

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH.
(Judicial Department)

Cr.A No. 83-B/2019

State through Advocate General, Khyber Pakhtunkhwa,
Peshawar.....(Appellant)

Versus

Wali Ullah, alias, Qismat Ullah.....(Respondent)

For State: Mr. Umer Qayum Khan, Asstt:A.G.

For Respondent: Nemo (in motion).

Date of hearing: 18.05.2023

JUDGMENT

Dr. KHURSHID IQBAL, J.-

This appeal is directed against the judgment dated 05.12.2018 of the Additional Sessions Judge-II, Bannu, whereby he acquitted the respondent-accused, namely, Wali Ullah, alias, Qismat Ullah, from the charges leveled against him. The respondent-accused was tried u/ss. 302/34, PPC, having been charged in a case registered vide FIR No. 08 dated 24.06.2013, at Police Station Jani Khel, District, Bannu.

2. The brief facts of the case are that on 24.06.2013, the complainant Muhammad Younas Khan son of Barray Khan present with the dead body of his deceased mother Mst. Janeka Bibi reported to the local police in the Civil Hospital District Bannu that on

23.06.2013, the day of incident, he along with his parents and other inmates of the house, was present in their house in Malak Shahi Jani Khel. At about 16:00 hours, Badshah Ali Khan (absconding accused) empty handed and his son Qismat Ullah (respondent-accused), armed with a Kalashnikov, came and started altercation with the father of the complainant. Meanwhile, on the command of co-accused Badshah Ali Khan (absconding), the respondent/accused fired at the parents of the the complainant with the intention to commit their Qatl-e-amd. Resultantly, they both were hit and fell to the ground. After the incident, the accused made good their escape from the spot. On attending his injured parents, the complainant found that they succumbed to their injuries. The complainant added that later, accused came back and took forcibly the dead body of his father for burial. He alleged that he could not rush the dead body of his mother to the hospital on time because transport was not available. Motive behind the occurrence was stated to be land dispute between father of the complainant and respondent-accused (his uncle).

Heard

3. After completion of the investigation, complete challan was submitted against them before the learned trial Court. Accused were absconding, therefore,

proceedings u/s. 512, Cr. P.C were initiated against them and they were declared proclaimed offenders on 18.03.2014. The respondent/accused Wali Ullah, alias, Qismat Ullah was arrested on 27.02.2017. Copies were supplied to him in compliance with section 265-C, Cr. PC. Charge was framed against him, to which he pleaded not guilty and claimed trial.

4. The prosecution examined as many as twelve (12) PWs. Statement of the respondent/accused u/s. 342, Cr. P.C, was recorded, in which he was given opportunity of evidence in defence and/or statement on oath, but he did not avail it. After hearing the arguments, the respondent/accused was acquitted from the charges leveled against him by the learned trial Court vide the impugned judgment dated 05.12.2018.

5. We have heard arguments of learned AAG for the State/appellant and perused the record.

6. The prosecution case mainly rests on the evidence of Muhammad Younas Khan (PW-9), the complainant [son of both the deceased, Baray Khan (father) and Mst. Janeka Bibi (mother)]. Admittedly, in the year 2013, in which the incident took place (on 23.06.2013), he was 15 years old. His statement at the trial was recorded on 20.12.2017. While the incident

took place at 16:00 hours in village Malik Shahi Jani Khel, he reported it to the police on 24.06.2013, the next day at 10:30 a.m, with a delay of about 18 hours. As per his statement, he lodged the report in the civil hospital Bannu, at which time he had shifted the dead body of his mother. The report of the incident shows that at the relevant time Badshah Ali Khan and respondent/accused Wali Ullah alias Qismatullah s/o Badshah Ali Khan entered the house of the complainant party. Badshah Ali Khan (absconding accused) was stated to be the brother of deceased Baray Khan and father of the present respondent/accused. The respondent/accused was stated to have been in possession of a Kalashnikov and the absconding accused empty handed. The latter started an altercation with Baray Khan, his brother. He, then, ordered the respondent/accused to open fire at Baray Khan and his wife Mst. Janeka Bibi, to kill them. Accordingly, the respondent/accused was alleged to have opened the fire at both. As a result of his firing, both died on the spot. The complainant further stated that he and his other siblings were present in the house. After sometime, the accused party forcibly removed the dead body of Baray Khan and buried it. He further deposed that due to non-availability of traffic, he could not took the dead body of his mother to the hospital.

Wali Ullah

However, with the help of his relatives, he was able to take it to the hospital where his report was registered and the postmortem examination of the dead body was performed. Motive for the occurrence was stated to be disputed over landed property.

7. From the site plan, prepared at the instance of the complainant, it appears that the houses of both the parties are adjacent to each other. The points at which mother of complainant was hit, the places at which both the accused were present and the place at which he was present, were pointed out. But the place at which his father deceased Baray Khan was present and hit, was not shown. It is pertinent to mention that no evidence was collected by the Investigating Officer in respect of the deceased Baray Khan whose dead body was allegedly shifted by the accused party forcibly from the spot and buried. The Investigating Officer made no application to the Judicial Magistrate for exhumation of his dead body. Surprisingly and shockingly, an application was moved in this respect in the year 2017, which was dismissed. In the year, 2017, the complainant submitted an application to the Police Department which was considered by the Regional Review Board, which directed reinvestigation along the following lines:-

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"28. Later on, when the case was put in Court and proceedings u/s 512 Cr.P.C, commenced against the accused, the complainant filed an application to the high-ups of the police, which was routed to the RRB (Regional Review Board) in 2017. The board held its meeting and in the minutes of the said meeting, it was cited that there are lacunas in the investigation of the instant case and;

- a) The statements of eye-witnesses have not been recorded.**
- b) No place has been attributed to Baray Khan deceased.**
- c) Investigating officer did not verify the murder of Baray Khan by recording statements of those, who attended his funeral nor located his grave for autopsy etc. If the deceased was buried in tribal areas, the political authorities have not been addressed in the matter.**
- d) The reasons for delay of around 24 hrs, in lodging the FIR have not been dug out."**

8. Though photographs were produced which were shown as those of the grave of the deceased Baray Khan. However, it was not convincingly proved that the grave was indeed of the afore-said deceased. Even otherwise, nothing substantial could have been come out of that exercise.

9. Coming to the remaining evidence of the prosecution, no recovery of empties was shown in the site plan. In the first report of the incident recorded in the shape of the murasila, the complainant explained the delay by stating that public transport was not available on the eventful day. While under cross-examination, he

changed his stance, stating that curfew was imposed in the area. The Investigating Officer collected no evidence, either regarding non-availability of the traffic or curfew in the locality. The complainant stated that the Police Station Jani Khel is situated at a short distance from his house where one can reach within half-an-hour. He also stated that he went to the village of his maternal uncles to arrange a vehicle for shifting the dead body of his mother to the hospital. However, he did not approach to the Police Station. It follows that on the face of the record, the long delay in lodging the report was not convincingly explained. Keeping in view the fact that the complainant could reach to the Police Station within 30 minutes, he could take the dead body of his mother there and also lodge the report. It is not appealing to a prudent mind that he waited till the next day late in the morning to lodge the report in the civil hospital Bannu situated at a long distance from his village in North Waziristan, particularly while Police Station, as per his own version, was situated at a short distance from the place of occurrence.

Wahid

11. In the site plan, the deceased Mst. Janeka Bibi was shown to have been present in front of the wall between the houses of the parties. Allegedly, she was

present at point-1, near the wall separating the aforesaid two houses. The respondent/accused was shown at point-4 while firing at her. It was natural that the wall would have been hit with the fire shots. But, as the Investigating Officer (PW-11) stated in his cross-examination, no marks of bullets strikes were found on the aforesaid wall. The complainant stated in his first report that the occurrence was also witnessed by other family members. He did not mention any one of them by name. However, the prosecution examined his sister Mst. Sona Bibi (PW-10). In her examination-in-chief, she stated nearly the same story about the incident. What happened soon after the occurrence, she disclosed like this:

"The accused left the spot while we attended for parents they were found dead. We shifted the dead bodies to the Cots with help of our co-villagers, later on the accused along with our another Chacha came there and forcibly took the dead body of my father for burial."

12. The above statement is not appealing to a prudent mind. The reason needless to say is that if she and the complainant were lifting up the dead bodies of their parents to put them on Cots with the help of their co-villagers, how could the accused along with other uncles took the courage to forcibly remove the dead body of their father. In the natural course of events, an

accused party, no matter in whatever brutal manner they might have committed a murder, would not have the audacity to come back, and that too, in the presence of so many people. While under the cross-examination, she said:

"The house of my Mamoo is visible from our house. After hearing the firing first the women folk of our Mamoo house came while the male members of my Mamoo family had reached later on. The other co-villagers also came to our house. The co-villagers had attracted just after the occurrence, however, the exact time has not known to me. I had disclosed the occurrence to the co-villagers who attracted to the spot. After the occurrence when we had shifted bodies of both the deceased to the Cots thereafter the accused along with Abad Khan (my Chacha) again came and took away the dead body of deceased."

13. Two points are worth consideration in the light of the above statement. Firstly, it contradicts the statement of the complainant, her brother who deposed that he went to the village of his maternal uncles. Secondly, if the house of their maternal uncles was near their house, their maternal uncles would have surely come to the spot soon after the occurrence and would have helped them not only to lodge the report promptly but would have also prevented the accused party from shifting the dead body of their father.

14. On the above reappraisal of evidence, we have reached to the conclusion that the prosecution has

failed to bring home guilt against the respondent/accused. Before parting with this judgment, we would like to make a few observations.

15. Firstly, though the incident was reported with a considerable delay, it was not efficiently and honestly investigated. If at all the dead body of Baray Khan was forcibly removed from the place of the occurrence and buried, the investigating officer had the duty to probe it to the best of his abilities. He should have recorded statements of the residents of the locality. He should have also moved an application for exhumation. Indeed that was the proper time for exhumation. By referring to the timely exhumation we mean its quick and proper effects on investigation of the case. We are conscious of the fact that though there is no time limit for exhumation in medical jurisprudence in our country, and for example, England and India. However, the time limit is 10 years in France and 30 years in Germany (Faryad Ali v. The State, 2008 SCMR 1086. Also see Muhammad Maqsood et al, 'Exhumation—Can Dead Tells Tales?', 7(4) Journal of Fatima Jinnah Medical University Lahore, 48). In the case in hand, the cause of the death (one of reasons for exhumation) of Baray Khan was known being the result

of fire arm injuries, it would have helped in identification of the dead body to confirm its individuality for the purpose of the crime of his murder. Despite no bar on time limit, exhumation after a longer time would tend to have lesser chances of its help. In this perspective, the following observation from the above cited research essay may be helpful:

Success regarding finding cause of death depends upon condition of corpse at the time of exhumation and the time duration lapsed since death. Nasib. R. Awan says in his book that the cause of death lay in the vital organs or systems composed of soft tissues. When a soft tissue has been affected adversely by advanced decomposition, no definite opinion about the cause of the injury and nature of wound whether it is ante mortem or post mortem, can be expressed with certainty.

Wounded

16. Secondly, no one from amongst the relatives and/or other residents of the village came forward to spell out the truth about this highly unfortunate incident. We are sure it must have deeply shaken the entire village when the parents of the complainant and his siblings were done to death at the one the same time and right in front of them. While the Investigation Officer couldn't be exonerated from his legal and professional responsibilities, people from the village, too, owed a moral obligation to have helped him

by recording statement. Indeed, giving evidence is a legal duty. The Holy Qur'an commands: (Urdu Translation):

اور شہادت ہر گز نہ چھپاؤ۔ جو شہادت چھپاتا ہے اس کا دل گناہ میں آلودہ ہے۔ اور اللہ تمہارے اعمال سے بے خبر نہیں ہے۔ (آیت نمبر 283) تنہیم القرآن، جلد اول، اشاعت ۲۰۱۱ء، صفحہ نمبر ۲۲۲

17. We find that the trial Court has properly appreciated the evidence on the record and arrived at a correct conclusion, while recording acquittal. It is worth observing that an accused person, as a matter of right, is presumed to be innocent before the trial Court unless the charge is proved against him/her. Acquittal at the trial gives rise to double presumption of innocence for an accused. An appellate Court needs to be cautious while considering the evidence and should avoid reversal of an acquittal, unless it finds that the acquittal is perverse, conjectural, arbitrary, jurisdictionally defective and prompted by mis-reading or non-reading of evidence. Even if a contrary view is formed on re-appraisal of evidence, it should not be used to disturb an acquittal, provided convincing evidence is available on the record to reverse acquittal. In this respect, reference may be made to the judgment of the Apex Court rendered in the case of Jehangir vs. Aminullah & others reported as 2010 SCMR 491, wherein it was held:

"It is well-settled by now that there are certain limitations on the power of the Appellate Court to convert acquittal into a conviction. It is well-settled that Appellate Court would not interfere with acquittal merely because on reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused, provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the forgoing searching light, should be found wholly as artificial, shocking and ridiculous. The view taken by this Court in Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11 is well-known that "in an appeal against acquittal this Court would not, on principle, ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different from that in an appeal against conviction when leave is granted only for the re-appraisal of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumptions: one initial, that, till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence. This will not carry the second presumption and will also thus lose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such evidence; (c) received such

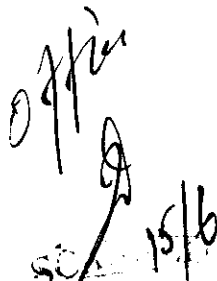
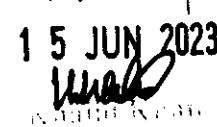
U. K. Khan

evidence illegally". This principle was also followed in Muhammad Iqbal v. Sanaullah PLD 1997 SC 569, State v. Farman Hussain PLD 1995 SC' 1, Ghulam Sikandar v. Mamaraz Khan PLD 1985 SC 11, Ahmad v. Crown PLD 1951 FC 107, Abdul Majid v. Superintendent of Legal Affairs, Government of Pakistan PLD 1964 SC 426, State v. Bashir PLD 1997 SC 408, Muhammad Sharif v. Muhammad Javed PLD 1976 SC 452, Shahzad v. State PLD 1977 SC 413; Farmanullah v. Qadeem Khan 2001 SCMR 1474 and Khadim Hussain v. Manzoor Hussain Shah 2002 SCMR 261."

18. The upshot of the above discussion is that while upholding the acquittal, we dismiss the instant appeal in *limine*.

Announced
18.05.2023


JUDGE


15/6
15 JUN 2023

JUDGE


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