

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A.No.852-P of 2020.


Date of hearing: 05.10.2021.

M/s Jalal-ud-Din Akbar-e-Azam Khan Gara
and Shabbir Hussain Gigyani, advocates for
the appellants.

Mr.Muhammad Inam Yousafzai, AAG for the
State.

Syed Abdul Fayaz, advocate for the
complainant.

JUDGMENT

 **LAL JAN KHATTAK, J.-** Through this
judgment, we shall also decide the criminal
revision bearing No.129-P of 2020 as both
the matters have arisen from the same
judgment dated 17.10.2020 of the learned
Additional Sessions Judge-II/MCTC,
Nowshera delivered in case FIR No.59
dated 23.04.2014 under sections
302/148/149 PPC of Police Station Akbar
Pura, Nowshera, whereby the appellants
have been convicted and sentenced under
section 302(b) PPC to imprisonment for life
on two counts. They have also been
directed to pay compensation of
Rs.500,000/- to legal heirs of both the
deceased as envisaged under section 544-A

Cr.P.C. or in default whereof same shall be recovered as arrears of land revenue. The appellants have also been convicted under section 148 PPC read with section 149 PPC and sentenced to rigorous imprisonment of three years. Benefit under section 382-B Cr.P.C. has been given to them. The appellants have assailed their convictions and sentences through their joint appeal whereas the complainant had filed Cr.R.No.129-P of 2020 for enhancement of the awarded sentence to the normal penalty of death.

Joint

2. Brief facts of the case are that on 23.04.2014, deceased Ibn-e-Ameen, the then injured, reported to Karim Dad Khan, ASI in the casualty of civil hospital Pabbi to the effect that on the day of occurrence when he and his son Sadiq Ameen reached near Hujra Babu Salam Akbar Pura while riding motorbike, there Mukhtaj, Waqar, Mukhtiar, Shafiq and Aizaz, who were already present over there, started firing at them with lethal weapons due to which they i.e. the complainant and his son, were hit. According to the FIR (Ex.PW2/1), Sadiq Ameen died on the spot while the

complainant got seriously wounded. Motive for the occurrence was stated to be previous blood feud. Per FIR, Muhammad Nazir and Muhammad Abbas Khan had witnessed the occurrence.

3. In order to establish its case, prosecution produced 12 witnesses whereafter statements of accused were recorded wherein they professed their innocence. After conclusion of the trial, the learned trial court found the appellants guilty of the charge and sentenced them as mentioned above. It is worth to mention that earlier appellants Waqar, Mukhtiar and Aizaz were tried and on conclusion were sentenced to death by the learned trial court vide judgment dated 07.03.2016, however, on appeal, their convictions were set aside by this court vide judgment dated 18.10.2017 and their case was remanded for trial afresh. During their trial, appellants Mukhtaj and Shafiq were arrested and put to face the trial alongwith the three already arrested accused.

4. Arguments heard and record gone through.

Gain

5. The prosecution case against the appellants consists of the ocular account furnished by PW-11, dying declaration of deceased Ibn-e-Ameen, medical evidence of both the deceased, recoveries from the spot in the shape of crime empties and bloodstained earth, recovery of motorbike from the spot and site plan of the crime spot.

6. First of all we take up for appreciation the ocular account furnished by PW-11, namely, Muhammad Abbas Khan, who is step brother of deceased Ibn-e-Ameen.



Though his name is mentioned in the FIR as an eyewitness to the occurrence but we doubt his presence on the spot at the time of occurrence for the reason that he had not accompanied with the victims when they left their house for Akbar Pura. According to his testimony, when both the deceased did not return home, he and his brother Muhammad Nazir (not produced) went after them to Akbar Pura and when they reached Akbar Pura *bazar* near the Hujra of Babu Salam, there all the five accused started firing at his brother and nephew with which they were hit and fell down from the motorbike. As per his deposition, both the deceased after hitting

entered into the Hujra of Babu Salam in order to save their lives where also they were fired at by the accused. The witness further deposed that with the fire shots Sadiq Ameen died on the spot whereas Ibn-e-Ameen sustained injuries and was taken to the hospital where he was examined by the doctor and in his presence, the injured reported about the occurrence.

7. Evidence of Muhammad Abbas Khan (PW-11) cannot be accepted for safe administration of justice on the ground that initially he was not with the victims when they left for Akbar Pura. He stated that he went behind his brother and nephew when they got late. In his evidence nowhere he has stated that he was aware of both the deceased going to Akbar Pura *bazar* and when he had no knowledge of the victims for their going to Akbar Pura *bazar*, then how he left for their search to the particular place i.e. the *bazar*. Also worth mentioning is the statement of PW-11 when he stated that "*it is correct that the wife of the deceased had not informed me about the specific places in Akbar Pura nor the name of the person with whom they had to meet*".

Again

8. When neither the specific place was known to the witness nor the person whom the deceased had gone to meet, then his seeing the deceased and that too at the time of occurrence can only be termed an extra ordinary happening and an extra ordinary event has to be properly explained by the person who claims to have seen it which is not the case in hand. No doubt, sometime extra ordinary events do take place but in the attending circumstances of the case, presence of PW-11 is not believable on the spot as neither he knew the person whom his brother and nephew had gone to meet nor the place of their visit anywhere (as mentioned earlier), therefore, arrival of the witness on the spot at the time of occurrence is doubtful, hence his evidence cannot be believed in.

Gair

9. Now we take up the FIR-cum-dying declaration of the then injured, namely, Ibn-e-Ameen, who while reporting to ASI Karim Dad in injured condition in the casualty of civil hospital Pabbi stated to the effect that on 23.04.2014 he and his son Sadiq Ameen were riding motorbike and when they reached near the crime spot

there all the five accused already present over there started firing at them with *Aslaha-e-Atisheen* with which he and his son were hit. According to the contents of the FIR (Ex.PW2/1), with the fire shots the complainant was seriously injured while his son on hitting died on the spot. It is worth to add that PW-11, namely, Muhammad Abbas is rider of the FIR and on extreme left corner whereof there is entry by the doctor to the effect that the patient was alive and conscious.



10. No doubt, as stated earlier, on extreme right corner of the FIR, there is endorsement of the doctor showing that the patient at the time of lodging of the FIR was alive and conscious but such endorsement alone would not be enough to hold that the contents of the FIR were correct qua the assailants. Of course, declaration given by a person at the time of his death carries great importance as to its truthfulness but there are certain pre-requisites which must be there in order to believe such declaration as true and one of them is that the declaration must be made without the interference of any close relative of the dying man who is

found present around the dier at the time of making the statement and second the declaration must be corroborated by the circumstances prevailing on the spot at the time of occurrence. Furthermore, it is also necessary to see, in order to believe a dying declaration, whether at the time of his death the dying person was capable to narrate the event occurred before his death.



11. On the touchstone of the above, if we look at the dying declaration of deceased Ibn-e-Ameen, it would appear that same was not free from foreign interference as his step brother, namely, Muhammad Abbas Khan (PW-11) was present around him at the time when such statement was being made. It is worth mentioning that in the preceding paragraph we have already disbelieved the testimony of Muhammad Abbas Khan and in such like situation interference on behalf of said witness in the statement of his brother, who was returning to his Creator to make an exaggerated account of the occurrence, cannot be ruled out.

12. Besides the above, physical condition of the declarant too was not such which

could allow him to narrate the occurrence as has been narrated by him. His medical examination shows that he has received the following firearm injuries on his person:-

1. A single firearm entry wound 1 x 1 cm on right interior flank with exit wound 3 x 5 cm on left side of lower back just lateral to the lumbar spine.
2. A single firearm entry wound 1 x 1 cm on lateral side of left buttock with exit wound 2 x 4 cm on upper medical side of left buttock.
3. A single firearm entry wound 1 x 1 cm on left upper guardant (left hypochondrium) with exit wound 2 x 2 cm on right side of upper back.
4. One through and through firearm wound with entry wound 1 x 1.5 cm in epigastria region with exit wound 2 x 1 cm on upper middle back.

Goin

Moreover, the medical officer who had examined the declarant had found his condition very serious (Ex.PW2/1) whereafter referred him for further treatment to LRH. If we see the endorsement of the medical officer appearing at the corner of the FIR and the referral chit, it would appear that the deceased at the time of his death could not be in a position to narrate about

the occurrence in detail as has been narrated in the FIR.

13. In addition, the dying declaration of the deceased has also not been supported by site plan of the case. It is in the FIR that the deceased were hit by the fire shots when they were riding on motorbike and after hitting they fell down. According to the site plan, both the victims were hit at points No.1 and 2 and the motorbike has been shown at point 'A'. As per the site plan (Ex.PW5/1), after falling on the ground at point No.1 and 2, both the deceased then went up to point 1A and 2A and the *inter se* distance between point 1, 2 and 1A and 2A is 17/18 paces. Keeping in view the serious conditions of both the victims, it was not possible for them to cover a distance of 17/18 paces and let assume that they were in a position to move and they did so, then there must have been some trail of blood from point where they were hit and fallen and the point 1A and 2A whereafter receiving firearm injuries they had reached which is not the case in hand. Therefore, the site plan does not corroborate the facts as narrated in the FIR.

Gan

14. For the above stated reasons, we hold that the dying declaration of Ibn-e-Ameen cannot be believed in for conviction of the appellants for the safe administration of justice.

15. Another important aspect of the case is that there is no report of FSL that the 03 empties of 222 bore and 9 empties of 7.62 bore collected from the spot were fired from more than one weapons. In the instant case, five persons, four of whom are brothers and one is nephew, are charged for the murder of two persons. In such like situation, production of the FSL report showing that the empties were fired from five weapons was must which material piece of evidence the prosecution has not produced and it appeared to us that the charge was exaggerated one which lamentable trend is very common in the area.



16. Thorough and careful examination of the case record has led this court to believe that the prosecution has not proved its case against the appellants beyond any shadow of doubt, which is a hallmark of criminal jurisprudence. The prosecution case is full of doubts benefit of which must go to the

appellants being a century old principle of criminal law. It appears to us that the learned trial court has not appreciated the case evidence in its true perspective and has fallen in legal error to convict the appellants.

17. For what has been discussed above, we accept this appeal, set aside the impugned judgment of conviction and acquit the appellants of the charge leveled against them. They be set at liberty forthwith if not required to be detained or wanted in any other case.

18. Above are the reasons of our short order of even date.

19. So far as Cr.R.No.129-P of 2020 is concerned, as we have set aside the impugned judgment of conviction, therefore, the criminal revision has become infructuous which is hereby dismissed.


JUDGE


JUDGE

Announced.

05.10.2021.

Sadiq Shah CS (DB) (Hon'ble Mr. Justice Lal Jan Khattak & Hon'ble Justice Musarrat Hilali)