

Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr. A No.04-B of 2022

Mustafa Ali Shah & another.

Vs.

The State etc.

JUDGMENT

For appellants: Malik Harun Iqbal, Advocate.

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

For Respondent: Mr. Farooq Khan Sokari, Advocate.

Date of hearing: 08.09.2022

SHAHID KHAN, J.- The subject single judgment shall

dispose of the instant criminal appeal coupled with *Cr.R. No.*

05-B/2022 (Mst. Mal Shahzada Vs Mustafa Ali Shah & 02

others) as both the same find their origin in Sessions trial

No.304/SC of 2019, in respect of the trial, outcome of one and

the same incident, registered vide F.I.R No. 930 dated

15.11.2018 u/s 302/34 P.P.C, Police Station, City, Bannu.

2. Appellants namely, Mustafa Ali Shah and Ishaque

Ali Shah, being aggrieved by judgment dated 23.12.2021 of the

learned Additional Sessions Judge-III, Bannu in Sessions trial

No. 304/SC of 2019, by which the accused/appellants have

been convicted U/S.302(b)/34 PPC, and sentenced to suffer rigorous imprisonment for life with direction to pay of Rs.10,00,000/-(ten Lacs) each, to the legal heirs of deceased u/s 544-A Cr.P.C and in default whereof they shall further undergo six months simple imprisonment. Benefit of Section-382-B Cr.PC was extended in favour of accused in the case Hence, the appellants preferred this appeal against their conviction and sentence.

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3. Complainant Nasib Nawaz Khan, deceased then injured, on 15.11.2018 at 12:45 hours in the emergency room of Civil Hospital Bannu reported the matter to police to the effect that on the day of incident, he was proceeding to Tehsil Office, Bannu in his personal vehicle in connection with entry of mutation, he parked his vehicle on railway road Bannu city and went towards Tehsil building on foot, he while on his way in Bagh Gali near the jewellery shop of Mustafa Ali Shah at about 12:00 hours, both the accused duly armed with pistols came out from their shop and fired at him with intention to kill, resultantly, from the fire of accused Mustafa Ali Shah, he got

hit and injured. Previous blood feud enmity was described as motive for the offence. Both the accused after commission of offence fled away from the crime venue, thus, the ibid FIR.

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4. After completion of investigation, challan against the accused was put in court and procuring attendance of accused, the learned trial court confronted both the accused with the allegations against them through charge sheet, whereof, the accused/appellants denied the allegations against them and pleaded not guilty.

5. The learned trial court after recording the prosecution's evidence consists of the statements of ten witnesses, confronted the accused under section 342 Cr.P.C with the set of allegations and the evidence so recorded against them, wherein the accused denied the allegations and professed innocence, however, neither they wished to be examined on oath as provided under section 340 (2) Cr.P.C, nor intended to produce evidence in his defense.

6. The learned trial court after hearing arguments of the learned counsel for the parties and learned prosecutor

coupled with scanning of evidence with their due assistance, arrived at the conclusion that the accused/appellants were guilty, as such vide impugned judgment dated 23.12.2021 convicted and sentenced both the appellants u/s 302(b)/34 P.P.C in the above manner, hence, the instant appeal against the impugned judgment of the trial court as well as connected Cr.R No.05-B/2022 for enhancement of the sentence.



7. Learned counsel for the appellants contends that the impugned judgment of the learned trial court is against law and facts, thus, not tenable in the eye of law and liable to be set-aside; that evidence of prosecution is full of doubts, dishonest improvements and shaky but still the learned trial court has recorded the conviction of appellants; that the prosecution story is neither supported by medical evidence nor by the recovery of the alleged crime weapon; that a cross case vide F.I.R No. 931 of the even date was registered by the appellant No.1 and as per evidence, it was the deceased who attacked the jeweler shop of accused party with pre-mediation; that the benefit of doubts which should have been extended in favour of appellants has

wrongly been extended to the prosecution; that the cause of death of deceased was highly doubtful and there is no prohibitory evidence regarding the death; that occurrence has not taken place in the mode and manner so claimed and presented by the prosecution. The learned trial court has not appreciated the prosecution's evidence in its letter and spirit and failed to high light the contradictions in the ocular account, circumstantial evidence and medical evidence. Concluded, the role attributed to the convict/accused Ishaq Ali Shah is only to the extent of firing without causing any injury at all and strong presumption can no way be ruled out that accused Ishaq Ali Shah was not present at all at the fateful time, other-wise, he was supposed to facilitate the alleged co-accomplice in the commission of offence. Likewise, mensrea on part of the convict/appellant Ishaq Ali Shah has not been substantiated for the reason that neither repeat of attempt is alleged against him nor the same has been alleged by the deceased then injured in his report.

8. In rebuttal, learned counsel for complainant assisted by learned AAG, while supporting the impugned judgment, contended that the accused/appellants are directly charged for the murder of deceased by firing at him; that all the PWs are consistent and coherent in their deposition made by them in their court statements in respect of the occurrence; that no major or minor contradiction could be extracted from their mouths; that the prosecution has proved its case beyond reasonable doubts; Learned counsel said that the witnesses fully supported the prosecution case, he was of the view that the learned trial court after analyzing the evidence on record and statements of the witnesses, found it to be credible, cogent and trust worthy and this being the position there is no scope for interference by this court in the well founded judgment rendered by the learned trial court.

9. Arguments heard and record perused.

10. The record tells that the complainant deceased then injured reported the matter to the Farid Khan ASI (PW-5) who reduced the same into writing vide murasila Ex.PW-5/2,

however, before writing the report he obtained the opinion of doctor regarding consciousness of the complainant vide application Ex.PW-5/1. The very averments of the murasila divulges that at the time of reporting the matter the deceased then injured was fully conscious while this fact could also be ascertained from the medicolegal report Ex.PW-1/1 that the injured was well oriented in time and space. Though the defense side subjected the said PW-5 to lengthy cross examination but astonishingly he was not asked a question regarding consciousness of the complainant at the time of report. The deceased then injured was examined by Dr. Irfanullah (PW-1) who opined vide application moved by PW-5 that the injured was well oriented in time and space. This PW was also cross examined at length but nothing favourable for the defense to the extent of accused Mustafa Ali Shah could be brought out of his mouth, as such it could be safely concluded that the deceased then injured at the time of reporting the matter was conscious in time and place. Keeping in view the locail of injury on the right upper abdomen normally did not disturb the

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sense of understanding and speech; as such the murasila report in shape of dying declaration of complainant could not be shattered at all. Reliance in this respect well be placed on case titled "***Farmanullah Vs Qadeem Khan & other***" (**2001 SCMR 1474**), the relevant portion is reproduced hereunder:-

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"----S. 302---Qanun-e-Shahadat (10 of 1984), Art.46---Appreciation of evidence---Dying declaration---Dying declaration made soon after the incident, or at a time when the deceased expected death, or at a time by which the deceased could not have consulted others, or received hints from others, will ordinarily be deserving great weight---If the contents of the dying declaration appear to be true, having been made without any exaggeration and without making an attempt to rope in false persons, dying declaration will be worth reliance. "

11. The record also tells that on the day of incident, accused/appellant Mustafa Ali Shah also lodged report against deceased then injured and his nephew Habib Nawaz to the effect that on the command of deceased then injured, his nephew Habib Nawaz attempted at the lives of accused/appellants as a result of which accused Mustafa Ali Shah got hit and injured on his right hand and finger but co-accused Ishaq Ali Shah escaped unhurt. Regarding the above incident F.I.R No. 931 u/s 324/34 was registered against the deceased then injured and his nephew. Perusal of both the FIRs

reveals that the date, time, venue of crime and motive in both the cases were the same, thus, question as to who was aggressor arises. The whole evidence on record is silent regarding the fact that which party assaulted first and which reacted in response.

Both the parties concealed the injuries of opposite party.



However, it could safely be held the deceased then injured was not aggressor as no crime weapon was recovered from the place of occurrence nor from possession of the deceased then injured.

For the sake of arguments, if it is presumed that deceased then injured was aggressor then in that eventuality the report of Musftafa Ali Shah was silent regarding injury of the deceased then injured and why he has not taken the plea of self defense in the investigation or in his statement recorded U/S 342 Cr.P.C.

The incident had taken place at 12:00 hours but he reported the matter on the spot at 14:00 hours, so why he did not reported the matter in time rather delayed the same till the time of his arrest, therefore, in the circumstances of the case, it could not be concluded the aggression was made by the deceased then injured and the accused/appellants reacted in self defense.

12. Next is the role of accused Ishaq Ali Shah in the commission of offence. It is transparent from the record that the deceased then injured attributed the role of ineffective firing in the commission of offence to him and during the investigation the I.O did procure positive report of the pistol so recovered from the accused with its matching result of the crime empties secured from the scene of occurrence. It is hard fact that the deceased then injured has attributed role of only firing to accused/appellant Ishaq Ali Shah.

13. There is no denial at all that the deceased then injured complainant in his initial report specifically charged the accused/appellant Mustafa Ali Shah for effective firing while accused Ishaq Ali Shah for ineffective firing in his dying declaration, as such co-accused Ishaq Ali Shah was exonerated by the deceased then injured from the charge of effective firing, thus, he was in no way sharing common intention with the principal accused and he could not be held liable for vicarious liability, as the record transpired that no material, whatsoever, had been brought on record to show that co-

accused Ishaq Ali Shah had committed the murder in connivance with main accused, as such the question of vicarious liability or sharing common intention with co-accused did not arise in circumstances and prosecution remained unable to establish intention of accused to kill the deceased. Reliance can be placed on a case titled "*Mashooque Ali & another Vs*

The State" (2022 P.Cr.L.J Note 62) the relevant portion is

reproduced hereunder:-

"(a) Penal Code (XLV of 1860)---

----Ss. 302 & 34---Qatl-i-amd, common intention---Appreciation of evidence---Prosecution case was that the accused along with his co-accused persons committed murder of the complainant's sister---Allegation of causing murder of deceased was mainly against the accused who along with co-accused had committed murder---Charge against the accused was different from that of the co-accused persons---Allegation of causing hatchet blows against the accused were stated by real brother of deceased, who was not alleged to have any motive to falsely implicate the accused--In absence of such plea, the presumption of truth was normally attached to such words particularly if the same remained un-shattered despite lengthy cross-examination as well find corroboration from other independent evidence---Evidence of Investigating Officer reflected that after completing all legal formalities of the investigation, he arrested the accused, secured hatchet from him, produced him before the Magistrate where he confessed his guilt---Witnesses were subjected to lengthy cross-examination, but they had stood by their version on all material points---Recovery of hatchet from accused together with his confessional statement before Magistrate could not be lost of sight under any pretext---**Record transpired that no material, whatsoever, had been brought on**

record to show that co-accused persons had committed the murder in connivance with main accused---Prima facie, it appeared that they had no relation with the deceased, therefore, their intention to kill the lady was not proved by the prosecution---Only allegation against the said two co-accused was of **sharing common intention with main accused, which was never proved by prosecution**---Case against accused was proved beyond any shadow of doubt, hence his appeal against conviction was dismissed---Prosecution had failed to prove their case against co-accused beyond any shadow of reasonable doubt, hence their appeal against conviction was allowed, in circumstances."



Reliance can also be placed on another case titled

"Muhammad Yousaf Vs the State & others" (2018 MLD 289

{Lahore}) the relevant portion of which is reproduced as

under:-

"Record transpired that accused had ample opportunity to do away with the deceased by firing but admittedly he had not caused any fire-arm injury to the deceased---Question of vicarious liability or sharing common intention with co-accused did not arise in circumstances and prosecution remained unable to establish intention of accused to kill the deceased."

14. The cumulative effect of what has been stated above, leads this Court nowhere but to hold that the appellant Mustafa Ali Shah could not succeed to invite the attention of this Court to set-aside the impugned conviction order/judgment, as such in view of the above discussion, this Court is of the considered view that case against accused Mustafa Ali Shah is

proved beyond any shadow of doubt hence the instant Criminal Appeal to his extent is hereby dismissed.

15. So far as the appeal to the extent of accused/appellant Ishaq Ali Shah is concerned, the prosecution has failed to prove their case for sharing common against him beyond any shadow of reasonable doubt hence this appeal is partially allowed and impugned judgment dated 23.12.2021 to his extent is set aside and he is acquitted of the charges leveled against him. He be set free forthwith, if not required in any other case, whereas, to the extent of appellant Mustafa Ali Shah the same is dismissed. The connected Cr.R No. 05-B/2022 also stands dismissed. These are the detailed reasons of the short order of the even date.

Announced
08.09.2022.
Imranullah PS



JUDGE



JUDGE



6 OCT 2022

(D.B)
Hon'ble Mr. Justice Sahibzada Asadullah & Hon'ble Mr. Justice Shahid Khan