

JUDGMENT SHEET

**PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

1. **Cr.A No. 160-M/2018**
&
2. **Cr.A. No. 150-M/2018**

I. *Behram son of Gul Sher*
(Appellant)

1. *The State through A.A.G.*
2. *Rozi Khan son of Said Hassan (Respondents)*

Present: *Mr. Rashid Ali Khan, Advocate.*
Mr. Haq Nawaz, Asstt: A.G.
Mr. Hamayoon Khan Torwali, Advocate.

Date of hearing: **13.02.2020**

CONSOLIDATED
JUDGMENT

WIQAR AHMAD, J.- This order is directed to dispose of the instant appeal against conviction filed by the appellant namely Behram son of Gul Sher, as well as connected appeal against acquittal of two other co-accused namely Tawkal Jan and Peer Gul. All the three accused faced trial before the Court of learned Additional Sessions Judge Behrain in a case registered against them vide FIR No. 34 dated 06.06.2016 under sections 324,34 PPC at Police Station Kalam District Swat.

2. FIR was lodged on the basis of 'Murasila' sent by Salim Yousaf SHO, Police

Station Kalam from Civil Hospital Kalam on 06.06.2016. It is incorporated in the '*Murasila*' that the SHO proceeded to emergency ward of civil hospital Kalam, pursuant to receiving information of bringing of the injured, where he found one Rehmat Ali son of Mubarak Shah, who was injured and in unconscious condition. The complainant namely Rozi Khan, who was present with the injured reported to the SHO that the injured was his relative. He along with the injured and other persons had gone to village *Banda* from *Kandail*, a day before the occurrence i.e. on 05.06.2016. They spent a night there. Then they found livestock of one Sher Gul in village *Banda*, which were taken by them to an area known as *Shareek*. On reaching the area of *Shareek*, it was 08:00 A.M when they found the accused Tawkal, Peer Gul both sons of Sher Din and Behram son of Gul Sher all residents of Matiltan. After a brief verbal altercation, all the three accused were alleged to have started firing upon the complainant-party with their respective firearms, as a result of which Rehmat Ali received injuries on his right arm and left foot, while the complainant and his other fellows escaped unhurt. It was also stated that some goats might have

got injured as a result of firing. Rehmat Ali injured was taken to civil hospital Kalam for treatment. Complainant charged the above named three accused for making firing upon them with the intention to commit their murder. Dispute over grazing of livestock in village *Banda* was stated to be a motive for the alleged occurrence.

3. Investigation in the case was kicked off. Opinion of doctor regarding the nature of injuries was received by the Investigating Officer, statements of the PWs were recorded. Eleven empties of 7.62 bore were also recovered from the spot. After completion of investigation, complete *challan* was put in Court. Charge was framed against the accused on 08.05.2018, which was denied by the accused facing trial, whereafter the prosecution was invited to produce its evidence. The prosecution produced eleven (11) witnesses and closed its evidence. Statements of accused were recorded under section 342 Cr.P.C. On conclusion of trial, the two accused namely Tawkal Jan and Peer Gul were acquitted of the charges, while the accused/appellant namely Behram was convicted and sentenced vide impugned judgment 21.05.2018 as follows;

- *U/S 324 PPC to seven years imprisonment along with fine of Rs. 50,000/-, or in default thereof, the accused shall further undergo four months simple imprisonment.*
- *U/S 337 F (iv) PPC to three years simple imprisonment as Ta'zir and to pay Rs.20,000/- as Daman, or in default thereof, the accused shall further undergo three months simple imprisonment.*
- *U/S 337 F (i) PPC to five months imprisonment and to pay Rs. 10,000/- as Daman, or in default thereof, the accused shall further suffer one month simple imprisonment.*
- *All the sentences shall run concurrently, however the appellant was¹ extended benefit of section 382-B Cr.P.C.*

4. Learned counsel for the accused/appellant submitted during the course of his arguments that general role of firing had been attributed to all the three accused, in the FIR, while the prosecution subsequently improved their version by ascribing a specific role of firing at the injured to the appellant namely Behram Khan. It being a dishonest improvement, according to the learned counsel, have shattered the case of the prosecution and such evidence cannot be made basis for conviction of the appellant. The learned counsel also added that weapon of offence had not been specified in the FIR, while subsequently it was so described in the evidence which was also a dishonest improvement. He further stated that the prosecution had failed to prove its case against the

accused beyond reasonable doubt. He placed reliance upon the judgments reported as "2011 SCMR 323, 2015 SCMR 1142, 2017 SCMR 724, 2017 SCMR 344, 2010 P Cr.L J 1842 (Lahore), 2011 YLR 1207 (Peshawar), 2011 P Cr. LJ 470 (Lahore), 2013 YLR 982 (Peshawar), 2016 MLD 1 (Lahore), P Cr. LJ 1559 (Peshawar), 2017 P Cr. LJ Note 83, 2018 YLR Note 59, 2018 YLR 1658 (Peshawar), 2018 P Cr. LJ 922 (Peshawar), 2018 YLR 1850 (Peshawar (Bannu Bench) and 2018 P Cr.LJ 922 (Peshawar).

5. The learned counsel for complainant submitted in rebuttal that minor discrepancies do occur in description of the occurrence at trial by the witnesses, which could not be made a justification for acquittal of the accused. He further added that motive had not only been established but stood admitted on record. He further argued that the defence had failed to cross-examine witnesses of the prosecution on material aspects of the case, which statements to the said effect shall be deemed to have been admitted by the accused. He placed reliance upon the judgments reported as 2011 SCMR 323, 2015 SCMR 1142, 2017 SCMR 724, 2017 SCMR 344, 2010 P Cr. LJ 1842 (Lahore), 2013 YLR 982

(Peshawar), 2017 P Cr. LJ 83 (Peshawar), 2018 YLR 59 (Peshawar Bannu Bench), 2018 YLR 1658 (Peshawar), 2018 P Cr. LJ 922 (Peshawar) and 2018 YLR 1850 (Peshawar Bannu Bench).

6. The learned Astt: A.G appearing on behalf of the State supported the learned counsel for complainant and adopted his arguments.

7. I have heard arguments of learned counsel for the parties including learned Astt: A.G for the State and perused the record.

8. Perusal of record reveals that the version of the occurrence as narrated in the FIR, and as described by the PWs in their statements recorded in the Court was varying from each other on material particulars. The complainant namely Rozi Khan has stated in his initial report that he along with the injured namely Rehmat Ali and other persons had exchanged hot words with the accused party at the spot, whereafter the accused started firing upon them, as a result of which Rehmat Ali got injured on right hand and left foot, while rest of the complainant-party escaped un-hurt. The complainant was examined as PW-6 during trial, where he had stated that he along with Rehmat Ali injured, Nausherawan and

Gulbar Khan were taking the herd (ٲٲٲ) of lambs and goats belonging to Sher Gul from the area of their village namely *Banda Kandleshy* to the houses of Sher Gul etc. When they reached to the place of occurrence, the above named three accused appeared duly armed with firearms, and started verbal altercation with them. The injured Rehmat Ali was stated to be ahead of them, who was fired at by the accused/appellant namely Behram, while the other two co-accused started firing at rest of the members of the complainant-party, who took refuge behind the stones and escaped the firing. From firing of accused, goats and lambs were also stated to have got injured. The change of version is noticeable in initial version of the complainant and the one narrated in his examination-in-chief, while deposing in Court. It had not been stated by the complainant in his initial statement that the injured Rehmat Ali was ahead of them, and that accused Behram had made firing upon him and that he got injured with the firing of accused Behram. Nor had the other two accused been assigned the role of firing on rest of the complainant-party in the FIR. In the FIR the general role of firing had been attributed to all three accused upon all members of the

complainant-party, indiscriminately. Substantial improvements have thus been made by the injured complainant in his statement recorded in the case rendering his testimony untrustworthy. In this regard reliance is placed on the judgment of Hon'ble Supreme Court of Pakistan in the case of "Farman Ahmad vs. Muhammad Inayat" reported as "2007 SCMR 1825", wherein the Hon'ble Court has held as follows;


"The rule for safe administration of justice is that improvement made by eye-witness in order to strengthen the prosecution case, lose their credibility and evidentiary value and when a witness made contradictory statement or improvement changing his version to suit the situation, if found to be deliberate and dishonest, would cause serious doubt on his veracity."

In the case of "Muhammad Arif v/s The State" reported as "2019 SCMR 636", the Hon'ble Apex Court had also held a similar view, relevant part of which is reproduced hereunder for ready reference;

"It is well established by now that when a witness improves his statement and moment it is observed that the said improvement was made dishonestly to strengthen the prosecution, such portion of his statement is to be discarded out of consideration. Having observed the improvements in the statements of both the witnesses of ocular account, we hold that it is not safe to rely on their testimony to maintain conviction and sentence of Muhammad Arif (appellant) on a capital charge."

9. It has also been admitted correct by PW-6 in his cross-examination that all the

witnesses belonged to one family but living in different villages. He had also stated in his cross-examination that they had not called each other to village *Kandleshy* one day before the occurrence but had met by chance and spent a night there. It could nowhere be mentioned that for which purpose the complainant, injured Rehmat Ali and other persons have gone to village *Kandleshy*. This explanation was necessary for the purpose that all the PWs have admittedly been belonging to different areas and their getting-together at village *Kandleshy* a day before the occurrence, appears to be a matter of mere chance, from the evidence of the prosecution. This along with other circumstances creates doubt regarding the presence of the PWs at the spot. The Hon'ble Supreme Court of Pakistan in the case of *"Muhammad Rafique alias Feeqa v/s The State"* reported as 2019 SCMR 1068 has observed as follows;



"The Achilles' heel of the prosecution's case is the very presence of the named eye-witnesses at the time and place of occurrence. To start with, the very reason for all the nine named persons to first gather and then to be present at the time of the occurrence at the haveli of the present appellant is not appealable to a prudent mind, especially when there is no evidence in support of the parties having a joint khall (water course), and the cutting of the same on the day of the occurrence was also not produced in evidence. To add to this crucial

legal lapse, there is a marked delay in carrying out the post mortem of the deceased Muhammad Azam. According to the complainant's own version, which has been toed by other prosecution witnesses, the crime was committed at 05.30 p.m. at the Dera of Ilam Din, a locality in District Lahore, while the post mortem was carried out after a delay of nearly 22 hours on the next day at 03.00 p.m. at a public hospital in Lahore."

10. The other circumstances creating doubt in the case of prosecution included the following discrepancies occurring in the statements of the prosecution witnesses. PW-6 while deposing in Court has stated that when they were going towards village *Kandleshy*, they had not taken any blankets with them, while the injured Rahmat Ali deposing as PW-8 in Court has stated in his cross-examination that the other fellows were having blankets with them. This injured PW has also stated that it was the accused Behram, who had made firing at him, as a result of which he got injured, fell down on the ground and became unconscious. When he came into his own senses, he found himself in Saidu Sharif hospital where he was being treated. He has also stated in his cross-examination that when they were going to village *Kandleshy*, his other fellows were having blankets with them. He has also stated that he and the other PWs were residents of different villages. He had further stated in his

cross-examination that when they were leaving for the area of Banda *Kandleshy* a person told them that the goats etc had been belonging to one Sher Gul. The other PWs have not so stated that anybody had informed them about the fact that the herd of goats and lambs were belonging to Sher Gul. He has further stated that since he became unconscious, therefore he could not say as to whether the other accused had made firing upon the complainant-party or not. The other PW namely Gulbar Khan was examined as PW-9, who has also given a similar account of the occurrence, however during cross-examination he has stated that he had given statement to the local police in respect of the occurrence on 07.06.2016 at police station Kalam. He had further stated in his cross-examination that he went to *Banda Kandleshy* alone. All these circumstances make presence of the PWs at the place of occurrence highly doubtful. Statements of prosecution witnesses cannot be termed as confidence inspiring. Hon'ble Supreme Court of Pakistan in the case of "Haroon alias Harooni v/s The State and another" reported as "1995 SCMR 1627", has held as follows;

"Statement of a witness must be in consonance with the probabilities fitting in the circumstances of the case and also inspire confidence in the mind of a reasonable prudent man. If these elements are present, then the statement of the worst enemy of an accused may be accepted and relied upon without corroboration, but if these elements are missing, then statement of a pious man may be rejected without second thought."

In support of the said ratio, further reliance is also placed on the judgments reported as 1997 P Cr. LJ 2075 and 2017 YLR 436.

11. The occurrence had taken place at 08:00 A.M on 06.06.2016 while report was made to police on 10:00 A.M. Though the reason for delay has been explained in statement of the SHO namely Salim Yousaf (PW-5) where he has stated that there is no carpeted road between the place of occurrence and civil hospital Kalam. The area is hilly and the terrain was very difficult which normally consume one and half to two hours in reaching Kalam. Report of the occurrence cannot be termed as a delayed one, but those two hours may have been equally utilized for managing the presence of the complainant and other PWs at the time of

lodging of the report, as well as for deliberations and consultations.

12. The evidence of prosecution in the case in hand not reliable at all. Benefit of doubt has to go to the appellant/convict as he cannot be handed down a sentence on the basis of such weaker type of evidences.

13. For what has been discussed above, the appeal in hand is allowed by extending the benefit of doubt to the accused/appellant. He is resultantly acquitted of the charge. The appellant has already been released on bail by this Court under section 426 Cr.P.C on 03.06.2019, therefore his sureties are discharged from liability of bail bonds.

14. The connected appeal against acquittal filed by the complainant is dismissed, accordingly.

Announced
Dt. 13.02.2020


JUDGE

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