

JUDGMENT SHEET

PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A. No.110-B/2018.

Amin Jan
Vs.
The State, etc.

JUDGMENT

For Appellant: **Muhammad Anwar Khan Maidad**
Khel, Advocate.

For Respondents: **Mr. Shahid Hameed Qureshi,**
Additional Advocate General.

Date of hearing: **10.02.2020.**
Date of announcement. **14.02.2020**

SAHIBZADA ASADULLAH, J.- This judgment shall dispose of Cr.A. No.110-B/2018, filed by Amin Jan against his conviction and sentence and the connected Cr.R. No.43-B/2018, filed by the State through Advocate-General, Khyber Pakhtunkhwa for enhancement of sentence awarded to the appellant by learned Additional Sessions Judge-I, Bannu vide judgment dated 06.6.2018, whereby the appellant has been convicted under Section 302(b) PPC and sentenced to imprisonment for life on two counts and to pay compensation of Rs.4,00,000/- to the legal heirs of each of the deceased in terms of Section 544-A, Cr.P.C., recoverable as arrears of land revenue or in default thereof to undergo six months simple imprisonment. Benefit of Section 382-B, Cr.P.C. was also extended to the appellants.

2. Facts of the case, as reflected from the FIR Ex. PA, are that on 19.02.1987 at 1715 hours, complainant Pathan Faqir brought the dead bodies of his nephew Ghazi Khan and a guest Moeen Khan to police station Miryan, Bannu and made report to the police to the effect that on the eventful day at *Peshin Vela*, he was sitting in front of his house, whereas the above named persons who had come as guests were sitting near their tents, meanwhile, convicted co-accused Aziz Khan, armed with 303 bore rifle, while the appellant armed with Kalashnikov, came towards Ghazi Khan and Moeen Khan, some altercation took place between them during course of which both the accused started firing, resultantly, Ghazi Khan and Moeen Khan were hit and fell on the ground; that when he attended them they had succumbed to their injuries. After the occurrence, the accused decamped from the spot. Besides the complainant, the occurrence was stated to be witnessed by Hakim Khan. Motive for the offence was that both the accused had been forbidden by the deceased not to come to their tents for disturbing '*Parda*' of the ladies. He charged the accused for the commission of offence.

3. Initially, co-accused Aziz Khan was arrested and tried by learned Additional Sessions Judge-II, Bannu, who was convicted under section 302(b) PPC and sentenced to death on two counts. He was also sentenced to pay compensation of Rs.2,00,000/- to the legal heirs of each

of the deceased in terms of Section 544-A, Cr.P.C. vide judgment dated 25.6.2011, whereas the appellant was declared proclaimed offender, however, convicted co-accused Aziz Khan escaped from Central Prison, Bannu and his appeal against the conviction and sentence pending before this Court was adjourned sine die.

4. After arrest of the appellant and completion of investigation, supplementary challan was submitted against him to learned Trial Court. Accused was charged for the offence to which he pleaded not guilty and claimed trial. During course of trial, PWs Hakim Khan, Mst. Zangeera, Banochi Khan, Abdul Wahid, Dr. Muhammad Jamil and Said Akbar Khan Investigating Officer were found dead, therefore, their statements recorded during proceedings under Section 512, Cr.P.C. were transferred to the trial of appellant, besides the prosecution examined Said Ayaz Khan SHO as PW-1, who arrested the accused on 18.8.2017 and submitted supplementary challan, whereas Munawar Khan appeared as PW-2, who escorted the dead bodies of both the deceased to the hospital from police station Miryan and after postmortem examination, the doctor handed over to him blood stained garments of both the deceased which he had taken to the Investigation Officer to the spot. After closure of prosecution evidence, the accused was examined under section 342, Cr.P.C., wherein he denied the allegations, professed innocence and

false implication, however, neither he opted to be examined under Section 340(2), Cr.P.C., nor produced evidence in his defence. After conclusion of the trial, the learned trial Court vide impugned judgment dated 06.6.2018, convicted the accused and sentenced him as mentioned above, which has been impugned by the appellant through the present appeal, whereas the State through Advocate General Khyber Pakhtunkhwa has filed Cr.R. No.43-B/2018, for enhancement of sentence awarded to the appellant.

5. Arguments heard and record perused.

6. It is the case of prosecution that on the eventful day at Peshin Vela, the complainant was sitting in front of his house, whereas the deceased Ghazi son of Habib (nephew) (2) Moeen son of Khan, where the deceased Moeen had come as a guest to the deceased Ghazi and were sitting in the open space between the tents, where in the meanwhile, convicted co-accused Aziz Khan, armed with 303 bore rifle, while the appellant armed with Kalashnikov, came towards Ghazi Khan and Moeen Khan, some altercation took place between them during course of which both the accused started firing, resultantly, Ghazi Khan and Moeen Khan were hit and fell on the ground and succumbed to their injuries on the spot. Since the complainant Pathan Faqir was dead prior to the trial of convicted co-accused, so he was abandoned by the prosecution, whereas Mst. Zangeera and PW Hakim were

produced in the previous trial against the co-accused and their statements were recorded. The learned counsel for the appellant went on to say that there was no attempt on part of the prosecution to procure the attendance of the witnesses and that the transposition of the statements recorded in the previous trial was motivated with malice and mala fide. There is no denial to the fact that the law has provided a mechanism for transposition of the statements recorded earlier if the witnesses were either dead or could not be found. Two provisions of law are worth mentioning for the purpose i.e. Article 47 of the Qanun-e-Shahadat Order, 1984, and Section 512 of the Cr.P.C. Article 47 reads as *"Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of given evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without any amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable"*. This is on record that the occurrence took place on 19.02.1987, whereas the matter was reported on the same date, but both the accused remained absconders. The co-accused Aziz Khan was earlier arrested and faced the trial when nearly all the

prosecution witnesses including Mst. Zangeera and Hakim Khan were examined and on conclusion of the trial, the trial Court vide judgment dated 25.6.2011, convicted the accused under section 302(b) PPC to death as Ta'zir on two counts and to pay fine of Rs.2,00,000/- to the legal heirs of the deceased in terms of Section 544-A, Cr.P.C. To repel the contentions of the learned counsel for the appellant, it is needed to mention that soon after the occurrence, the appellant absconded and was never heard of for long thirty years and it was on 17.8.2017, the accused was arrested. It needs reiteration that some of the witnesses examined in the previous trial were either dead or could not be found, we feel no hesitation to say that it was the prerogative of the trial Court to transpose the earlier recorded statements of the witnesses after observing the legal formalities and the same was done. The contentions of the learned counsel for the defence that Mst. Zangeera Bibi did not find mention in the FIR and that the other prosecution witness namely Hakim Khan was not present and attracted to the crime scene by the time when the firing had already been made and the accused were running there-from and he stressed that the testimony of these witnesses cannot be taken for conviction against the appellant. We are conscious of the fact that the incident occurred at a place where the complainant with some of his relative were living in tents, as they had come from another area, it is a common

practice in these people that they usually keep sticking to their tents being alien in the area and as such, the presence of Mst. Zangeera Bibi and PW Hakim Khan cannot be doubted. Soon after the occurrence, the dead bodies were taken to the police station without loss of time, where the report was made and this quick succession of events excludes the possibility of consultation and deliberations.

7. The defence failed to establish that the charge against the appellant was the outcome of malice and ulterior motives as it transpires from record that the accused and complainant were not related to each other and as such, had no common interest. The motive given in the FIR appeals to mind that these were the accused who had come to tease the women folk and in such eventuality altercation took place which yielded the occurrence. The overall circumstances of the case tell nothing but bona fide on part of the prosecution that they told what they saw.

In case titled Imtiaz Ali alias Taji Vs. The State & others (2020 SCMR 287), it was held that:

The ocular account in this case was furnished by Tariq Ejaz (PW-10) and Meer Tahir (PW-11). Tariq Ejaz (PW-10) is the complainant of the case and is the real son of deceased Ejaz Ahmad. He has given sufficient explanation for his presence at the spot at the relevant time. Meer Tahir son of Noor Muhammad (PW-11) used to work at General Bus Stand and sustained fire-arm injuries during the occurrence. Both these witnesses by and large remained consistent on all the material aspects of the case and held the appellant responsible for fire-arm injury on the abdomen of Ejaz

Ahmad (deceased). Their statements get support, from the medical evidence”.

8. In order to scrutinize the discrepancy, if any, was minor or not or the same amounted to contradiction, regard is required to the facts and circumstances of each case, keeping in view the social status of the witnesses and environment in which such witness was making the statement. In the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time etc. Material discrepancies are those which are not normal and not expected of a normal person. The Hon'ble Supreme Court of Pakistan in case titled *“Allah Bakhsh Vs Ahmad Din (1971 SCMR 462)”*, observed that minor discrepancies in deposition of prosecution witnesses of inconsequential nature cannot reasonably be considered as good grounds in disbelieving independent and disinterested witnesses. If importance be given to such insignificant inconsistencies there can hardly be any conviction, for seldom is there a witness whose evidence does not suffer from such inconsistencies.

9. No doubt, mere absconsion is not a conclusive proof of guilt of accused person, but it can be used as a corroborative piece of evidence and has to be read along with substantive piece of evidence. While going through the record, it appears that after commission of the

offence, the accused remained fugitive from law for more than thirty (30) years and no explanation whatsoever was given for his long abscondence. It is evident from the record that all efforts were made to arrest the accused, but the law enforcing agencies could not succeed and even the concerned Court issued the process against the appellant but it was after long thirty years when the accused was arrested to face the charges.

In case titled *Bux Ali alias Dodo Vs. The State (2019 YLR 324 [Sindh, Hyderabad Bench])*, it was held that:


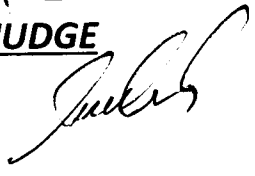
Appellant did not join investigation, his abscondence for pretty longtime was unexplained and was additional piece of evidence against him.


10. The learned State counsel at the tail end requested for enhancement of sentence by accepting Cr.R. No.43-B/2018, and stated that when the prosecution proves its case, then the normal penalty is nothing but the sentence of death, however, we do not find ourselves in agreement with the learned State counsel, as the prosecution badly failed to establish the motive against the accused and no evidence was collected by the Investigating Officer in that respect. The law is settled that once the motive is alleged and is not proved, it reacts upon the quantum of sentence.

11. After evaluating the evidence on file, this Court reaches to an inescapable conclusion that the prosecution has proved its case against the accused to the

hilt and that the impugned judgment is well-reasoned in all respects which needs no interference. Resultantly, this criminal appeal alongwith Cr.R. No.43-B/2018, stand dismissed.

Announced.
Dt: 14.02.2020.
Kifayat/*


JUDGE

JUDGE


28/4/2020

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