IN THE PESHAWAR HIGH COURT, BANNU BENCH

(Judicial Department)

Cr.A No.104-B of 2022

Nawab Khan
Vs
The State etc

JUDGMENT

For Appellant: Mr. Marghoob Hassan Advocate

For respondents: Haji Humayun Khan Wazir and Wali-ur-Rahman Advocates

For State: Mr. Saif-ur-Rehman Khattak, Addl. A.G.

Date of hearing: **13.12.2022**

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SHAHID KHAN, J.— The appellant Nawab Khan assailed the judgment dated 13.06.2022, passed by the learned Sessions Judge, Lakki Marwat, whereby he was convicted under section 302(b) P.P.C and sentenced to life imprisonment as Tazir with fine of Rs.3,00,000/- as compensation to the legal heirs of deceased within the meaning of section 544-A Cr.PC or in default whereof to undergo six months SI. Benefit of section 382 P.P.C was also extended to the appellant vide FIR No.172 dated 06.05.2019 U/S 302 PPC of Police Station Ghazni Khel, Lakki Marwat.

2. Feeling aggrieved, the appellant has questioned the legality of the impugned judgment and the awarded

sentence through the instant appeal, whereas, Muzafar Abbas, son of the deceased, and Ali Sardar, brother of the deceased, being aggrieved of the quantum of sentence have moved Criminal Revision Petition No.35-B of 2022 for enhancement of the same. Since both these matters have arisen out of the same judgment, therefore, we intend to decide the same through this common judgment.

3. The transient facts as unfolded in the first information report are that on 06.05.2019 at 11:15 hours, complainant / injured Abdul Khaliq lodged a report to the local police in emergency ward of DHQ Hospital, Lakki Marwat to the effect that on the eventful day, he alongwith his son Zafar Ali and Nawab Khan, his co-villager, were jointly running the thresher in his house; that after completion of work, Nawab Khan went to his own house and after some time, he (Nawab Khan) came back duly armed with pistol; that the complainant carried a cot and entered into his room; that at about 10:00 hours, accused Nawab Khan also entered into the room and inquired if the complainant had brought the Charpai (cot) inside the room; that on complainant's affirmative reply, accused Nawab Khan shot him inside the room, as a result of which, he got hit and fell down; that after the occurrence, accused decamped from the spot; that there was no previous motive. Report of the complainant / injured Abdul Khaliq wsa

reduced in shape of murasila Ex.PA/1 which was sent to the PS for registration of the case, on the basis of which, the case was initially registered under section 324 PPC, however, thereafter when the injured succumbed to his injuries, the section of law was altered from one under section 324 PPC to 302 PPC.

4. Initially, the accused remained absconder, however, after his arrest, supplementary challan was submitted against him, where at the commencement of trial, the prosecution produced and examined as many as 11 witnesses. On close of prosecution evidence, statement of appellant was recorded under section 342 Cr.P.C, wherein he professed innocence and false implication, however, neither he opted to be examined on oath as provided under section 340(2) Cr.P.C nor wished to produce defence evidence. After hearing arguments, the learned trial Court vide the impugned judgment, convicted and sentenced the appellant as mentioned above. Hence, the instant appeal against the judgment of conviction and the criminal revision for enhancement of the sentence.

5. Arguments heard and record scanned through.

6. The deceased then injured after receiving firearm injury was shifted to DHQ Hospital, Lakki Marwat, where he reported the matter to the local police in respect of the incident and charged the accused / appellant for

commission of the offence. The police official after examining the injured prepared the injury sheet and thereafter, drafted the murasila and the deceased then injured was sent to the doctor, for medical examination, under the escort of constable Bilal. The injured was examined by the doctor and after his examination, the medico legal certificate was prepared. After giving first aid to the deceased then injured, he was referred to Civil Hospital, Bannu for further treatment and as such, the injured was shifted to Civil Hospital, Bannu. The murasila was incorporated in the FIR and the investigating officer after receiving copy of the FIR visited the spot and on pointation of the eye witness, prepared the site plan. During spot inspection, the investigating officer collected bloodstained earth from the place of the deceased and also recovered an empty of .30 bore pistol, the same was sent to the firearms expert for ascertaining the fact that from which bore the same was fired. The laboratory report in respect of the bloodstained earth and the .30 bore pistol was received and available on file. The investigating officer on the very day of the incident recorded 161 Cr.P.C statement of the eye witness namely Zafar Ali who happens to be the son of the deceased. It is pertinent to mention that on the same day, the deceased then injured breathed his last and as such, section 302 PPC was inserted in the FIR and his dead body

was received in DHQ Hospital, Lakki Marwat, where the inquest report was prepared and thereafter, the doctor conducted autopsy on the dead body of the deceased.

7. The appellant was arrested on 27.02.2020, who led the police party to the place of incident and after the expiry of his physical custody, he was remitted to judicial lock up. The trial commenced and on conclusion of the trial, the learned trial Court was pleased to convict the appellant vide the impugned judgment.

8. The record was scanned through with valuable assistance of learned counsel for the parties and also the worthy Additional Advocate General in order to see as to whether the learned trial Court was justified to convict the appellant and as to whether the learned trial judge appreciated the available record in its true perspective. This Court is to see as to whether the learned trial Court appreciated the evidence on file; as to whether the impugned judgment finds support from record of the case and as to whether the conclusion drawn by the learned trial judge is the outcome of the assessment of evidence on file and the recorded statements of the witnesses. This being the Court of appeal and is under the obligation to reassess the already assessed evidence and to re-appreciate the evidence once appreciated, so that miscarriage of justice could be avoided. True that in the instant case, single accused is

charged and that in case of singularly charged accused, substitution is a rare phenomenon, but equally true that mere this fact is not sufficient to relax the courts of law to decide the fate of the accused charged with a preoccupied mind, rather in case of a single accused, the responsibility on the shoulders of both the trial as well as the appellate Court is higher than ordinary cases. So, in the circumstances of the present case, we are under the obligation to revisit and rediscover the already visited and discovered aspects of the case, so that miscarriage of justice could be avoided.

9. The moot questions to be answered by this Court are as to whether the incident occurred in the mode, manner and at the stated time; as to whether the deceased then injured was capable to talk and that it was he who reported the matter; as to whether the eye witness was present at the crime scene at the time of occurrence and as to whether the prosecution succeeded in bringing on record substantial evidence to connect the appellant with the murder of the deceased. There is no denial of the fact that the incident occurred inside the residential room of the house of the deceased and that the investigating officer, during spot inspection, collected bloodstained earth and an empty of .30 bore, but the prosecution is yet to tell that it was only and only the appellant, who killed the deceased and that the eye

witness was present at the time of incident. The record tells that soon after receiving firearm injury, the deceased then injured was shifted to DHQ Hospital Lakki Marwat where he was examined by the doctor and his medico legal certificate was prepared. It is evident from the record that the injured was received by the doctor at 11:30 AM, whereas, the report was made by the deceased then injured at 11:15 AM to the local police, in the same hospital. The record is silent as to who brought the deceased then injured to the hospital and at what time. As the time of examination of the injured by the doctor and the time when the matter was reported to the local police are not in harmony with each other, as when the doctor was examined as PW-05, he stated that it was about 11:31 AM, when the deceased then injured was produced by constable Bilal and by that time, he was bleeding and that he examined the injured at 11:31 AM; he completed the examination of the injured in 30 minutes and thereafter, the deceased then injured was referred to Civil Hospital Bannu. When the statement of the doctor is taken into consideration with that of the scribe who was examined as PW-04, both the witnesses contradicted each other on material aspects of the case. The scribe was examined as PW-04, who stated that on receiving information regarding arrival of the injured to the hospital, he reached there and at 11:15 AM where he

recorded the report of the complainant; that the injury sheet was prepared and thereafter, the murasila was drafted and that after drafting the murasila, the deceased then injured was shifted to the doctor under the escort of constable Bilal. This witness further stated that it was in the emergency room of the hospital that he took the report and the doctor was also present. When the statements of these two witnesses are taken into juxtaposition, it leads us to draw an inference that neither the report was made in the manner nor the injured was examined at the stated time. If we consider the statement of PW-04 that he penned down the report at 11:15 AM, prepared the injury sheet and shifted the injured to the doctor, then we are to disbelieve the statement of the doctor on that particular aspect of the case and if we believe the doctor, then in that eventuality, it is the scribe who is to lose his credibility. The doctor admitted that the injured was examined at 11:31 AM and he also admitted that it was 11:30 AM, when the injured was brought to the hospital. If such is the state of affairs, then an inference can be drawn that the medical examination of the injured was conducted much earlier than the report was made. If we calculate the time which the injured spent before the doctor, it tells another story, as by 11:31 AM, the doctor started his medical examination and it took him 30 minutes to conclude, so in such eventuality, the injured

remained before the doctor tell 12:01 PM, whereas, the report was made at 11:15 AM. The doctor was cross examined on this particular aspect of the case, who replied in an unnatural tone as he stated that he does not remember as to whether the report was made by the injured to the scribe in his presence or otherwise. The doctor did not accept that when the injured was brought before him, the concerned constable was also in possession of the injury sheet and even, he did not admit that the report was made in his presence. Another intriguing aspect of the case is that the doctor in his court statement disclosed that the injured remained under his custody from 11:30 AM to 12:01 PM and thereafter, he was referred for specialized treatment to Civil Hospital, Bannu; if such is the state of affairs, then there was no occasion for the scribe to have penned down the report as it was after the medical examination, that the report was made and when the doctor admitted that soon after examination, the deceased then injured was referred to Civil Hospital, Bannu, then it creates a mystery that at what time the report was made and the injury sheet was prepared. Another circumstance which invites the attention of this court is the presence of eye witness Zafar Ali at the time of incident and also at the time of report. The investigating officer when visited the spot and prepared the site plan, there in the site plan, at point No.2, the eye witness is

shown and surprisingly, the eye witness was examined by the investigating officer under section 161 Cr.P.C at 16:00 hours, but at the time of report, neither the eye witness came forward to verify the report made by the complainant nor the complainant disclosed his presence at the time of incident, while reporting the matter. It adds to our anxiety that when the deceased then injured was conscious, alert, and oriented in time & space, then he would have mentioned the presence of the witness at the crime scene, but he remained silent regarding his presence. The participation of the eye witness in shifting the deceased then injured to the hospital and receiving the dead body after the postmortem was conducted and thereafter, his presence on the spot at the time of spot pointation is another factor which creates doubt regarding his presence. The complainant while reporting the matter disclosed that on the day of incident, he alongwith eye witness and accused were busy in threshing and thereafter, the appellant left for his house and after an interval, attracted to the spot; that he (the deceased) took the Charpai (cot) from the courtyard to his residential room and at the same time, the appellant entered the room and asked regarding the cot and soon thereafter started firing at him. This is surprising to note that during spot inspection, the investigating officer neither took into possession the thresher nor the same has been cited in the

site plan. It is again surprising that the investigating officer did not mention the presence of wife of the deceased in the house at the time of occurrence. We are yet to know the relationship between the accused / appellant and the deceased and the motive which led to the death of the deceased. When the very report is taken into consideration, it fails to convince that why the appellant killed the deceased, more particularly, when soon before the incident, all the three were helping each other in threshing. When this part of the case is taken into consideration in light of the motive advanced then it further creates doubt regarding the manner in which the incident occurred and regarding the participation of the appellant in the incident. If the appellant killed the deceased because of the reason that he was an obstacle in their friendship, then it surprises us that why the appellant was working with him and his son at the time of incident, rather in that eventuality, he would have not allowed the appellant to enter his house and to work with them. Even the eye witness did not utter a single word in that respect. The attending circumstances of the present case lead us to hold that the incident did not occur in the mode & manner as alleged and presented. Even the investigating officer was examined as PW-07, who failed to explain that why the thresher was not taken into possession and that why it finds no mention in the site plan. Even the

investigating officer could not explain that when the eye witness was present in the hospital then how the site plan was prepared on his pointation and that how the recoveries were signed from a witness who was not present on the spot at the time when the recoveries were effected. The presence of investigating officer on the spot at that time is contradicted by the fact that by that time, the eye witness was in the hospital as at that time, the postmortem examination of the deceased was in progress. The record further tells that both the wife of the deceased and his son are the witnesses of identification as they identified the dead body of the deceased before the police at the time when the inquest report was prepared and before the doctor, at the time of postmortem examination. The record further tells that it was the eye witness who received the dead body of the deceased after the postmortem examination. When the presence of eye witness on the spot is not established from the record then the recoveries effected and the site plan prepared is a circumstance which goes against the facts of the case. The prosecution story receives a major below when the eye witness is not produced before the court and as such, neither the eye witness was examined during trial nor wife of the deceased and in such eventuality, this court is left with no option, but to hold that they were not ready to depose against the appellant. As both the witnesses i.e. Mst.

Shazarina (wife of the deceased) and Zafar Ali (son of the deceased) were not examined by the prosecution then no inference can be drawn, but that they were reluctant to support the false claim of the prosecution and there is no cavil with the proposition that when the best available evidence is not examined then it is only and only the prosecution to suffer. In the circumstances of the present case, we lurk no doubt in mind that Article 129(g) of the Qanun-e-Shahadat Order, 1984 can be pressed into service. In this regard, wisdom could also be derived from the judgment rendered by the Apex Court in case titled ***"Lal Khan Vs The State" (2006 SCMR 1846)*** wherein it was held that:

> ***"The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutorial misconduct which would not only be considered a source of undue advantage for possession but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an***

impression that the witness if would have been brought into witness-box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."

10. The final question which needs determination from this Court is the dying declaration of the deceased. There is no cavil with the proposition that dying declaration is a weak type of evidence and that it cannot be made the sole basis for conviction. The concept of dying declaration is not novel, rather it has its original in the medieval times where it was felt necessary that in case of no evidence, other than that of the dying man, the accused should not go scot free, rather they must be brought to books even in case of absence of other corroborative and circumstantial evidence, provided the declaration made by the dying man rings true and inspires confidence. At the very initial stages, the courts of law acted upon the declaration made by a dying person and even in absence of corroborative and circumstantial evidence, the responsibles were punished, but gradually, with the passage of time, more particularly, when the moral level of the individuals went recession then the wise men realized that to punish on the basis of the sole statement of a dying man would amount to injustice and so, need was felt to search for independent corroboration. The

attitude of the courts of law remained different at different intervals in respect of this piece of evidence and at times, the courts of law went and declared it the most valuable piece of evidence and corroboration was declared immaterial, but at intervals, this attitude remained on the other side and it was held to be a weak type of evidence which needs corroboration. We have plethora of judgments on either side from different jurisdictions and more particularly, from the Apex Court of this land. With the passage of time, with moral disintegration, need was felt to protect both the sides, that is, the prosecution and defence. As the courts of law are the custodians of the rights and liberties of the people and that without having been influenced from the status of the parties concerned, these must protect and respect the law on the subject and the jurisprudence on the subject. With each passing day, the tendency of telling a lie and enroping innocent people is on rise and if this tendency is left unchecked with a primitive approach to this piece of evidence, then it would yield to drastic consequences which has never been the intent and purpose of law. In this era where the truth and false have mixed to such an extent, an atmosphere of uncertainty has been created, it is a must that corroboration must be searched and seen from independent quarters, so that the guilty would be punished and the innocent would be

rescued. In this particular case, we have the statement of a dying man who reported the matter while injured. This court is to explore as to whether the deceased then injured was capable to talk, when his report was penned down, as to whether the scribe opted for taking a certificate from the doctor concerned to know the capability of the dying man to understand, to comprehend and to talk. If this test succeeds, then this court is to see as to whether the attending circumstances of the present case support such statement and as to whether independent witnesses were examined in that respect. The record tells that the deceased received firearm injury inside his house and that he was rushed to the hospital where he was examined by the doctor at 11:31 AM. The record further tells and so the medico legal certificates that the injured was produced to the doctor by a police official, but nowhere the name of the eye witness or wife of the deceased find mention. The doctor was examined as PW-05, who stated that the injured was brought before him at 11:31 AM by a constable namely Bilal. He further disclosed that when the injured reached to him, he was bleeding and he confirmed that the injured arrived to the hospital at the stated time. Now this is surprising that if the injured was brought to the hospital and produced before the doctor at 11:31 AM, then how the matter was reported at 11:15 AM. It further disturbs that

why the doctor did not mention the availability of private / independent witnesses with injured at the time of examination. The doctor declared that the injured remained under his supervision from 11:30 AM to 12:00 PM and soon thereafter, he was referred for specialized treatment to civil hospital, Bannu. When the statement of this witness is read in juxtaposition with the statement of Kalim Ullah PW-04 i.e. the official to whom the matter was reported, it tells another story. He was examined as PW-04, who stated that he reached to the hospital soon after arrival of the injured and prepared his injury sheet followed by Murasila, but when the doctor confirmed that the injured arrived to the hospital at 11:30 AM, then how the matter could be reported at 11:15 AM. The doctor further confirmed that when he was examining the injured, he does not remember as to whether by that time, the report had been made or not. This portion of his statement further creates doubt in respect of the time and the manner of examination. If we accept that the injured arrived to the hospital at 11:30 AM and from 11:30 AM to 12:01 PM, he remained under supervision of the doctor and soon thereafter, he was referred to Civil Hospital, Bannu, then it is for the prosecution to tell that at what time, the matter was reported. We have before us another intriguing aspect of the case that the son of the deceased who posed himself to be

the eye witness of the incident did not verify his report and interestingly, if he had seen the occurrence and accompanied the deceased then injured to the hospital then it was a must for him to verify the report. This particular aspect of the case goes deep to the roots of the prosecution case. Now, it is for the prosecution to tell as to whether at the time of report, the requisite formalities were complied with and as to whether measures were taken to record the report of the deceased then injured in line with the directions issued by the superior courts from time to time. The scribe was examined on this particular aspect of the case who admitted that he did not opt for a certificate from the doctor as at the time of report, the patient was capable to talk. When as per statement of the scribe, the doctor was busy in examining the injured and at the same time, he was recording the statement of the deceased then injured, then what precluded him to ask a certificate from the doctor, to confirm that the deceased was fully conscious and capable to talk. If the statement of PW-04 is taken to be correct, then how could he say that the matter was reported to him at 11:15 AM, when the doctor expressed his ignorance regarding any report made in his presence. True that while preparing the medico legal certificate, the doctor opined that the injured was fully conscious and capable to talk, but keeping the statement of PW-04 in consideration, it takes us

to hold that both these witnesses were trying to conceal the material aspects of the case. When the requisite formalities are not complied with, when the certificate has not been obtained from the doctor regarding the capability of the deceased then injured, to talk and understand, then in that eventuality, the statement so made needs independent corroboration. This is unfortunate that the only corroboration available with the prosecution was the so called eye witness, but he was not produced before the trial court and his statement was not recorded. Another important factor of the case, which agitates the judicial mind of this court is the manner in which the report was made and the motive which led the appellant to kill the deceased. The very report on one hand is silent regarding the presence of eye witness in the house at the time of occurrence and on the other, when at the time of occurrence, the relation between the deceased and accused / appellant was cordial enough, then what agitated the appellant to kill the deceased. As this particular aspect of the case does not appeal to a prudent mind and when this court feels itself unable to appreciate this particular aspect of the case, in favour of the prosecution, then it reacts upon the veracity of the report made by the deceased then injured. When on one hand, the requisite formalities for recording the statement of the dying man have not been

fulfilled and when on the other, the attending circumstances of the case did not convince the judicial mind of the court regarding the manner in which the incident occurred, then this court is not reluctant in holding that the prosecution failed to bring home guilt against the appellant. In case titled ***"Rafaat Shah Vs The State" (2022 PCr.LJ Note 39 Balochistan)*** it was held that:

> ***"The mode and manner of the occurrence itself by the prosecution is not appealable to the prudent mined, therefore, it was highly unsafe to rely on the statement of both these witnesses to maintain conviction and sentence of the accused on a capital charge."***

11. The motive advanced by the complainant while reporting the matter has not been proved and even the investigating officer could not collect independent evidence in that respect. As it is evident from the record that at the time of incident all the three were busy in thrashing and when no altercation took place between the two at the time of thrashing and thereafter, then we are failed to understand that what led the appellant to kill the deceased. Another circumstance of the case cannot be ignored that it has never been the case of the prosecution that the deceased and

appellant little earlier to the incident altercated with each other and that the appellant left the house and came back duly armed to kill the deceased. The manner in which the matter is reported and the manner in which the incident occurred, both are not sufficient to convince this court regarding the involvement of the appellant in the incident. There is no cavil with the proposition that motive once alleged must be proved and when the prosecution fails to prove, then it reacts upon its case. As in the instant case, the motive has not been proved, the presence of the appellant in the house before the incident is not proved and when the most important witness did not come to depose against the appellant, then in such circumstances, this court is left with no option, but to hold that the prosecution failed to establish the alleged motive and under the circumstances, its benefit must accrue to the appellant.

12. Though, from the place of incident, a .30 bore empty was taken into possession, the same was sent to the forensic science laboratory which was received on 30.05.2019, after a considerable delay, but the same is of no help to the prosecution as no weapon of offence was recovered from possession of the accused, at the time of his arrest, so to establish that the same was fired from the weapon in possession of the appellant. Even otherwise, the laboratory report is a circumstantial evidence which can be pressed

into service only when the prosecution succeeds otherwise. As in the instant case, the prosecution could not bring substantial evidence on record, so this piece of evidence in isolation cannot play a decisive role, rather it crawled to the background and cannot be taken into consideration.

13. The cumulative effect of what has been stated above leads this court nowhere, but to hold that the learned trial judge failed to comprehend the inherent worth of the prosecution case and he failed to appreciate the available evidence on file and as such, fell into error. As the prosecution case is based on the only statement of a dying man, that too, uncorroborated, so we are not reluctant to hold that without corroboration, this piece of evidence is insufficient to connect the appellant with the murder of the deceased, as such, the appellant has succeeded in making out a case for indulgence of this court. The instant criminal appeal is allowed, the impugned judgment is set aside, and the appellant is acquitted of the charges; he shall be released forthwith if not required to be detained in connection with any other criminal case.

14. As the prosecution has failed to prove the charges against the appellant beyond reasonable doubts and since the instant criminal appeal ended in acquittal, so the Criminal Revision Petition No.35-B of 2022 for

enhancement of sentence fails in the circumstances and is dismissed as such.

Announced
13.12.2022
Ghafoor Zaman/Steno

JUDGE

JUDGE

(DB)
Hon'ble Mr. Justice Sahibzada Asadullah
Hon'ble Mr. Justice Shahid Khan

16/12/2022

16 DEC 2022