

**JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**1. Cr.A No. 32-M/2018**

(Noor Islam Versus The State and another)

**Present:**

Qazi Farid Ahmad, Advocate for the appellant/  
convict.

Mr. Razauddin, A.A.G. for State.

Mr. Farman Ali, Advocate for the  
complainant.

**2. Cr.R No. 08-M/2018**

(Qashqaray Khan Versus The State and another)

**Present:**

Mr. Farman Ali, Advocate for the petitioner.

Mr. Razauddin, A.A.G. for State.

Qazi Farid Ahmad, Advocate for respondent/  
convict.


Date of hearing: 04.02.2021

**JUDGMENT**

**ISHTIAQ IBRAHIM, J.-** The present appellant/  
convict namely Noor Islam was indicted u/s 302  
PPC in case FIR No. 618 dated 21.12.2015 of P.S  
*Kanju* for committing murder of Bakht Zamin Khan.  
As a sequel of his regular trial for the said offence  
before the Court of learned Additional Sessions  
Judge/Izafi Zilla Qazi, Swat at *Kabal*, he was  
convicted u/s 302(b) PPC vide judgment dated  
24.01.2018 and sentenced to life imprisonment (R.I)  
with compensation of Rs.500,000/- payable to LRs  
of the deceased as compensation u/s 544-A, Cr.P.C

or to suffer further six months S.I in case of default thereof. Benefit of section 382-B, Cr.P.C was extended to him.

The appellant/convict has challenged his conviction and sentence through this appeal whereas the complainant has filed the connected Cr.R No. 08-M/2018 seeking enhancement of the sentence awarded to the convict by learned trial Court. Both the cases, being inter connected and emanating from the same judgment, are decided through this judgment.



2. The occurrence took place on 21.12.2015 at 10:30 hours in the lumberyard of Bashir Ullah (PW-14) situated near High School *Dherai Kanjoo* which was reported by complainant Qashqaray Khan (PW-2) on the same day at 12:25 hours in casualty room of Saidu Sharif hospital. According to the report, the complainant received telephonic information that his cousin Bakht Zamin Khan has been wounded by someone and he is being shifted to Saidu Sharif hospital, therefore, he should come to hospital hurriedly. On arrival to hospital, he was informed that his cousin (deceased) was sitting in the lumberyard whereas his friend Muhammad

Islam (the present appellant whose name was later on corrected as Noor Islam) was roaming there. In the meanwhile at 10:30 hours, the appellant suddenly attacked his cousin with axe due to which he sustained injury on his head and became unconscious. The occurrence was stated to have been witnessed by Habib-ur-Rehman (PW-3) and several other persons present in the wood-stock. The complainant, however, could not disclose any motive at the time of lodging the report.

3. Hazrat Ali ASI (PW-5) recorded report of the complainant in *Murasila* (Ex.PW-5/3) and sent the same to P.S *Kanju* for registration of FIR. Amjad Ghafoor ASI (PW-1), on receipt of *Murasila*, chalked out formal FIR (Ex.PA). The injured was initially examined by Dr. Fazal Amin (PW-11) on 21.12.2015 who issued report Ex.PW-11/1 regarding consciousness of the injured which is as follows:

I examined Mr. Bakht Zamin s/o Kashmir Khan R/O Koza Bandai. He is semi-conscious and unable to give statements.

The aforesaid doctor (PW-11) also prepared his report Ex.PW-11/2 which is as under:

Crushed lacerated wound on left parieto-occipital region. Wound is skin/muscles deep. The underlying skull bone is crushed with brain matter oozing out of skull. Wound is profusely bleeding.

Patient is semi-conscious and unable to give statements.

Ad: X-Ray skull

Call to Nero Surgeon. Nero Surgeon \_\_\_\_\_ AD \_\_\_\_\_  
CT Brain. Patient referred to CT Brain then Nero  
Surgical Unit.

The injured died 08.01.2016 in HMC,  
Peshawar. On receipt back of dead body, autopsy  
was conducted by Dr. Muhammad Iqbal (PW-10).  
His opinion as per report Ex.PW-10/1 is as follows.

**Wound:**

Already healed wound on the top of scalp 4 inch  
long. Scalp fracture old present. Brain vessels  
ruptured. Scalp fracture.

**Remarks by Medical Officer**

Skull fracture caused head injury, which resulted in  
death.

**Cause of death:** Severe head injury.


**Probable time that elapsed:**

- (a) Between injury and death: 16-18 days.
- (b) Between Death and Postmortem: 1-2 days.

4. The appellant was arrested on  
23.12.2015. The matter was investigated by Javed  
Iqbal ASI (PW-12). After completion of  
investigation, complete challan was put in Court  
where the appellant was formally charge-sheeted for  
the offence to which he did not plead guilty and  
opted to face the trial. Prosecution produced as many  
as fifteen PWs in support of its case and closed the  
evidence. When examined u/s 342, Cr.P.C, the  
appellant denied the allegation of prosecution and

stated to have been charged in a false case, however, he neither recorded his own statement on oath nor produced any witness in his defence. On conclusion of trial, the learned trial Court vide impugned judgment convicted and sentenced the appellant in the manner already discussed in the earlier part of this judgment. Hence, this appeal and the connected revision petition.


5. We have heard the arguments of learned counsel for the parties including the learned A.A.G for State and gone through the record with their able assistance.



6. It is the case of prosecution against the present appellant that he gave axe blow to deceased Bakht Zamin Khan in the woodstock of Bashir Ullah (PW-14). Ocular account in the present case has been furnished by Habib Ullah (PW-3), Hakim Ullah (PW-4) and Muhammad Hussain (PW-7) whereas complainant Qashqaray Khan was examined as PW-2.

All the eye witnesses have unanimously stated that the present appellant and deceased Bakht Zamin came to the wood-stock on motorcycle. They asked for a space in the lumberyard for installation

of saw-machine, however, the PWs replied them to consult the owner Bashir Ullah in this regard. Thereafter the appellant and deceased went ahead in the wood-stock while the PWs continued their work of splitting/cutting the wood. In the meanwhile they heard 'Aah' and saw the deceased falling on the ground whereas the appellant rode on the motorcycle and decamped from the spot. On getting closer to the deceased they found him injured with an axe lying near him.



Presence of the three eye witnesses on the spot cannot be doubted because they were working in the same wood-stock as laborers which fact has been confirmed by Bashir Ullah (PW-14), owner of the wood-stock, in his statement. The first objection which was raised by learned counsel for the appellant during the course of arguments was that name of none of the eye witnesses has been mentioned in the FIR. The record transpires that name of PW Habib Ullah has been mentioned as Habib-ur-Rehman in the FIR, however, the same mistake appears to be inadvertent because father name in both the cases has been mentioned as Sarzamin. Moreso, the report was lodged by complainant Qashqaray on the basis of information

he had received from PW Habib Ullah. The complainant is neither eye witness of the occurrence nor resident of the area where the occurrence had taken place rather he was residing in Rahim Abad Mingora at the relevant time and had followed the deceased then injured to hospital on receipt of phone call from PW Habib Ullah. Thus mentioning the name of PW Habib Ullah as Habib-ur-Rehman and non-mentioning the names of other eye witnesses in the FIR by complainant is not fatal to the prosecution case in view of the above stated circumstances.

Z. It is a case of single accused and all the eye witnesses have recorded their forthright statements which are sufficient for establishing the guilt of the present appellant. PW Habib Ullah, though is distant cousin of the deceased but on the other hand he is also brother-in-law of the present appellant, therefore, his integrity could not be doubted in any manner. The other two eye witnesses namely Hakim Ullah and Muhammad Hussain are independent and impartial witnesses of the occurrence and they have supported the prosecution version through their straightforward statements. All the eye witnesses are unanimous on important

aspects of the case and their credibility has not been damaged during their cross-examination except a few contradictions of minor and ignorable nature. In fact they have narrated the occurrence and other events having nexus therewith in the manner in which they had actually taken place and nothing could be found in their statements to suggest any play-acting on their part for supporting a false case. Indeed they had no motive to depose against the present appellant. Thus, the ocular account in the present case being reliable, truthful and trustworthy, can safely be relied upon for conviction of the appellant. Similar is the position with complainant Qashqaray who has charged the appellant for the murder of deceased who had taken away his sister but despite the said grudge with the deceased he lodged the report of his murder.

8. The case of prosecution is supported by medical evidence. As per ocular account and initial report, the appellant had hit the deceased on his head with axe. The deceased then injured was examined by Dr. Fazal Amin (PW-11) who has found a crushed lacerated wound skin/muscles deep on his left parieto-occipital region which caused his death on 08.01.2016. The said doctor was cross-examined



to controvert the authenticity of his reports Ex.PW-11/1 and Ex.PW-11/2 by confronting him with several un-attended blanks in his report, however, he has confidently explained the non-filling thereof by stating that his top primacy in view of the critical situation was to save a precious life, therefore, he preferred speeding up of medical examination of the injured over filling of the blanks in his report. Similar are the reports of Dr. Muhammad Iqbal (PW-10) which duly corroborate the version of prosecution as narrated in the first information report.

9. The I.O has recovered blood-stained axe and blood through cotton from the spot which were secured vide recovery memo Ex.PW-12/2. Similarly, blood-stained shirt of the deceased was taken into possession through recovery memo Ex.PW-12/13. According to F.S.L report (Ex.PW-12/26), blood on the axe and shirt has matched with the blood recovered from the spot, thus, said report further corroborates the prosecution case. The I.O has not only recovered motorcycle on which the appellant and deceased had arrived to the place of occurrence but a helmet was also recovered during search of his house as a proof of the fact that he was

using motorcycle as routine. Some contradictions with regard to the aforesaid recoveries in the statements of PWs especially of Habib Ullah (PW-3) cannot be excepted, however, the inconsistencies, being minor in nature, have no significant bearing on the prosecution case. Even otherwise, the ocular account in the present case is sufficient for conviction of the appellant and the circumstantial evidence is to be considered as a matter of caution, therefore, any inadequacy in the circumstantial evidence would not discredit the ocular testimony which is otherwise trustworthy and confidence inspiring. Reliance is placed on Mst. Sughra Begum and another Vs. Qaiser Pervez and others (2015 SCMR 1142) . It was observed by august Supreme Court of Pakistan in the said judgment that:

**"8. It is cardinal principle of justice that ocular account in such cases 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, would be required as a matter of caution. 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, we have to see the probative value of the ocular account in light of the facts and circumstances of the case".**

10. Thus, prosecution has proved through trustworthy direct as well as circumstantial evidence

that the present appellant had hit the deceased with axe causing him serious wound on his head which proved fatal to him and caused his death. However, there are certain unattended circumstances of the case with regard to real motive of the occurrence which react on the quantum of sentence awarded to the appellant by learned trial Court.

11. It is admitted that the deceased and the present appellant had arrived to the place of occurrence on the one and same motorcycle. It is also admitted that the appellant was unarmed and he had ample opportunity of doing away with the deceased before his arrival to the scene of occurrence. There is also no denial to the fact that nobody has seen as to what had happened between them right before the occurrence and that who was at fault at that particular time which resulted into the occurrence. It is also a matter of record that the axe, which was used in commission of offence, was lying in the wood-stock and it was not in possession of the appellant prior to the occurrence. In addition to that the appellant has caused a single axe blow to the deceased. The witnesses are also silent with regard to origin of the incident and reason of its commission. Keeping in view the afore-referred

circumstances, it appears that something had happened between the appellant and deceased right before the occurrence at spur of the moment which prompted the appellant to hit the deceased with axe, however, that aspect of the case still shrouds in mystery. Keeping in view the sudden mode of the occurrence without premeditation or pre-planning on the part of appellant, his case falls within Exception 4 to the erstwhile section 300 of the Pakistan Penal Code which by that time was punishable under section 304 of the old PPC. It would be appropriate to reproduce Exception 4 herein below for ready reference.

*Exception 4.*— Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Admittedly, neither the old section 300 nor the exceptions thereto are available in the new Code and it was laid down in the case of "The State V/s. Muhammad Hanif and 05 others" (1992 SCMR 2047) that all the matters which were initially dealt with by erstwhile Section 304 PPC are now to be considered under Section 302 (c) PPC. The said view has repeatedly been upheld by the august

Supreme Court of Pakistan in a number of cases. Thus, keeping in view the facts and circumstances of the present case in light of the afore-referred persistent view of the Hon'ble apex Court, in our opinion, the case of the present appellant attracts section 302 (c) of the Pakistan Penal Code, therefore, his conviction and sentence by the learned trial Court u/s 302 (b) PPC are not sustainable. In addition to that the appellant has caused a single axe blow to the deceased. He neither repeated the axe blows nor acted in a brutal manner by causing more than one injuries to the deceased. Thus, in this scenario, he deserves leniency with regard to quantum of sentence. In the case of "Muhammad Salim V/s. The State" (1969 SCMR 653), the august Supreme Court of Pakistan in view of single knife blow by accused during a sudden fight observed that:

At the same time, it seems to us that Muhammad Salim, in facing up to his uncle and attacking him with a knife when he himself was attacked ' with a hatchet, did not behave in the manner of a very junior nephew upon whom the wrath of his uncle had fallen, so that he found himself in an open place being attacked by the latter with a hatchet. If Muhammad Salim had been himself unprepared to meet force with force, then the probability would be that after he was suddenly attacked by his uncle with a hatchet, he would have taken evasive action and perhaps run away from the spot. Therefore,

we consider that the view of the learned trial Judge that there was a fight between the two men is correct, and taking into account all the circumstances, we agree with him also that this fight took place suddenly and was not pre-planned by the accused. In that fight, the accused did not take undue advantage for he struck only one blow, with his knife and then fled from the spot.

12. For the foregoing reasons and circumstances of the case, the instant appeal is partly allowed. The conviction and sentence of the appellant-convict recorded by the trial court under Section 302(b), P.P.C are set aside. Instead he is convicted under Section 302(c), P.P.C. and sentenced to rigorous imprisonment for 14 years. He shall also pay compensation of Rs. 500,000/- (five hundred thousand) to the legal heirs of the deceased in terms of Section 544-A, Cr.P.C., and in default of its payment he shall undergo simple imprisonment for further six months. Benefit of Section 382-B, Cr.P.C. is extended to him. The connected Cr.R No. 08-M/2018, being devoid of merits in view of the above discussion, is accordingly dismissed.

Announced.

Dt: 04.02.2021

Office  
25/2/2021  
WR

JUDGE

JUDGE