

**JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
PESHAWAR  
JUDICIAL DEPARTMENT**

**Cr. A No.677-P of 2014**

**J U D G M E N T**

Date of hearing: 16.10.2017

Appellant (by): Mr. Muhammad Saleem Khan, Advocate.

State (by): Mian Arshad Jan, AAG.

Complainant (by): Mr. Altaf Khan, Advocate.

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**LAL JAN KHATTAK, J.-** Through this judgment we shall also decide the Cr. R No.159-P/2014 and Cr. R No.33-P/2015 as all the three matters have emanated from same judgment dated 01.12.2014 of the learned Additional Sessions Judge-II, Swabi delivered in case FIR No.964 dated 03.11.2012 u/ss 302/34 PPC registered at Police Station Topi, District Swabi, whereby, the appellant has been convicted u/s 302 (b) PPC and sentenced to imprisonment for life as ta'zir with payment of Rs.5,00,000/- as compensation to the legal heirs of the deceased or in default whereof to further suffer six months simple imprisonment. Benefit u/s 382-B Cr. P.C has been extended to the appellant.

2. Appellant has impugned his conviction while the complainant and the State have filed their separate revisions for enhancement of the sentence.

3. Brief facts of the case are that on 03.11.2012, complainant Ajmal Khan (PW-7) reported to SI Islam Khan (PW-10) to the effect that after parking datsun at Bilal Hotel, he and alongwith his brother Fazal Hussain were returning home and when reached at the place of occurrence, there the appellant and absconding accused Rawaiz Khan emerged who opened firing at his brother with which he was hit and died on the spot. The occurrence was stated to be witnessed by one Attaullah. Motive for the occurrence as given was that the deceased being the head of local '*Islahi*' committee would reprimand the accused and others for their wrong doing on which the accused were not happy.

4. After arrest of the appellant and completion of investigation, complete challan was put in Court, where the appellant was indicted for the crime to which he pleaded not guilty and claimed trial. In order to prove its case, prosecution

examined 11 witnesses, whereafter statement of the accused was recorded, wherein, he professed innocence. The learned trial Court, after conclusion of the trial, found the appellant guilty of the charge and while recording his conviction sentenced him as mentioned above, hence the instant appeal.

5. Arguments heard and record gone through.

6. Perusal of the case record would show that in support of the charge against the appellant, complainant Ajmal Khan appeared before the learned trial Court as PW-7 while Attaullah deposed as PW-8. No doubt, both the witnesses have testified quite in line with what has been alleged in the case *murasila* which is Ex. PA/1 but noticeable aspect of the case is that the complainant is a shopkeeper by profession while eyewitness Attaullah is a mason hailing from Topi i.e. a village other than the one where the occurrence had taken place. As both the witnesses are closely relate to the deceased, therefore, we will appreciate their evidence with utmost care and caution

so as to see whether they have given a true picture of the account or not.

7. In the context of the above, first we take up the testimony of PW-7. Though this witness has testified that at the time of occurrence, he was present with the deceased when he was fired at but record shows that he was a chance witness. A chance witness is one who should not normally be where and when he claims to have been and it is now well settled that testimony of a chance witness, being interested in the victim, cannot be considered as credit worthy unless he gives full justification for his presence on the spot. According to the evidence, complainant was running a shop in his village. He has deposed that on the day of occurrence, he accompanied the deceased from village Topi and after parking their datsun, they were returning home when the deceased was targeted. Normally the complainant, being a shopkeeper in village Gala, was supposed to be either in his shop or village. He has not given the purpose of his going to village Topi with his deceased brother. When the very purpose of going to Topi with

the deceased has not been given by the complainant then coming of both the brothers together at the time of occurrence seems to be doubtful, hence his evidence cannot be accepted. Likewise, PW-7 Attaullah too is a chance witness who has not proved his presence on the spot through any reliable evidence. As stated earlier, he is mason by profession hailing from another village quite away from *Gala* and as per his testimony on the day of occurrence; he was working in the house of complainant. He has deposed in his examination-in-chief that on the night of occurrence, he was in the complainant's house and when the deceased and the complainant got late, he was asked by their father to go and enquire about them. According to his deposition, when he reached near the house of Mian Khan, there the appellant and the absconding accused were present and when his nephews reached the spot, there both the accused opened firing with which Fazal Hussain was hit and died on the spot.

8. Though PW-8 has tried to justify his presence in the house of the complainant for raising construction for him but the

investigating officer did not collect any material to show that he had raised any construction for the complainant in his house, therefore, his presence on the spot cannot be accepted for want of any reasonable justification from him over there.

9. In addition, conduct of both the eyewitnesses at the time of occurrence appears to be unnatural one. It is in the evidence of PW-7 that the dead body was lying on the spot for 20/25 minutes whereafter it was removed therefrom. Had both the eyewitnesses been present on the spot when the deceased was gunned down then they would lift the dead body from the spot immediately, so as to take it to the hospital or the police station. Letting the dead body lying on the spot for 20/25 minutes indicates that both the PWs were not present on the spot when the occurrence had taken place.

10. Furthermore, PW-8 has deposed that when after the occurrence people came to the spot then someone was sent for arranging a vehicle and when the vehicle reached the spot then the dead body was put in it. Ibid part of the testimony of PW-8, if

accepted to be true then it would negate the version of the complainant that after parking their vehicle at Bilal Hotel, he and the deceased left for their house. When personal vehicle of the complainant was available near to the spot then waiting for the people on the spot and on their coming sending someone for getting a vehicle in order to take the deceased to hospital etc does not appeal to mind.

11. Besides, the occurrence had taken place at 19.20 hours on 03.11.2012 when at that time there was quite dark. Keeping in view the distance shown in between the eyewitnesses, the accused and the bulb, there was no chance for the eyewitnesses to properly identify the accused. No doubt, in the site plan (Ex. PB) a bulb has been shown letting at point 'A' but as this fact was not mentioned in the *murasila* (Ex. PA/1), therefore, no reliance could be placed on citing of the bulb in the site plan. The addition seems to be an afterthought attempt to strengthen the prosecution case.

12. Another important aspect of the case is that all the injuries sustained by the deceased are of the same dimension which

shows that one weapon of offence was used in commission of the offence. This fact shows that taking life of the deceased was the job of one man for which two persons have been charged which aspect of the case has caused dent in the prosecution's case as to its accuracy.

13. Thorough and careful examination of the case record would show that the prosecution has not proved its case against the accused beyond any shadow of doubts. It has been held umpteenth times by the superior Courts that in order to record conviction of an accused, the prosecution has to prove its case through consistent, reliable and confidence inspiring evidence, which is not the case in hand.

14. For what has been discussed above, we accept the instant appeal, set aside the impugned judgment and resultantly acquit the appellant of the charge leveled against him. He be set free, if not required to be detained in any other case.

15. As we have accepted the appeal against conviction and sentence, therefore, both the criminal revisions have become infructuous, hence, dismissed as such.



16. Above are the reasons of our short order of even date, which reads as under:

“For the reasons to be recorded later, this appeal is allowed, conviction and sentence of the appellant recorded by learned Additional Sessions Judge-II, Swabi vide impugned judgment dated 01.12.2014 in case FIR No.964 dated 03.11.2012 u/ss 302/34 PPC of Police Station Topi District Swabi are set aside. He is acquitted of the charge leveled against him and be set free forthwith if not required to be detained in any other case”.

**J U D G E**

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Announced  
16.10.2017

*\*A. Ali\**

*(D.B) (Hon'ble Mr. Justice Laf Jan Khattak and Hon'ble Justice Qalandar Ali Khan)*