

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

Cr.A No.330 -B of 2019

Hanifullah alias Pentar & 4 others.

Vs

The State etc.

JUDGMENT

Date of hearing 01.09.2020

For appellants: **Mr. Farooq Khan Sokarri advocate**

For respondent: **Mr. Imran Ali Shah advocate.**

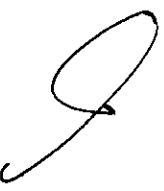
For State: **Mr. Shahid Hameed Qureshi Addl: A.G.**

SAHIBZADA ASADULLAH, J.- Through the instant

criminal appeal, the petitioner has assailed the judgment dated 22.10.2019 passed by learned Additional Sessions Judge-V, Bannu, dated 22.10.2019, whereby the appellants involved in case F.I.R No. 380 dated 05.07.2018 registered at Police Station Domel, Bannu were convicted under section 302(b) P.P.C and sentenced to imprisonment for life alongwith compensation Rs.2,00,000/- (two lac) (on two counts) to the legal heirs of deceased under section 544-A Cr.P.C or in default to undergo six months SI on two counts. They were further convicted under section 148/149 P.P.C and sentenced to three years RI on two counts with fine of Rs.20,000/- each on two counts and in default

of payment of fine to further undergo four months SI. It was directed that all the sentences shall run concurrently and benefit of section 382-B P.P.C was also extended in their favour. The complainant Habib-ur-Rehman and Saadullah Khan also filed Cr. R No.64 -B/2019 for enhancement of sentence against the appellants, hence this judgment shall decide both.

2. Brief facts of the case are that on 05.07.2018 at 10.45 hours, complainant Habibur Rehman alongwith dead-bodies of Sajjad Khan son of Habibur Rehman and Aminullah son of Saadullah, in Khalifa Gulnawaz Hospital, Bannu township, reported the matter to Asar-ul-Islam ASI, to the effect that he alongwith his son Sajjad Khan, Aminullah and Ala Khan were sitting in front of the shop of Raheemullah. In the meanwhile at about 10.00 hours, accused Baitullah, Sanaullah, Hanifullah Saifullah and Zainullah armed with pistols appeared and started indiscriminate firing at them, as a result of which Sajjad Khan and Aminullah hit and fell down, while the complainant and Ala Khan luckily escaped unhurt. The accused after commission of offence decamped from the spot. The complainant party could do nothing being empty handed. When they attended the injured, they had died. Motive alleged to be altercation between the deceased and the accused party, some days prior to the occurrence. The report of complainant was reduced in shape of *Murasila* Ex:PW-03/1, and sent to the Police Station through constable Aslam No.701, which was culminated



into F.I.R Ex:PA. After preparing the injury sheets Ex:PW 5/2 and 5/5, and inquest reports Ex:PW-5/6 and 5/3 the deceased were sent to the doctor under the escort of Rahat No. 5821 (PW-07) for their post mortem examination. After completion of investigation challan was submitted before the learned trial Court. On commencement of trial, the learned trial Court summoned the accused from jail, who were produced in custody. The learned trial Court after complying with the provision of section 265-C, Cr.P.C, framed the charge against the appellants, to which they pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined (12) twelve witnesses in support of its case and on conclusion of trial the learned trial court recorded statement of accused/ appellants under section 342 Cr.P.C, wherein they professed their innocence, however, they did not opt to produce defence or to be examined on oath as provided under section 340(2) Cr.P.C. The learned trial Court after hearing arguments of learned counsel for the parties vide impugned judgment dated 22.10.2019 convicted and sentenced the appellants as mentioned above. The accused/ appellants challenged the impugned judgment through instant criminal appeal, while the complainant filed Cr.R No.64-B/2019 for enhancement of sentence.

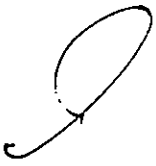
3. Arguments of learned counsel for the parties and learned Addl: A.G representing the State heard and with their valuable assistance the record gone through.

4. The incident occurred at 10.00 a.m on 05.07.2018, where the deceased Aminullah son of Saadullah and Sajjad son of Habibur Rehman lost their lives, which resulted into a charge against the accused/ appellants. The matter was reported by one Habibur Rehman son of Mir Tajam Khan, who happened to be the father of deceased Sajjad. The matter was reported to the local police of Police Station Domel, when on information they reached to Khalifa Gulnawaz Hospital, where the dead-body of the deceased were transported by the co-villagers, accompanied by the complainant and the abandoned eye-witness Alla Khan. The complainant reported that on the eventful day he alongwith Alla Khan and the deceased were present in front of the shop of one Raheemullah when the appellants / accused appeared duly armed with 30 bore pistols and started indiscriminate firing on them as well as the deceased, where they luckily escaped unhurt and the deceased Sajjad and Aminullah got hit who breathed their last.

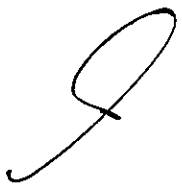
5. The learned counsel for the appellants submitted that both the eye-witnesses were not present at the spot at the time of incident and that it was after receiving the information regarding the incident they attracted to the spot. He further submitted that the prosecution could not establish its case against the accused/ appellants through cogent, convincing and confidence inspiring evidence; and that the circumstances do not support case of the prosecution. It was lastly submitted that the

purpose of presence of the witnesses is not established from record and that the medical evidence is in conflict with the ocular account.

6. The record transpires that the incident was stated to occur in front of the shop of one Raheemullah, where the complainant, Alla Khan (the abandoned eye-witness) and the deceased were sitting on cots. We are to see as to whether the complainant established his presence on the spot with the deceased at the time of incident and as to whether the purpose for presence advanced by the complainant appeals to a prudent mind. There is no denial to the fact that the complainant happens to be the father of deceased Sajjad and that the motive advanced was an altercation between the appellants and the deceased, few days ago. The complainant was examined as PW-06, who stated that on the eventful day he alongwith Alla Khan and the deceased were leaving for Peshawar in order to conduct medical fitness tests for the deceased to acquire Visa and that at the time of incident they were sitting in front of the shop when the accused /appellants appeared and resorted to indiscriminate firing. The contention of the complainant is lacking substance, as he could not produce anything in this respect to the Investigating Officer, that they were leaving for medical checkup and even this was admitted on record by the Investigating Officer that nothing was recovered from the bodies of the deceased, which could support the claim of the complainant. The complainant



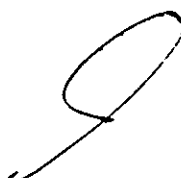
was thoroughly cross-examined who went on improving his case constantly and as such his statement is replete with dishonest improvements. He stated that when the accused/ appellants appeared he saw them from a distance of 10-paces, holding pistols in their hands and that when they fired at the deceased he alongwith Alla Khan ran away from the spot and the accused/ appellants fired at them as well, where they luckily escaped unhurt, but in his report he kept mum regarding this particular aspect of the case. The complainant stated that the motive for commission of the offence was an early altercation between the deceased and the appellants, when so, we are surprised that why the complainant and the eye-witness were fired at, when they had no nexus to the stated motive. The record tells that five real brothers are charged for murder of the deceased but the prosecution remained unsuccessful to convince this Court as to what magnitude of the motive was that put all the real brothers to do away with the deceased. The complainant miserably failed to explain the motive and its intensity which led to the present tragedy. Neither the complainant could produce independent witness in this respect nor the Investigating Officer could collect anything from the surroundings, which could substantiate the claim of the complainant. The complainant went on to say that only three out of the accused had altercated with the deceased, but he could not explain that when and where this altercation took place. The complainant introduced the shop keeper, namely,



Raheemullah, who was Chachazad of deceased Aminullah who was examined as PW-11, who stated that prior to the incident he was standing at the door step of his shop and at the time of firing he took shelter inside his shop, when this witness was further cross-examined he stated that he did not see the appellants while firing at the deceased and that it was after the firing was made he came out of his shop. This witness went in glaring contradiction with what the complainant stated, as he stated that the accused when reached near the deceased they drew out their pistols and started firing, whereas the complainant stated that was from a distance of ten paces, he noticed the appellants having pistols in their hands. We are surprised to see that when PW Raheemullah was inside his shop and he did not see the accused at the time of firing, how could he say and how could he see the accused /appellants pulling out their pistols before the firing was made.

7. The presence of the complainant is further doubted when he admitted in his cross-examination that it was not his routine to enjoy the company of the deceased, rather the medical checkup at Peshawar brought them together on the day of occurrence. The complainant stated that soon after the incident the accused/ appellants decamped from the spot, where after he came towards the deceased and with the help of co-villagers shifted them to cots, but the Investigating Officer did not notice as to whether his hands were besmeared with blood or not. The complainant stated that the deceased were shifted in a datsun to

Khalifa Gulnawaz Hospital and he after making the report came back to his village in the company of Alla Khan. We are surprised to see that how a real father and real brother could leave the dead-bodies of the deceased unattended and unescorted and that why they did not take the pains to accompany the dead-bodies to the hospital for post mortem examination. The conduct of the complainant is not only unnatural but abnormal as well, when he went back to his village in an unholy haste.

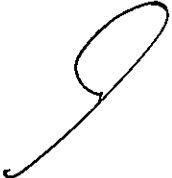


8. The report was made to one Asar Islam ASI, who was examined as PW-03, who stated that he received information in Police Station Domel and after getting information he rushed to the hospital where the complainant reported the matter. It is pertinent to mention that the place of incident is nearer to RHC Domel than Khalifa Gulnawaz Hospital, but surprisingly, the dead-bodies were transported to Khalifa Gulnawaz Hospital instead of RHC Domel. It further increases our anxiety that when the matter was reported at Khalifa Gulnawaz Hospital then what for the dead-bodies were taken to RHC Domel. The presence of the complainant is further doubted that neither he nor the eye-witness Alla Khan are the witnesses of identification before the police at the time of preparation of the injury sheets and inquest reports. Similarly none of the witnesses identified the dead-bodies before the doctor at the time of their post mortem examination, which leads us nowhere, but to hold that the complainant was not present at

the time of incident and the report was made when his attendance was procured. This tells nothing but that the report was made after preliminary investigation. There is no cavil to the proposition that reports which are made after preliminary investigation loses its sanctity and the Court must be on guards while convicting the accused that too on capital charges.

9. The Investigating Officer visited the spot and on pointation of the complainant six empties of 30 bore alongwith blood stained earth from the places of the deceased were recovered. The empties collected from the spot were sent to the office of the chemical examiner (FSL), to ask an opinion as to whether these were fired from one weapon or more. The Laboratory report was received on 10.07.2018 which tells that the recovered empties were fired from one weapon. The accused Baitullah was arrested on 10.07.2018 and a 30 bore pistol was recovered from his possession while, in police custody another pistol was recovered on his pointation, the pistol and empties were sent again for an opinion to the Forensic Sciences Laboratory but the report was received in negative.

10. The prosecution examined two witnesses namely, the complainant and the shop keeper Raheemullah but both the witnesses went on constant improvements with the sole purpose to bring their statements in line with the prosecution story. The record tells that the complainant did not utter a single word in his report that they ran away from the spot and the appellants fired at



them, whereas in his court statement he stated that when the accused/ appellants reached to the place of incident and started firing on the deceased he alongwith the eye-witness ran away from the spot and the accused were firing at them from behind, but surprisingly no empty was recovered as it is in the statement of the complainant that the appellants made ten fire shots at them. The complainant while making the report did not mention the shop keeper, namely, Raheemullah to be the eye-witness of the occurrence but later on after hectic efforts he was brought before the Court during trial and was examined as prosecution witness. The Investigating Officer prepared the site-plan at the instance of the complainant where Raheemullah was shown at point No.5 just in middle of the door of the shop and an impression was given that at the time of firing he was watching the incident, but this witness stated that he rushed inside the shop to take shelter and that he came out when the accused/ appellants had left the spot. When he realized the blunder he committed, he went on to say that he saw the accused before firing while pulling out their pistols. This witness failed to convince us of his presence at the spot, particularly when he went in open contradiction with the complainant. These improvements on part of the witnesses caused a greater damage to the case of the prosecution and the witnesses have lost their worth and credibility. PW Raheemullah was not willing to appear before the Court and an attempt was made through the trial court to

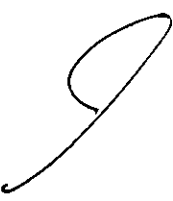
compel his appearance and it was after a month or so from recording of statement of the complainant that he turned up. This witness was self confused, as he stated that owing to his presence at Peshawar in pursuit of his livelihood he could not appear before the Court in time, but his this explanation turned surprising as he was shown of having a permanent shop at his village, which finds mention in the site-plan. If we say yes, to what he stated then his presence at his village as shop keeper in the days of occurrence is beyond understanding.

11. This is astonishing that Alla Khan was abandoned despite the fact that he happened to be a brother of one of the deceased and his non-production tells nothing but that he was not ready to support the false charge of the complainant. We cannot ignore that in the episode two persons were done to death, one son of the complainant and the other brother of the eye-witness, so both of them having equal grudge and anger, but what we gather from is that in fact the complainant and eye-witness reached to the place of occurrence after the deceased were done to death and that it was the complainant who initially persuaded the eye-witness Alla Khan to charge the appellants but on later realization he was not ready to support the false claim of the complainant. Withholding of the best possible evidence favours none but the accused. Article 129(g) of the Qanun-e-Shahadat Order, 1984, caters for the situation and the Courts are left with no option but to apply the principle of negative inference, as has

been held by the apex Court in case titled, "Riaz Ahmad Vs the State" (2010 SCMR 846), wherein it is held that:

"One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution."

12. We cannot ignore that five real brothers have been charged, where one of the deceased received one firearm injury and the other two firearm injuries and the Investigating Officer collected six empties of 30 bore from the place of occurrence. The number of injuries do not commensurate with the number of accused and even the Forensic Sciences Laboratory report does

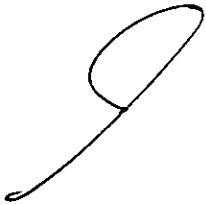


not support the case of the prosecution, as the collected empties after chemical examination were found to have been fired from one 30 bore pistol. This piece of evidence has lost its integrity and cannot be taken against the appellants as valid piece of evidence. The seat of injuries on persons of the deceased and the places of the assailants where they were standing at the time of firing find no support from the medical evidence, as one of the deceased had received two firearm injuries from the back side whereas the other from left to right, whereas the circumstances suggest that the deceased were facing the accused at the time of incident. One of the deceased received an entry wound from his right with its exit to left which further belies the stance of the prosecution, had he been facing the accused or having his back exposed to the accused then either the entry would have been on the front or back, but not from left to right, so it can safely be held that the medical evidence does not support the case of prosecution.

In case titled "Akhter Saleem and another Vs the State and another" (2019 MLD 1107), it is held that:

"12.The above factors, material contradictions between ocular and medical evidence create serious doubts in the happening of alleged occurrence and it is well settled law that even a single doubt, if found reasonable, would entitle the accused

person to acquittal and not a combination of several doubts."



13. The motive advanced was stated to be an altercation between the parties few days prior to the occurrence, but neither the complainant could produce an independent witness in that regard nor the investigating officer took the pains to collect any evidence in that respect. The complainant could not explain that when, where and how the altercation took place and with which of the accused/ appellant. The complainant was examined on this particular aspect of the case, he stated that only three of the accused out of the appellants had altercated with the deceased. The joining hands of five real brothers to do away with the deceased that too for an altercation does not appeal to a prudent mind. We know that prosecution is not bound to setup motive in every case but once it is alleged and not proved, then ocular account is required to be scrutinized with great caution.

In case titled "Muhammad Ashraf alias Acchu Vs The State" (2019 SCMR 652 Para-7), wherein it has been held that: -



"7. The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit

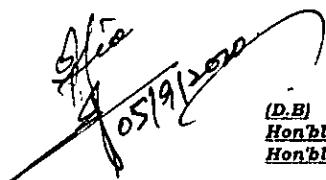
the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."

14. 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/appellants. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellants recorded by the learned trial court is set-aside and they are acquitted of the charge by extending him the benefit of doubt, they shall be released forth with from jail, if not required to be detained in connection with any other case. As the appeal has been allowed so Cr. R No.64-B of 2019 stands dismissed.

15. *Above are the reasons of our short order of the even date.*

Announced
01.09.2020
Azam/P.S


JUDGE

JUDGE


05/9/2020

(D.B)
Hon'ble Ms. Justice Musarrat Hilali and
Hon'ble Mr. Justice Sahibzada Asadullah

IN THE PESHAWAR HIGH COURT,
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Cr.A No.330 -B of 2019

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For respondent: **Mr. Imran Ali Shah advocate.**

For State: **Mr. Shahid Hameed Oureshi Addl: A.G.**

SAHIBZADA ASADULLAH, J.- For the reasons to be

recoded later on, this criminal appeal is accepted, the impugned judgment of conviction dated 22.10.2019, rendered by learned Additional Sessions Judge-V, Bannu, is set-aside and consequently appellants Hanifullah alias Pentar, Baitullah, Zainullah, Saifullah and Sanaullah sons of Obaidullah involved in case F.I.R No. 380 dated 05.07.2018 under section 302/324/148/149 P.P.C, Police Station Domel, Bannu, are acquitted of the charges leveled against them. They be set at liberty forthwith, if not required in any other criminal case.

Connected Cr.R No.64-B of 2019 stands dismissed.

Announced

01.09.2020

SCANNED

02 SEP 2020

Khalid Khan

JUDGE

JUDGE