

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH

(JUDICIAL DEPARTMENT)

CR.APPEAL NO.05-B OF 2013

JUDGMENT

Date of hearing 04.6.2015

Appellant :- **By Faqir Mahboob-ul Hamid advocate**

Respondents: **By Mr. Saifur Rehman Khattak, Addl.AG.**

MUHAMMAD YOUNIS THAHEEM, J. At the trial,

held by learned Additional Sessions Judge-II Lakki

Marwat, appellant Habibullah was found guilty for

crimes under sections 302 (b), 324, 449, 148/149 PPC

and upon conviction he has been sentenced as follows:-

- i) Sentenced to life imprisonment as Tazir U/S 302(b)/149 PPC for the qatl-e-amd of Mst. Man Bibi by common fire shots and out of which two years will be R.I and remaining S.I. He has to pay compensation of Rs.2, 00,000/- to the legal heirs of the deceased under section 544-A Cr.P.C. In case of failure to Pay compensation amount, it will be recovered as arrears of Land Revenue against him;

- ii) Sentenced to five years of R.I with fine of Rs.20,000/- under section 324/149 PPC for ineffective firing at the complainant party. In case of failure to pay fine of Rs.20,000/- he will suffer six months SI, at the end of main imprisonment;
- iii) Sentenced to five years R.I with a fine of Rs.30,000/- for modified offence under section 449/149 PPC, in default of payment of fine, he shall to undergo further one year S.I;
- iv) Offence U/S 148/149 PPC has been deleted for wanting evidence and redundant in nature;
- v) All the sentences are order to be run concurrently;
- vi) Benefit of Section 382-B Cr.P.C has also been extended to the appellant/ convict.

2. The appellant has impugned his conviction and sentences awarded vide impugned judgment dated 19.11.2012, through instant Criminal Appeal under section 410 Cr.P.C.

3. The crime was reported by complainant Bilal Khan (PW-7) to Ghulam Muhammad Khan ASI on 27.02.2009 at 1130 hours in Police Post Shahbaz Khel. While narrating the occurrence the complainant

alleged that on the fateful day, he, alongwith his brothers namely Enjar Nawaz, Karim Nawaz, deceased mother Mst. Man Bibi and sister Asmat Bibi alongwith other inmates were present in the courtyard of his house; that it was 09.00 a.m time when the appellant/accused Habibullah son of Nizam Khan alongwith others absconding accused Farmanullah, Habib Shah alias Bisha sons of Ghazi khan, Habibullah and Kalimullah sons of Abdullah Khan, duly armed with Kalashnikovs entered into their house and started firing at them as a result, his mother Mst. Man Bibi got hit and fell to the ground while they escaped unhurt as they took shelter inside the rooms of their house and the accused decamped from the spot; that when they attended their mother she was died. Beside him, the occurrence was also witnessed by other inmates of the house. Motive for the crime was that absconding accused Farmanullah and Bisha had stolen their Cock from their house. The complaint was made to present appellant/accused Habibullah. His report was entered in

Daily diary vide Mad No.4 dated 27.02.2009, the contents of which were read over to him and he put his signature on it as a token of its correctness. He has also prepared injury sheet and inquest report of the deceased and send the dead-body under the escort of Constable Javed to RHC Tattar Khel for PM examination, while copy of Naqal Mad was sent to the Police station Pezu for registration of case, the contents of which were incorporated in shape of FIR No.94 dated 27.02.2009 under sections 302/ 324/ 452/ 148/ 149 PPC Police station Pezu, Lakki by Rehmatullah ASI (PW-2).

4. One Bashir Khan S.I (PW-10) on receipt of copy of FIR went to the spot, prepared the site plan (Ex.PB) at the pointation of complainant as well as eye witness Injar Nawaz and Karim Nawaz, collected blood stained earth from the place of deceased, 12 empties of 7.62 bore from the place of the accused with 2 spent bullets from the court yard of complainant's house vide Recovery memo Ex.PR. He also secured garments of the deceased vide memo Ex.PR/1. The Chemical

Examiner's report to that effect is Ex.PK. He also sent the crime empties to the Arms Expert and placed on record his report as Ex.PK/1. He recorded the statements of the witnesses and on completion of investigation, he handed over the case file to the SHO for challan against the accused party in their absence.

5. Dr. Humera Tahir WMO RHC Tattar Khel (PW-9) had conducted autopsy on 27.02.2009 at 1.00 p.m of the dead body of Mst. Man Bibi and in this respect, she admitted her signature on PM report Ex.P.M as correct.

6. At the conclusion of investigation and after arrest of the appellant, charge-sheet was filed in the trial court where-after the prosecution examined (10) PWs in all. After conclusion of trial, the learned trial court has convicted and sentenced the appellant/accused Habibullah as above, vide impugned judgment dated 29.11.2012.

Perusal of record reveals that as per FIR, the occurrence took place on 27.2.2009 at 0900 hours whereas the complainant Bilal Khan alongwith his brother Enjar Nawaz and his sister Mst. Asmat Bibi reported the matter at Police post Shahbaz Khel to Ghulam Muhammad ASI at 1130 hours with a delay of about 2 ½ hours. As the report has been lodged to nearby PP not at the Police station or in the hospital which are far away from the place of occurrence, hence, in such circumstances, one could easily infer that the report has been lodged with consultation and deliberations by spreading wide net. Moreover, brother of the complainant and his sister being eye witness of the occurrence were present with the complainant at the time of lodging report but none of them has signed or thumb impressed the report as rider.

8. As the ocular account would play a decisive role in the case, therefore, we would consider the same first.

9. The complainant Bilal Khan appeared and recorded his statement as PW-7 wherein he narrated the same facts as mentioned in the FIR, however, he made some improvements at the trial, by stating that all the accused entered into the house jointly and scattered in the court yard and started firing at once. His statement is not only smeared with improvements but also contradictory one, as PW-8 Enjar Nawaz who is allegedly eye witness of the occurrence altogether different story by stating that:-

“First of all, accused Farmanullah and Habib Shah alias Bisha entered our house and on entering our house, these two accused started firing upon us a during the firing of those accused, we entered the room of our house and took shelter in the room”

This PW made further improvement by stating that:-

“Accused Farmanullah and Habib Shah when entered the house, they took

position near the door of the house, situated at front of the entrance and they did not make any fire during this, then other accused entered the house and took positions. After taking positions accused party started firing”

10. The prosecution produced the complainant as well one eye witness as PWs 7 and 8, the statements of both the PWs are contradictory to each other and full of improvements and such improvements made by the witnesses in their statements subsequently to strengthen the prosecution case would lose their credibility and evidentiary value, hence could not be relied upon. Further their testimonies are suffering from glaring contradictions and discrepancies creating doubts about their presence at the spot at the time of incident. Reliance is place on case titled “Abdur Rahman Vs Fateh Sher & 8 others” (1996 SCMR 176), “Akhtar Ali & others Vs The state” (2008 SCMR 6) and “Muhammad Rafique and others Vs the State and others” (2010 SCMR 385).

11. The complainant as well as eye witness Enjar Nawaz are brothers interse and having relationship of mother and sons with the deceased, hence both the witnesses are closely related to the deceased and interested one. Court could not base conviction of accused solely on the testimony of interested witnesses, unless such evidence finds corroboration by some other independent and impeachable piece of evidence. In the instant case, both the PWs have made sufficient improvements and contradicted each other and further does not corroborate with the other pieces of evidence, hence the conviction on such statement could not be awarded. The learned trial court has fallen into error by not appreciating the evidence in accordance with law and based conviction mere on the basis of surmises and conjectures and escaped the contradictions and improvements mentioned above.

12. Statement of Bashir Khan SI, who is IO of the case examined as PW-10 too does not corroborate

with the facts and circumstances of the case and is not worth reliable as during cross examination he admitted that during spot inspection the complainant had not made pointation of the rooms where they took shelter, although had stated to him that they took shelter in three of the rooms of the spot house. He further stated that during spot inspection nobody pointed him the bullet marks present on the surrounding walls.

13. Further the IO had sent 12 empties of 7.62 bore to the FSL for Arms expert opinion and result s available on file as Ex.PK/1 which shows that all the crime empties were fired from one and the same 7.62 MM bore weapon, meaning thereby that the instant occurrence is the job of one person whereas the complainant had spread wide net. Moreover as per version of complainant the dispute of stealing a Cock was with the absconding accused Farmanullah and Habib Shah alias Bisha whereas the complainant charged five accused in all for the alleged occurrence. If all the five accused had fired through Kalashnikov

rifles, fully automatic weapons then, in that case, there was no occasion for the eye witnesses and inmates of the crime house to be escaped unhurt, rather substantial damage would have been caused to the deceased and others. This fact would clearly show that the number of accused and the charge both are highly exaggerated.

14. In view the above facts, the case of the prosecution appears to be replete with grave doubts with regard to the manner of the occurrence as well as the participation of a large number of accused. These doubtful aspects, in view of the principles of law and justice, have to be resolved in favour of the accused-appellant.

In the case of **“Muhammad Jehangir alias Badshah and Muhammad Naveed Vs. The State”** (NLR 1995 Cr.SC 688) the Hon’ble Apex Court has laid down the following principles:-

“Corroborative evidence must be exceptionally strong and sufficient enough when eye-witnesses have judiciously been

found capable of involving an innocent person and attributing him main role of murder.”

Further held that:-

“Court would not be able to sift grain from chaff when prosecution case is pregnant with serious doubts and there is confusion and darkness all around.”

It was further held that:-

“Presence of witnesses on the spot does not mean that they are witnesses of truth. Acid test of veracity of a witness is inherent merit of his own statement. Eye-witnesses not only exaggerating number of assailants but also falsely implicating an innocent person. They going to extent of assigning falsely major role of murder to accused for which he could be hanged. They showing reckless disregard not only for truth but for human life as well. Held: Corroborative evidence qua each accused would imperative for relying on such ocular evidence.”

It was further held by the Hon’ble Apex Court that:-

“a single doubt if found reasonable would entitle the accused to acquittal and not a bundle of doubts.” (Please see the case of “Riaz Masih alias Mithoo Vs. The State” (NLR 1995 Cr.SC 694).

15. To carry conviction on a capital charge, the ocular account, in all circumstances, must come from unimpeachable source; otherwise, evidence short of such standard cannot be infused life to place reliance on it even if it is corroborated. Reliance in this regard is placed on the view held by the Hon'ble Apex Court in the case of "*Asghar Ali Vs. The State*" (1992 SCMR 2088).

Same and similar was the view of Lahore High Court Lahore in the case of "*Jahangir Hayat Vs. The State*" (PLD 1999 Lahore 285) wherein the testimony was held to have not come from unimpeachable source, thus, in a case of single accused the death sentence awarded was set aside.

17. For what has been discussed above, this appeal is allowed. Conviction and sentences of the appellant namely, Habibullah son of Naizam Khan, recorded by the learned trial Judge vide impugned judgment dated 29.11.2012 are set aside and he is

acquitted of all the charges, leveled against him. He be
set at liberty forthwith, if not required in any other case.

The above are the reasons of my short
order of the even date.

Announced:
04/6/2015

J U D G E

****Azam.P.S****

J U D G E