

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

Cr.A. No.131-B/2015

The State through A.G. KPK
Vs.
Subhan Ali

JUDGMENT

For Appellant: **Mr. Shahid Hameed Qureshi, Addl:**
A.G.

For Respondent: **Mr. Waqar Ullah Khan, Advocate.**

Date of hearing: **27.4.2020.**

SAHIBZADA ASADULLAH, J.- At a trial held before learned Additional Sessions Judge-I, Bannu, in case FIR No.110 dated 02.6.2009, registered under Section 302/34 PPC at police station Domel, District Bannu, the accused/respondents were acquitted vide judgment dated 02.12.2014, which has been assailed by the State through Advocate General, Khyber Pakhtunkhwa, Peshawar, by filing the instant appeal.

2. Facts in brief as spelt out from the first information report are that on 02.6.2009 at 1620 hours, complainant Laiq Nawaz alias Laknavi (PW-9) brought the dead body of his brother Zainullah to police station Domel where he made report to the effect that he alongwith his brother were present in their Hujra, meanwhile, accused Rashid Khan and another unknown person, duly armed with

Kalashnikovs came there and asked from his brother Zainullah about him (complainant) to which Zainullah replied that Laiq Zaman is his brother, then Zainullah brought cold drink (*Sharbat*) from home and after taking the same, both the accused made firing with their respective weapons with the intention to commit *qatl-i-amd* of his brother Zainullah. As a result of firing, he was hit and injured. Accused decamped from the spot after the occurrence. He could do nothing being empty-handed and when he attended his brother, by then he had succumbed to his injuries. On the report of complainant instant case vide the captioned FIR was registered against the accused. Subsequently, on 07.6.2009, the complainant in his supplementary statement, charged unknown co-accused to be Subhan Ali, for the commission of offence.

3. Initially, accused absconded, therefore, they were proceeded against under Section 512, Cr.P.C. Consequently, they were declared proclaimed offender. Later on, accused were arrested and on completion of the investigation, complete challan was submitted before the trial Court. Accused were charged for the offence to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as twelve witnesses, whereafter, the accused were examined under Section 342, Cr.P.C, wherein they denied the allegations and professed innocence, however, they neither opted to be

examined under Section 340(2), Cr.P.C. nor wished to produce defence. The learned trial Court heard arguments from both the sides and vide impugned judgment dated 02.12.2014, acquitted the accused/respondents, hence this appeal.

4. It is worth mentioning that the instant appeal was admitted to regular hearing on 10.12.2015 and accused/respondents were summoned. The respondent Subhan Ali put his appearance and submitted power of attorney, whereas respondent Rashidullah was reported to be dead and in this respect copy of FIR No.389 dated 12.10.2015 was produced which revealed that Mst. Haleema Bibi had reported the matter regarding murder of her brother Rashidullah and his father Taj Muhammad, hence proceedings to the extent of accused/respondent Rashidullah stand abated.

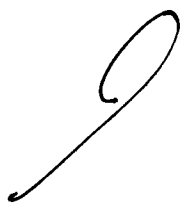
5. Arguments heard and record gone through.

6. It was on 02.6.2009 that complainant Laiq Nawaz alias Laknavi (PW-9) brought the dead body of his brother Zainullah to police station Domel where he made report to the effect that he alongwith his brother were present in their Hujra, meanwhile, accused Rashid Khan and another unknown person, duly armed with Kalashnikovs came there and asked from his brother Zainullah about him (complainant) to which Zainullah replied that Laiq Zaman was his brother, then whereafter

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Zainullah the deceased went home and brought cold drinks (*Sharbat*) and was served to the accused/ respondents, who after drinking the same, started firing at the deceased with their respective weapons with the intention to kill. The deceased got hit and fell down and the accused/ respondents decamped from the spot. When he attended his brother, he had expired.

7. The incident occurred in the Hujra of the complainant where he alongwith the deceased was present when the respondents approached and that after they were served with cold drinks, they resorted to firing where the deceased lost his life. The record is silent that why the accused came to the *Hujra* and that why only the deceased was selected to be killed despite the reason that no previous ill-will or grudge was there between the parties. The conduct of the complainant is not above board that when there was no particular purpose with the deceased and that when on reaching the Hujra the assailants could have accomplished their task then what for they kept waiting and facilitated the deceased to go home and bring cold drinks as the very purpose was to kill and the opportunity was there. This is again surprising that only the deceased was targeted and the complainant was spared when both of them were the easiest targets. The conduct of the complainant is unnatural and his presence on the spot disturbs the mind that why the assailants asked for his introduction from his

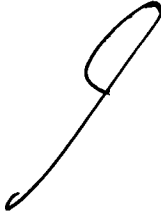


brother and that why the deceased did not tell that who the assailants were.

8. The spot is the Hujra of the complainant and both the assailants resorted to indiscriminate firing but no bullet marks were found on the surrounding walls or on the cot where the deceased was sitting, which fact creates a serious doubt regarding the place of occurrence and mode and manner as alleged by the complainant. The complainant was examined as PW-09, who could not explain that whether at the time of firing the deceased was sitting on the cot or was in standing position and even when the deceased succumbed to his injuries he did not try to shift him to the cot and even his clothes and hands were not besmeared with blood. This unnatural conduct of the complainant casts doubt regarding his truthfulness.

9. The record is silent that what prompted the assailants to kill the deceased and even the Investigating Officer could not collect anything in this respect. The complainant stated that both the accused / respondents entered their Hujra, where he knew one accused by name, whereas the co-accused was not known to him and it was on the next day that his supplementary statement was recorded where he disclosed the unknown accused as Subhan Ali. Our curiosity beings that when the co-accused Rashid Khan was known to him then why the assailants asked his introduction from his brother being from the same

locality. It was on the next day when through a supplementary statement the complainant introduced the unknown as Subhan Ali, but when he was examined as PW-09, he did not explain that how he came to know that the unknown accused was Subhan Ali and even the Investigating Officer could not bring anything on record to have confirmed the source wherefrom the information was gathered.



10. The Investigating Officer recovered three empties of 7.62 bore alongwith blood stained earth from the spot and prepared the site-plan on pointation of the complainant, but neither the jug nor the glasses were taken into possession. The circumstances tell that the deceased at the time of incident was all alone and that the complainant was not present on the spot and it was later on when his attendance was procured and the respondents were charged.

In case titled, "Muhammad Hussain Vs the State" (2017 YLR Note 12), it is held that:

"Similarly, law is also quite settled on the point that evidence adduced by interested and chance witnesses has to be scrutinized with great care and caution and an independent and impartial testimony is required to believe them which is missing in this case."

11. The report is silent regarding the name of the co-accused as initially the complainant mentioned him as

unknown and it was through a supplementary statement that his name was introduced as Subhan Ali. The respondent was arrested on 10.12.2011 where after he was produced for custody before the Court of Judicial Magistrate and later on was lodged in the judicial lock up, after his arrest the complainant was informed and identification parade was arranged in the Central Jail, Bannu, where the respondent was identified. This court is to see as to whether the identification parade was conducted after observing all the legal formalities and as to whether the accused was duly identified. We are surprised to see that on the next day of the occurrence the complainant through a supplementary statement disclosed the identity of the respondent as Subhan Ali then what was the need for conducting identification parade, when the accused was already known to the complainant. The report is silent regarding the features of the respondent but simply the complainant has stated that if the accused was brought before him, he can identify. Though the identification parade was conducted but neither any specific role was given to the respondent at the time of occurrence nor were the requirements fulfilled. This is admitted on record that it was after 23-days of the arrest of the respondent that the identification parade was conducted but the prosecution could not explain that what caused the delay. Though the complainant stated that he had gone for *Tableegh* and that it was on his coming back

that he was informed and the accused was got identified but his this explanation holds no ground as no material was collected by the Investigating Officer to substantiate his claim. The Judicial Magistrate in whose supervision the identification parade was conducted was examined as PW-12, who stated that the accused was produced before him for his physical custody on 12.12.2011, and again for another round where further one day custody was granted. PW-12, admitted it correct that when the respondent was brought before him he was not muffled. He also admitted that possibility cannot be excluded that the witnesses would have an opportunity of seeing the respondent. The learned Judicial Magistrate, stated that while conducting identification parade the respondent complained that the complainant was provided an opportunity to visit him in Central Jail, Bannu before the identification parade, when this is the status of the identification parade then it cannot be relied upon to convict the respondent.

In case titled Amanullah Vs. Muhammad Asfhaq and another (2018 YLR Note Peshawar 169), it was held that:-

"Of course, there is an identification parade of the appellants by identifier Muhammad Abbas (PW-11) but such identification parade has no evidentiary worth as same had taken place on 22.11.2012 and prior to holding the identification parade, the appellants were produced before the learned Judge Anti-Terrorism Court-II, Peshawar on 01.11.2012 and the possibility of their

showing to the identifier cannot be ruled out, therefore, no importance could be attached to the identification parade. Besides, the identifier did not point out the specific role played by the appellants in the crime. It is by now well settled that in order to make an identification parade reliable one, the identifier must assign the specific role, which the perpetrator has played in the crime. As the identification parade is silent on the ibid aspect and had taken place at a belated stage of the appellants' arrest, therefore, no explicit reliance could be placed upon it for the safe administration of justice".

12. The Investigating Officer recovered three empties of 7.62 bore from the spot, which were sent to the office of chemical examiner with a request to tender its opinion, as to whether these were fired from one or different weapons, the report has been exhibited as Ex: PW10/6, where these empties were shown fired from one and the same weapon. The deceased has three inlet wounds and three empties were recovered from the spot with opinion from the Forensic Sciences Laboratory as having been fired from one and the same weapon belies the stance of the complainant regarding the involvement of two accused in commission of the offence.

13. Besides the above, generally the order of acquittal cannot be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is, that, if two views are possible on the evidence adduced in the case, one

pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is casted upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, or the purpose of ascertaining as to whether the accused committed the offence or not. The principle to be followed by this Court considering the appeal against the judgment of acquittal is, to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference.

14. For the reasons mentioned hereinabove, this appeal being without merit and substance is hereby dismissed.

Announced.
Dt: 27.4.2020.
Kifayat/PS*

JUDGE

JUDGE

(D.B)

Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah

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4/6/20