrence that the appellant could be arrested by the local police. Absconsion by itself is not sufficient to declare a person offender but such evidence may be used for the purpose of corroborating



other evidence of the prosecution. Reliance in this respect may be placed on the judgment of Hon'ble Supreme Court of Pakistan delivered in the case of "*Riaz Hussain Vs. The State*" reported as **2001 SCMR 177**.

11. In light of what has been discussed above, prosecution has been able to prove case against the appellant beyond reasonable doubt. The learned trial court has rightly found him guilty for commission of the offence. His conviction recorded by the learned trial court under Section 302 (b) PPC was, therefore, found justified on the basis of evidence present before the court below, warranting no interference by this court. Resultantly, the instant appeal was, therefore, found divested of any merit and same is accordingly dismissed.

12. So far as **Cr.Revision No. 17-A/2019** filed by complainant for enhancement of sentence of appellant is concerned, it is observed that while awarding life imprisonment, the learned trial court has stated that the occurrence had not been committed in a pre-planned manner and that

it had happened all of a sudden. Findings of the learned trial court as well as the ensuing decision was also found by us to be appropriate in the given circumstances. The occurrence had no doubt happened all of a sudden where the appellant had fired a single fire shot and that also when the deceased had approached him as per story narrated in the FIR. In such circumstances, award of alternate punishment of life imprisonment was not found inappropriate. Learned counsel for the complainant was heard, but he could not convince us on revisiting the sentence already awarded to the convict. The criminal revision was also found meritless and same is accordingly dismissed.

Announced:  
12.10.2022.

**J U D G E**

**J U D G E**

*Justices Wiqar Ahmad and Kamran Hayat Miankhel*

/s/Saif. CS/