

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No.677-P of 2016.

With

Murder Reference No.17-P/2016

JUDGMENT

Date of hearing.....26.09.2017.....

Appellant(s)...(Sheriyar): By M/S Barrister M. Zahurul Haq and
Sohail Akhtar, Advocates.

Respondent(s)/State: By Syed Sikandar Hayat Shah, AAG assisted by
Mr. Ghulam Mohy-ud-Din Malik, Advocate,
counsel for respondent/complainant.

☆☆☆

QALANDAR ALI KHAN, J:- Convict-
appellant, Shehriyar son of Maqbool Khan
resident of Toru, Mardan, has lodged the
instant appeal against the Judgment/Order
dated 03.11.2016 of learned trial

Court/Additional Sessions Judge-IV, Mardan, whereby, the appellant was found guilty of the offence and convicted under section 302 (b) PPC, and sentenced to the penalty of death. He was also made liable to payment of compensation of Rs:500000/-, which on recovery was to be made to the legal heirs of the deceased as required under section 544-A Cr.P.C. The learned trial Court further directed that the amount of compensation shall be recoverable as arrears of land revenue under section 544-A (2) Cr.P.C, and that in default thereof the accused shall undergo S.I for six months. The learned trial Court also convicted the appellant-accused under section 324 PPC for ineffective firing upon the complainant and the eyewitnesses, and sentenced him to imprisonment for three years and fine of Rs:50,000/-, and in default thereof to further S.I for six months. While extending benefit of section 382-B Cr.P.C to the appellant, it was directed that all the sentences shall run concurrently. Simultaneously, reference under

section 374 Cr.P.C was sent by the learned trial Court to this Court for confirmation of sentence of death awarded to the appellant.

2. The appellant was charged by complainant, Zairullah, in case vide FIR No.146 dated 12.03.2000 under sections 302/324 PPC in Police Station Sheikh Maltoon Town, Mardan. In his report, lodged at the scene of occurrence to late Hassandali Khan ASI, the complainant alleged that he along with his brother Inamullah (deceased), son of Shakhirullah and Hashim Khan son of Inamullah were proceeding towards their houses from the fields and when reached the place of occurrence situated on the road near the house of the appellant, the appellant, who was present there armed with Kalashnikov, opened fire on their sight, resulting in the death of his brother; while they escaped unhurt. The motive for the occurrence was stated to be murder of brother of the appellant, Saleem, for which he suspected them for having role in the murder of his

brother. The complainant, therefore, charged the appellant for the *qatl-e-amd* of his brother and firing at them; and thumb impressed the 'murasila' drafted by the abovementioned late ASI. After preparation of the injury sheet and inquest report, the deceased was referred to the Medical Officer for Postmortem examination, and after conducting Postmortem examination of the deceased, the following firearms injuries were found on the body of the deceased by the Medical Officer (PW-1).

1. Four firearm entry wounds on the right side face below and in front of right ear about 1/2 x 1/2 CM each.
2. Firearm exit wound on the top and posterior portion mostly on left side of head. The brain matter and scalp is blown away.
- 3 & 4. Two firearm entry wounds on left upper arm lateral side each 1 x 2 cm.
- 5 & 6. Two firearm exit wounds on the medial aspect of left upper arm each 2 x 1

cm.

- 7 & 8. Two firearm entry wounds on the left lateral side of chest about 1 x 1 cm.
- 9 & 10. Firearm two exit wounds on the right upper abdomen 2 x 3.
11. Firearm entry wound on the right forearm medial aspect about 1/2 x 1/2 cm.
12. A firearm exit wound on the right forearm lateral side 1/2 x 1/2 cm.
13. A firearm entry wound on the back of right lumbar region 1/2 x 1/2 cm.
14. A firearm exit wound on the front of right lumbar region about 1 x 1 cm.
15. A firearm entry wound on the back of right shoulder about 1/2 x 1/2 cm.
16. A firearm exit wound on the right shoulder front side about 2 x 2 cm. "



In the opinion of the Medical Officer, the cause of death was due to injuries to vital organs i.e. brain, heart and lungs leading to hemorrhage shock and death. Death was


instantaneous, while time between death and Postmortem within 03 hours. The Medical Officer furnished Postmortem report, which was placed on the record as EX.PM.

3. Following registration of the FIR, the same late S.I, who had recorded report of the complainant in the *murasila* (EX.PA/1), himself started investigation, and proceeded to the scene of occurrence for spot inspection, where, during spot inspection, he secured blood from the place assigned in the site plan (EX.PB), to the deceased, and also noticed bullet marks on the scene of occurrence. He prepared the site plan on the day of occurrence i.e. 12.03.2000; but made addition of two points i.e. B and C, the former showing recovery of five empties of 7.62 bore and the latter showing presence of injured Taj Mohallah, later, on 02.06.2000. After arrest of the appellant-accused, the pointation memo (EX.PW5/4) of the scene of occurrence was prepared, but without any recovery or discovery as a result of the alleged pointation

of the place of occurrence by the appellant/accused. The blood stained earth secured from the spot by the I.O and the blood stained garments of the deceased were sent to FSL for chemical analysis, and report of the chemical examiner was received in the affirmative, showing the same as human blood and of the same group. Likewise, report of the firearms expert with regard to five empty shells of 7.62 bore was to the effect that the same were fired from one and the same 7.62 bore rifle. Injured, Taj Mohallah, was also examined by the Medical Officer, Lady Doctor Sajida Begum, (PW-8), who found firearm entrance wound 2 cm x 2 cm on her left knee joint with corresponding outlet 4 cm x 4 cm adjacent skin grazed wound 2 cm x 2 cm, left femur fractured, and deformed bone. After recording statements of PWs under section 161 Cr.P.C and completion of investigation, supplementary challan in the case was submitted by the SHO, Police Station Sheikh Maltoon, Town, leading to

commencement of trial in the trial Court /Additional Sessions Judge-IV, Mardan.

4. After complying with the mandatory provision of section 265-C Cr.P.C, the learned trial Court framed formal charge against the accused/appellant under sections 302 and 324 PPC, to which he pleaded not guilty and claimed trial. During trial, the prosecution produced the following nine PWs:-

- 
- Fida Muhammad, Deputy DHO, Swabi (PW-1), conducted Postmortem examination of deceased Inamullah and furnished P.M report (EX.PM);
 - Fazal Ahad No.400 (PW-2), executed warrant of arrest under section 204 Cr.P.C and also proclamation under section 87 Cr.P.C and furnished his reports about abscondance of the appellant/accused;
 - Pervez Khan Inspector/SHO, Police Station, Sheikh Maltoon (PW-3), submitted complete challan against the

absconding accused/appellant under section 512 Cr.P.C;

- Hakeem Khan S.I (PW-4), submitted supplementary challan against the accused-appellant after his arrest and completion of investigation;
- Farooq Hussain ASI (PW-5), conducted investigation in the case after arrest of the accused/appellant;
- Zairullah son of Asmatullah (PW-6), the complainant;
- Hashim Khan (PW-7), the eyewitness mentioned in the FIR;
- Lady Doctor Sajida Begum (PW-8), conducted medical examination of injured Mst: Taj Mohallah wife of Firdoos; and
- Madad Khan Inspector (PW-9), deposed about investigation conducted by late Hassandali Khan S.I;




5. After prosecution closed its evidence, statement of the accused-appellant was

recorded under section 342 Cr.P.C, wherein, he, besides refuting allegations of the prosecution, also produced statement of injured PW Mst: Taj Mohallah in proceedings under section 512 Cr.P.C against the accused/appellant on 11.11.2003 in the Court of the then ASJ-I, Mardan, as EX.DA; but declined to be examined on Oath. Thereafter, the learned trial Court/Additional Sessions Judge-IV, Mardan, heard arguments of learned SPP for the State assisted by learned counsel for the complainant and learned counsel for the accused/appellant; and rendered the impugned judgment dated 03.11.2016, whereby, the appellant/accused was convicted and sentenced as mentioned hereinabove; hence the instant appeal against the impugned judgment and conviction and sentence of the appellant/accused.

6. Arguments of learned counsel for the appellant and learned AAG assisted by learned counsel for the complainant, heard; and record perused.

7. In the 'murasila' (EX.PA/1), drafted by late Hassandali ASI, on the report of complainant, Zairullah, at 1900 hours on 12.03.2000, about the occurrence, which, allegedly, took place earlier at 18:30 hours, the appellant/accused was charged for firing at the brother of the complainant, Inamullah, with his Kalashnikov and causing his death in the presence of the complainant, his son Shakirullah and son of the deceased, namely, Hashim Khan; while citing suspicion of the appellant/accused about their role in the murder of his brother, namely, Saleem. During investigation, this fact also came to surface that another lady, namely, Taj Mohallah wife of Firdos resident of Toru, also sustained firearm injury during the occurrence and her medical examination was also conducted by lady Doctor Sajida Begum (PW-8); but neither this fact was mentioned in the FIR lodged by the complainant to the police officer at the spot, nor she could appear in the Court as a PW during trial of the

appellant/accused, and abandoned by the prosecution "being dead". However, she had appeared as PW-6 in proceedings under section 512 Cr.P.C against the appellant/accused; but had categorically stated in her statement before the Court that she had neither seen any person firing at her nor had charged any accused earlier and that she did not want to charge anyone now (at the time of recording her statement).



8. In the FIR, only two eyewitnesses have been mentioned i.e. son of the complainant, namely, Shakirullah, and son of the deceased Inamullah, namely, Hashim Khan; thus the prosecution case comprising of the complainant, being brother of the deceased, Shakirullah son of the complainant and Hashim Khan son of the deceased, without showing them as witnesses in the inquest report or the Postmortem report to have identified the dead body before the police and the Medical Officer; as two other persons, namely, Alamgir Khan son of Fida Muhammad

and Muhammad Ishaq son of Mir Ahmed were shown the persons who identified the dead body before the police as well as before the Medical Officer; but the former was abandoned by the prosecution as 'unnecessary' and the latter abandoned 'being abroad.' The non citing of the eyewitnesses mentioned in the FIR as identifiers of the dead body before the police and the Medical Officer; and non production of both the identifiers of the dead body by the prosecution tend to create doubt about presence of the eyewitnesses at the spot at the time of occurrence, besides raising question about with-holding of testimony of those persons who could have narrated actual facts, being present at the spot at the relevant time.

9. Admittedly, the complainant, the deceased and both the PWs, Shakirullah and Hasham Khan, were residing separately from each other, and in the absence of the purpose for their joint visit to the fields, nowhere visible near the scene of occurrence in the site plan,

their assemblage at the spot at the time of occurrence becomes a distant possibility, thus creating doubt about their presence on the spot at the relevant time, especially when neither the complainant nor the so-called eye witnesses received any injury so as to lend credence to their presence on the spot at the time of occurrence, which is already shrouded with doubts in the absence of evidence showing either their hands or clothes having blood stains despite their claim that their hands and clothes were smeared with blood. It is also something beyond imagination that while motive for the commission of the offence on the part of the appellant/accused was imputed not only against the deceased but also against the complainant and the eye witnesses as well; but the appellant/accused would make only deceased a target for his firing while sparing the complainant and the eye witnesses to become complainant and eye witnesses in a case of murder and attempt to murder against him.

Notwithstanding compromise between the parties in the murder case of brother of the appellant/accused, the deliberate or unintentional omission on the part of the prosecution to ask question about motive, being an incriminating piece of evidence, from the appellant/accused during recording his statement under Section 342 Cr.P.C. would also render case of the prosecution weak on this account. Their close relationship with the deceased would become an added factor, in the circumstances, to bring their presence on the spot on the eventful date and time under cloud of doubt, particularly when the only other independent/injured PW, Mst.Taj Mahala, showed her complete ignorance about the assailants in her statement before the Court during proceedings under Section 512 Cr.P.C against the appellant/accused.

10. The occurrence was reported by the complainant to late Hassand Ali Khan ASI, who, without waiting even for registration of the FIR and entrustment of investigation of the

case to him by Incharge of the Police Station under Section 156 Cr.P.C, himself started investigation and proceeded to the spot for spot inspection, and during spot inspection on 12.03.2000 i.e. on the day of occurrence, he could only notice bullet marks on the wall of house of Zahoor-ul-Haq i.e. Point-A; but showed recovery of five empties of 7.62 bore from added Point-B and also presence of Mst. Taj Mahala at a distance of three paces from the deceased and 8 paces from the appellant/accused at added Point-C on 02.06.2000. Apart from the complainant and the eye witnesses shown closely following the deceased at varying distances from 8 to 14 paces, they escaped unhurt while Mst.Taj Mahala received firearm injury from an equal distance of 8 paces from the appellant/accused, it is also an admitted fact that the deceased, the complainant and the so-called eye witnesses were moving from South towards North, while the appellant/accused at Point No.5 in the site

plan has been shown on their right side; but not all the entry wounds are from the right side, as not only fire arm entry wounds No.3 and 4 were on left upper arm lateral side but two more firearm entry wounds No.7 and 8 were on the left lateral side of chest; and, likewise, firearm entry wound No.11 was on the right fore-arm medial aspect, firearm exit wound No.12 on the right fore-arm lateral side, fire arm exit wound No.14 was on the front of right lumber region, besides the entry wounds having different sizes and dimensions, like firearm entry wounds No.1 of the size of $\frac{1}{2} \times \frac{1}{2}$ cm, entry wounds No.3 and 4 each of 1×2 cm, entry wounds No.7 and 8 of 1×1 cm, entry wounds No.11, 13 and 15 of $\frac{1}{2} \times \frac{1}{2}$ cm, indicating use of different weapons; but report of the firearms expert showed all the five 7.62 MM bore crime empties, recovered from the spot by the I.O; having been fired from one and the same 7.62 MM rifle. It may be added here that complainant, Zahirullah (PW6) admitted in his statement

before the Court that when the police officer came to the spot, he inspected the same and then he lodged his report to him which was written, thus suggesting preliminary inquiry preceding lodging of the report. Besides, Hasham Khan (PW.7) also stated that scribe of the report first saw the deceased and also inspected the spot before recording their statements and starting investigation.

11. It is by now well established that abscondence, alone, would not be a substitute for substantive evidence, and can be used only as a corroborative piece of evidence. In this case, too, abscondence of the appellant/accused for considerable period would not strengthen the otherwise weak case of the prosecution. Even otherwise, the prosecution has not been able to prove that either the appellant/accused had knowledge of the criminal proceedings against him or the warrant under Section 204 and proclamation under Section 87 Cr.P.C were properly executed; because Fazal Ahad No.400

(PW.2), who was DFC at the relevant time, admitted in his statement that he had neither written CNIC numbers of the attesting witnesses nor boundaries of house of the appellant/accused were given and, similarly, sketch of his house was also not prepared.

12. All the above stated facts would go a long way to hold that the prosecution was unable to bring home charge against the appellant/accused; therefore, there was no incriminating material before the learned trial Court to award the sentence of death to the appellant/accused, who deserved to be extended benefit of doubt, rather doubts and discrepancies, in the case of the prosecution, which was wrongfully denied to him, thus rendering the impugned judgment, conviction of the appellant/accused and award of sentence of death to him liable to be set aside.

13 Consequently, the appeal is accepted, and the impugned judgment, together with conviction and sentence awarded to the

appellant, are set aside. The appellant is acquitted of the charges leveled against him and be set free forthwith, if not required in any other case.

14. Murder Reference No.17-P/2016 sent by the learned trial Court for confirmation of the sentence is answered in the negative.

Announced.
26.09.2017.


JUDGE


JUDGE

****M.Iqbal****

(D.B) Hon'ble Mr. Justice Lal Jan Khattak.
Hon'ble Mr. Justice Qalandar Ali Khan.