

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

1) Cr.A No. 309-M/2019

Muhammad Zaman alias Kotay.....(Appellant)

Versus

The State and another.....(Respondents)

2) Cr.R No. 63-M/2019

Mst. Zaiba.....(Petitioner)

Versus

Muhammad Zaman and another....(Respondents)

3) Cr.R No. 98-M/2019

The State.....(Petitioner)

Versus

Muhammad Zaman.....(Respondent)

Present: Mr. Sher Muhammad Khan, Advocate for
the appellant.

M/S Rahimullah and Azim Khan,
Advocates for the complainant.

Mr. Haq Nawaz, Asst:A.G for the State.

Date of hearing: 20.05.2021

JUDGMENT

WIQAR AHMAD, J.- Appellant has called in question judgment of his conviction passed by learned Additional Sessions Judge-III/Model Criminal Trial Court, Swat on 02.07.2019 in a criminal case registered vide FIR No. 467 dated 30.10.1994 under sections 302/34 PPC at Police Station Kabal, District Swat. On conclusion of trial, the appellant was convicted and sentenced as follows;

- i. Under section 302 (b) PPC to undergo life imprisonment as Ta'azir;
- ii. Under section 544 (A) Cr. PC to pay Rs. 300,000/- to legal heirs of both the deceased and in default thereof, he was ordered to undergo simple imprisonment for six (06) months.

Benefit of Section 382-B Cr. PC was also extended to the appellant.

2. Criminal revision No. 63-M/2019 has been filed by complainant, whereas criminal revision No. 98-M/2019 filed by the State for enhancement of the sentence awarded to appellant namely Muhammad Zaman alias Kotay to that of death penalty.

3. FIR in the case in hand has been registered on the basis of Murasila Ex PA. Contents of the Murasila reveal that during investigation of case FIR No. 466 dated 30.10.1994 registered under sections 302/34 PPC at Police Station Kabal, complainant namely Mst. Zaiba wife of Dalilullah had lodged report of the present occurrence stating therein that she had been busy in cultivating onions along with her father-in-law namely Khalilullah as well as her husband namely Dalilullah in their field at about 09:00 AM. Accused Ayub Khan and Muhammad Zaman (present appellant), (who had been armed with

firearm), appeared in the meanwhile and started firing at father-in-law and husband of the complainant. From firing of the appellant, both father-in-law and husband of the complainant died at the spot. The occurrence was also claimed to have been witnessed by Mst. Zahida wife of Habibullah, who had got attracted to the spot on hearing sound of fire shots. Previous strained relations were stated to have been motive for commission of the offence and accordingly both the accused were charged in the first report.

4. Initially, challan under section 512 Cr. PC had been submitted against the present appellant as he had gone in absconsion after commission of the offence. Thereafter, proceedings under section 512 Cr. PC had also been initiated against him by the learned trial Court and later on, he had been declared proclaimed offender by the learned Sessions Judge Shangla at Camp Court, Swat vide his order dated 21.10.2000. Upon arrest of the appellant, further investigation was also conducted by the Investigating Officer in the case in hand. The Investigating Officer had earlier obtained injury sheets as well as autopsy reports of the two deceased. Beside other proceedings in investigation, weapon of offence was also produced by one Sher Afzal Khan, which was taken in

possession by the local police vide recovery memo Ex PW 2/5. Six empties had been recovered from the spot. FSL report regarding comparison of the empties with rifle was also received and placed on record as Ex PZ. On completion of investigation in the case, supplementary challan was put in Court against the present appellant. The prosecution examined nine (09) witnesses and closed their evidence, whereafter statement of the accused was also recorded under section 342 Cr. PC. On conclusion of proceedings in the trial, the accused/appellant namely Muhammad Zaman was convicted and sentenced as reproduced above vide impugned judgment dated 02.07.2019.

5. We have heard arguments of learned counsel for the parties, learned Asst:A.G appearing on behalf of the State and perused the record.

6. Perusal of record reveals that prosecution relied upon eye-witness account of the complainant recorded as PW-4 as well as another eye-witness namely Mst. Zahida recorded as PW-5. In her examination-in-chief, complainant has stated that at about 08/08:30am in the morning on the day of occurrence, her husband and father-in-law had been cultivating onions in their field, during which time she

heard sounds of fire shots and climbed on the rooftop of her house, where she saw acquitted co-accused namely Ayub Khan, who killed her husband and came towards her. She tried to catch him but he released himself and thereafter made firing on her father-in-law and also killed him. She further stated that at the time of occurrence, brother of her husband namely Naik Amal as well as his son namely Said Ali Shah have also been present in their field. The accused was also alleged to have made firing on brother of husband of the complainant. Almost at the end of her examination-in-chief, she has stated that Muhammad Zaman (present appellant) had also been present at the spot and made firing at her husband and father-in-law. She also stated that she had been having no knowledge about the motive that existed on part of the two accused, for commission of the offence. In her cross-examination, she admitted it correct that on the day of occurrence, brother of accused namely Ayub Khan as well as his maternal uncle had also been killed. She has also stated in her cross-examination that she had climbed the rooftop of her house after three minutes of the firing and that all the firing had been made in one go. She also admitted that it was correct that parties

have effected a compromise later on, in pursuance to which bail had been granted to all the accused.

7. It is astonishing that the complainant has changed her version in her examination-in-chief from the one given while lodging first report of the occurrence. The changed variations offered by the witness was tried to be explained by learned counsel for complainant by stating that her statement had been recorded after 24 years of the occurrence and therefore she might have forgotten the actual story and that the difference between the two versions has been minor variation, which might be ignored. But it is difficult to be agreed with learned counsel for complainant. The variations in the two accounts have not been minor in nature rather the main story of commission of the offence has been changed. The role of effective firing had earlier been attributed to the appellant at the time of lodging first report of the occurrence, which had subsequently been changed to that of the acquitted co-accused namely Ayub Khan. One of the reasons might be a fact that the appellant had been absconding while the other co-accused had earlier been arrested and had been facing trial. In his trial, complainant had shifted the effective role of causing death of the two deceased to him. She has reiterated the same stance

while appearing during trial of the appellant. Not only this, she has also given divergent accounts of her own presence. In the FIR she has stated that she had been busy in cultivating onions in their field along with her husband and father-in-law but subsequently in her Court statement, she has shown her presence inside her house and then climbing the rooftop, three minutes after hearing the fire shots. Same was the case with motive which has specifically been alleged in first report but had then been disowned by the complainant while recording her examination-in-chief in the Court. Such variations cannot be treated as minor in nature. There is a sea of difference between the two accounts, which cannot be justified by taking the plea of lapse of memory. Evidence in a case of capital charge must come from unimpeachable source or to be supported by strong circumstances that might remove inherent doubt attaching to evidence of interested or partisan witness, as held by the Hon'ble Supreme Court of Pakistan in its judgment given in the case of Thoba and Another vs. The State reported as *PLD 1963 Supreme Court 40*. When a witness is found to be telling lies on an important point having material bearing on culpability of the accused, as held by this Court in its judgment given in the case of Faridullah

Shah and another vs. The State reported as 1990 P Cr. LJ 1945, his evidence could not be attached any credence. In the case of Muhammad Achar vs. The State reported as 1991 P Cr. LJ 522, Hon'ble Karachi High Court has held that witnesses having no respect for truth and being capable of changing their versions as and when it suited them, were worthy of no credence, even if they were found to be natural witnesses. Relevant part of observation of the august Court is reproduced hereunder for ready reference;

"The witnesses having no respect for truth and being capable of changing their versions, as and when it suited to them are worthy of no credence even if they are found to be natural witnesses. The dictum laid down in Akbar Shah v. The State reported as PLJ 1974 (Lahore) 84, is to be followed while appreciating evidence of such witnesses in the given circumstances."

The variation of version made by the complainant during trial of the instant case has changed the entire complexion of the case of prosecution and same cannot be termed to be minor lapses on any dent of imagination.

8. The other witness i.e. PW-5 has also stated in her examination-in-chief that on hearing the fire shot, she had climbed the rooftop of their house along with Mst. Zaiba (complainant), where they had seen the acquitted accused namely Ayub Khan and

Muhammad Zaman (present appellant) making firing at brother of her husband and her father-in-law, whereafter they decamped from the spot. She has also stated that she knew nothing about the motive for commission of the offence. The complainant had though stated in her Court statement that this PW namely Mst. Zahida had also got attracted to the spot on hearing fire shots but she has not stated that this PW had climbed the rooftop along with her at the relevant time. In the site plan also, both the witnesses have been shown at a distance from each other and none of them have been shown at the rooftop of their house. The description of occurrence as given by the complainant, attributing a specific role of causing death of the two deceased to a particular accused, has not been stated in same manner by this PW and in this respect, the accounts of occurrence offered by the two witnesses have not been one and the same. In such circumstances, this witness who has also been closely related to the deceased is not believable.


9. When the eye-witness account of the prosecution has been disbelieved, then rest of the witnesses have mainly been formal in nature and their testimony need not be discussed. No recovery or discovery has been effected from or on pointation of

the accused/appellant. The medical evidence is also of no help to the case of prosecution in the given circumstances.

10. In light of what has been discussed above, it is held that prosecution have failed in proving the case against appellant beyond reasonable doubt. On allowing of the appeal in hand, the impugned judgment is set aside and the appellant is acquitted of the charges leveled against him on extending him benefit of doubt. He be released forthwith, if not required in any other case.

11. Since, criminal appeal No. 309-M/2019 against conviction was allowed and the appellant in conviction appeal was acquitted of the charges, therefore both the criminal revisions in hand have become infructuous and same are accordingly disposed of.

12. These are reasons for our short order of even date, which read as;



"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 02.07.2019 passed by learned Additional Sessions Judge-III/Judge Model Criminal Trial Court Swat in case FIR No. 467 dated 30.10.1994 registered under sections 302, 34 PPC at police station Kabal District Swat and resultantly acquit the appellant namely Muhammad Zaman alias Kotay of the

charges leveled against him. He be released forthwith if not required in any other case."

Announced
Dt: 20.05.2021

JUDGE

JUDGE

Office
29/05/2021
W/R