

THE PESHAWAR HIGH COURT,
BANNU BENCH.

[Judicial Department].

Cr.A No. 124-B of 2017

Bad Shah Jamil

Vs.

Muhammad Jan Baz Khan etc

JUDGMENT

Date of hearing _____ *04.11.2019* _____.

***Appellant(s) by: Jalal-ud-Din Akbar Azam Khan Gara
advocate (heard on 22.10.2019)***

***Respondent/State by Shahid Hameed Qureshi Addl: A.G.
Others by Muhammad Rashid Khan Dirma Khel advocate
and Malik Akhtar Nawaz Khan Khattak advocate
(heard on 04.11.2019)***

SAHIBZADA ASADULLAH, J.--- This single judgment

is aimed to dispose of the instant Criminal Appeal as well as

the connected ***Criminal Revision No. 30-B/2017***

(Muhammad Janbaz Khan Vs Bad Shah Jamil etc), as both

these have arisen out of one and the same judgment.

2- Appellant Bad Shah Jamil, being aggrieved by judgment dated 25.5.2017 of the learned Sessions Judge, Karak in Sessions Case No. 11/7 of 2017, by which the appellant was convicted U/S.302 (b) /34 PPC, and sentenced

to rigorous imprisonment for life as Ta'zir. He was also liable to pay compensation of Rs.5,00,000/-(Five Lacs), U/S.544-A(i) Cr.P.C, if realized be paid to the legal heirs of the deceased and in default six months SI, however, the accused was given benefit U/S. 382-B Cr.P.C. whereas was though acquitted from the charges U/S- 324/34 PPC. Hence, has preferred this appeal against his conviction and sentence, while the connected ***Criminal Revision No.30-B/2017*** was preferred by the complainant Muhammad Jan Baz, for enhancement of sentence.

3- Brief facts given in the FIR (Ex.PW-10/1) are that on 25.9.1996 at 11:00 hours, Muhammad Jan Baz Khan/complainant (PW-10) brought the dead body of his deceased cousin Ameer Faraz to the police station where he reported the matter to the effect that on the eventful day, he along with the deceased had gone to the shop of Nasib Khan, when came out of the shop at about 11:30 hours, the appellant armed with Kalashnikov emerged, raised "Lalkara" and fired which resulted into the death of the deceased. The complainant ran after the accused to overpower him, but he

was fired at by the co-accused Zafar Iqbal and Rasool Badshah who luckily escaped unhurt. Motive shown was family honour.

4- It is pertinent to mention here that the co-accused were earlier arrested and after facing trial were acquitted whereas the appellant was declared proclaimed offender. The appellant was arrested on 12.3.2015 and faced the trial and vide judgment dated 28.7.2016 was convicted U/S. 302 (b) PPC for murder of deceased Ameer Faraz and was sentenced to death. Feeling aggrieved of the judgment of the appellant by then filed Cr.A No. 323-B/2016 before the Peshawar High Court Bannu Bench, which was allowed vide judgment dated 14.02.2017 and the case was remanded to the trial court to make efforts to procure the attendance of some of the witnesses failing which their already recorded statements should be transposed U/S. 512 Cr.P.C after observing the codal formalities and thereafter to record statement of accused U/S. 342 Cr.P.C with fresh decision on merit.

5- After remand the trial court on 27.3.2017 recorded the statement of Dr. Abdul Samad (PW-12) the then Medical Officer posted at Rural Health Center, Sabir Abad, who had conducted autopsy on the dead body of the deceased Ameer Faraz Khan and had also endorsed the injury sheet and inquest report which are exhibited as Ex.PM, Ex.PM/1 and Ex.PM/2, respectively.

6- One Awal Khan SHO now retired though appeared before the court, but was incapable of recording statement being of extreme old age, so Dr. Abdus Samad (PW-12) who was in attendance as his statement was to be recorded, so the trial court requested his opinion as to whether this witness was capable to understand the proceedings, he replied in negative. After observing the legal formalities, his earlier recorded statement was transposed with his status as PW-7. This PW had taken into possession the blood-stained garments of the deceased brought by constable Gul Pari Jan and sealed the same into parcel vide memo Ex.PW-3/1, arrested the acquitted co-accused Rasool Badshah and Zafar Iqbal, issued their cards of arrest and vide application Ex.PW-

7/1 he obtained warrants against all the accused and proclamation notices vide his application Ex.PW-7/2, recorded statements of the marginal witnesses, placed report of FSL Ex.PK on file and submitted challan U/S. 512 Cr.P.C. This PW in his earlier recorded statement also verified the signatures of PW-Mashal Din ASI now deceased.

7- One Khalid Usman DSP (PW-13) while present in court in some other case also came forward and stated that he being fully conversant with the hand-writing and signature of deceased Mashal Din ASI, got recorded his statement and stated that he remained posted with deceased Mashal Din ASI on several occasions during his service, thus, was fully conversant with his hand writing and signature, he also verified FIR Ex.PW-10/1, site-plan Ex.PB, recovery memos Ex.PW-6/2 to Ex.PW-6/4, injury sheet Ex.PM/1, inquest report Ex.PM/2, to be in the hand-writing of deceased Mashal Din ASI and confirmed his signatures on the said documents.

8- The prosecution closed its evidence and the accused recorded his statement U/S. 342 Cr.P.C, but did not opt to be examined on Oath nor opted to produce defence.

9- The trial court after hearing the parties convicted the appellant vide the impugned judgment dated 25.5.2017.

10- The learned counsels for the parties were heard and with their valuable assistance the record was read from cover to cover.

11- The prosecution story unfolded in the FIR is that the complainant accompanied the deceased to the shop of one Naseeb Khan to purchase snuff and cigarette and after purchase the deceased followed him from the shop, while he had hardly walked 10 paces that he heard fire shots and found the appellant/accused duly armed with Kalashnikov firing upon the deceased. Though both, the complainant and the deceased had come with common purpose and left the shop together, if this was so then instead going ahead 15 paces they would have been together in front of the shop at the time of firing. The complainant stated in his court statement that the firing was indiscriminate and the accused exhausted the magazine, if so then the complainant too would have received

fire arm injuries. The presence of the complainant on the spot is not free from doubt, the purpose of their presence was to purchase snuff and cigarettes from the shop of one Naseeb Khan, neither the cigarettes nor the snuff were produced to the investigating officer, so much so no attempt was made to record the statement of the shop-keeper to confirm the purpose of their presence and to convince us of their presence at the place of occurrence. There was a deliberate attempt on part of the complainant to justify his presence on the spot, we failed to understand that why the complainant gave two contradictory statements regarding presence of the deceased, i.e, during spot pointation a specific point has been given to the deceased adjacent to the door of the shop while sitting whereas in his court statement he went on to say that the deceased was coming after him. This PW in his court statement admitted that all the shop-keepers came out and witnessed the occurrence, but non came forward to confirm the time and manner of the occurrence. In case titled Abid Ali and two others Vs. The State (2011 SCMR 208), it was held:-

"We have thoroughly discussed the statements of two eye-witnesses claiming to be present at

the scene of crime but they on their own admissions were chance witnesses and have admitted their enmity with the appellant. Both these witnesses could not reasonably explain their presence with the deceased Muhammad Azam rather their conduct runs against the natural behavior of normal human, therefore, their testimonies appears to be unbelievable in the circumstances of the case."

12- The appellant/accused is shown at Point No-5 and the deceased at Point No.1, that too according to site-plan being prepared by the complainant, in sitting position, then the seat of injuries on the person of the deceased did not support the stance of the complainant and there is an open conflict between the medical evidence and ocular account; if in fact the stances so taken are placed in juxta position then we are afraid the medical evidence does not support the case of the prosecution, if the deceased was sitting then his left was exposed to the assailant, and in that situation the entry wounds which found its exit on the left side of his body is against the medical evidence and so was the case, while walking with his back exposed to the assailant. Janbaz Khan PW-10 stated that the appellant/accused resorted to indiscriminate firing, if so, then we are anxious to know that

why no more empties were recovered as admittedly, only three empties of 7.62 bore were recovered from the spot and even no bullet marks on the surrounding walls were noticed, as it is a matter of experience that a magazine of a Kalashnikov accommodates cartridges maximum to seventy five. The witness stated that it was a burst fire then instead of three entry wounds the body of the deceased would have been bullets riddled. The accused was positioned at Point No.5, whereas the empties were recovered from Point-A at a considerable distance that too towards left of the accused which speaks nothing, but malafide on part of the complainant and it strengthens the stance taken by the defence that the complainant was not present at the time when the deceased was done to death. The motive alleged was that of family honour and the prosecution witnesses admitted of being from one family with a common motive then why only the deceased was targeted and rest of the witnesses, if present on the spot, were spared, it gives no other inference, but to hold that the witnesses are chance and interested witnesses and the courts are to be careful while awarding sentence on

the testimony of such like witnesses and strong corroboration is always needed. In case titled *Muhammad Akram Vs. The State (2009 SCMR 230)*, it was held that:-

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. "

13- That the investigating officer when came to the spot in order to effect recoveries and to prepare the site-plan, the complainant accompanied him and on his pointation the site-plan was prepared. The complainant pointed out Point-B as the place when after firing the accused/appellant was chased and the complainant when reached this point the co-accused namely-Zafar Iqbal and Rasool Badshah started firing at him, so he gave up the chase and came back towards the deceased. The investigating officer kept silence that where the appellant was present when chased by the complainant and when the complainant reached to Point-B. This explanation by the complainant finds no favour with us as the complainant was empty handed and he could not run the risk to go after the accused/appellant being armed with a Kalashnikov. This factor is again disturbing that why the other two accused

came there and only resorted to ineffective firing, had they been there with the intention to kill then the result would have been other-wise.

14- The complainant stated in his report that the occurrence was also witnessed by PW- Muhammad Nisar and Muhammad Saeed, who were the first cousins of the deceased. When Muhammad Saeed was examined as PW-11, he stated that at the time of occurrence, he along with Muhammad Nisar was digging the soil and they saw the accused while firing at the deceased, the distance between the deceased and this PW has stated to be 93/96 paces which comes out to be some 260 feet and in such a long distance this is humanly impossible to recognize/identify a person with a weapon in his hand. Neither the investigating officer collected the instruments which they used for digging the soil nor the dug earth was shown in the site-plan. Their presence at the time of occurrence is not established on record, but being closely related they were lateron procured to charge the appellant/accused for commission of the offence. The witnesses went in glaring contradictions and they suffered

with dishonest improvements with the only purpose to bring their statement in line with the prosecution case. The motive was not only against the deceased, but all the witnesses admitted that they belong to one and the same family and the motive was common to all of them, if so, then why they were spared despite the fact that three assailants were there with deadly weapons. In case titled *Abdul Jabbar alias Jabbari Vs The State (2017 SMCR 1155)*, it was held that:-

"Eye-witnesses claimed to have seen the occurrence from a distance of about 111-1/2 feet and still they claimed to have witnessed every detail of the incident including the different weapons being used by the accused party, which was a claim which could not be easily accepted."

15- The deceased was fired at, at 09:30 AM whereas the matter was reported to the local police of police station Sabir Abad at 11:00 AM, and the distance between the spot and the police station is about 5/6 kilometers. The prosecution miserably failed to explain that how this abnormal delay in reporting the matter occasioned. None of the two witnesses, i.e, the complainant and eye-witness were the witnesses of identification before the police at the time of

preparation of the inquest report and also during the postmortem before the doctor in the hospital. Had the witnesses been present then they would have surely identified the deceased at both these places, but in fact they were procured and after consultation and deliberations the appellant with the other accused were charged after preliminary investigation. In case titled *State through Advocate- General, N.W.F.P., Peshawar Vs Shah Jahan (PLD 2003 SC 70)*:-

“It was held that the delay in lodging the F.I.R. has not been explained plausibly, which shows that it was lodged after preliminary inquiry/investigation, deliberation and consultation....)

16- We went deeply into merits of the case and read the record thoroughly with assistance of the learned counsels. The over-all impression of both, the documentary evidence as well as the ocular account produced, led us to conclude that in fact the witnesses were not present at the time and at the place of occurrence. The prosecution did not make efforts to associate any one of the shop-keepers especially Nasib Khan from whose shop the witness and the deceased allegedly purchased cigarettes and snuff and also the purchased items

were not taken into possession by the investigating officer.

Out of the identifiers who identified the dead body before the doctor and the police, one Zakir was produced and in fact this was the witness who was earlier produced as a prosecution witness when the co-accused were facing trial before the court and this witness went ahead of what he spoke before the trial court when the co-accused were facing trial, this witness stated therein that after the occurrence the dead body was shifted to his house and from the house the deceased was taken to the police station where the report was made and Post Mortem was conducted. The appellant while recording his statement U/S. 342 Cr.P.C, also explained the conduct of this witness in the previous trial and the present one. If that aspect is taken into consideration it further belies the presence of the complainant and other witnesses on the spot and the veracity of the prosecution case is further diminished.

17- The learned counsel for the prosecution vehemently argued that the accused /appellant remained absconder for sufficient long time, we agree with the submission so put before us but we are to see as to

whether the prosecution could prove its case through confidence inspiring evidence, if so, then abscondence can be taken into consideration, but it cannot be denied that sometimes the accused absconds because of fear of the police. The prosecution case suffered a lot when the empties collected from the spot were not sent to the Forensic Sciences Laboratory with the request as to whether these empties especially, the three recovered from Point-A were fired from one or different weapons. The accused was arrested, but at the time of arrest nothing incriminating was recovered from his possession so much so the weapon of offence.

18- The prosecution has alleged motive that too a dispute over women-folk/family honour, but no efforts were made either by the investigating officer or the complainant to bring something concrete on record to connect the appellant with the offence in hand. No independent witness came forward to support and explain that what kind of dispute between the parties was, which led the appellant to commit


the murder of the deceased. The motive so alleged cannot be believed because if all were connected then why only the deceased was done to death and rest of the witnesses were left unhurt.

19- Be that as it may, the prosecution failed to convince this court that it was non-else but accused who killed the deceased.


20- After thoroughly evaluating the evidence available on file this court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against accused/appellant. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the learned trial court is set-aside and he is acquitted of the charge by extending him the benefit of doubt, he shall be released forth with from jail, if not required to be detained in connection with any other case. So far as the connected ***Criminal Revision No. 30-B/2017 (Muhammad Jan Baz Khan V Bad Shah Jameel etc)*** is concerned, the same stands dismissed.

21- These are the detailed reasons for my short
order of the even date.

Announced:
04.11.2019


JUDGE

JUDGE



04/11/19