

Judgment Sheet
PESHAWAR HIGH COURT, PESHAWAR
Judicial Department

JUDGMENT

Cr. Appeal No. 833-P of 2020

Date of hearing: 30.03.2021

Appellant: (Muntazir Khan) By M/s.
Astaghfirullah, Yaseenullah &
Nasrumin Allah, Advocates.

Respondent: (State) By Mr. Omer Farooq, A.A.G.
(Raj Wali complainant) By Mr.
Shabbir Hussain Gigyani, Advocate.

S M ATTIQUE SHAH, J.- Muntazir Khan son of
Khog Khan, the appellant, has impugned the judgment
dated 08.10.2020 passed by learned Additional Sessions
Judge/Judge, Model Criminal Trial Court, Swabi, in case
FIR No.299 dated 28.09.2001 under sections 302/34 PPC,
registered at Police Station, Yar Hussain, District Swabi,
whereby the appellant was convicted and sentenced as
mentioned below:-

- (i) *Under Section-302 (b) PPC to undergo imprisonment for life as Ta'zir.*
- (ii) *The convict-appellant was also held liable to pay compensation under section-544-A Cr.PC to the tune of Rs.3,00,000/- to the legal heirs of deceased and; shall be recoverable as arrear of land revenue or in default of payment of such compensation the*

convict shall suffer further S.I for six months.

(iii) Benefit of section-382-B Cr. PC was extended to the appellant.

2. Precisely stating the facts of the case are, that on 28.09.2001 complainant Raj Wali brought the dead body of his brother Muhammad Ali to police station Yar Hussain with the help of co-villagers and reported the matter to the effect that at the time of occurrence, he was coming back after attending the call of nature, his deceased brother Muhammad Ali alongwith his son Qaiser Ali came out from their house and; when reached near him; in the meantime, Muntazir Khan (convict-appellant) and Dawar Khan (convicted co-accused) duly armed with Kalashnikovs arrived and started firing at his brother Muhammad Ali; resultantly, his brother got hit and died on the spot. The motive was reported that some 18/19 years back, sister of the accused namely Mst. Aqal Mina had eloped with deceased Muhammad Ali; but, that matter was subsequently patched up. The complainant charged the accused for the murder of his brother Muhammad Ali. Report of the complainant was reduced into writing vide FIR (EX.PA). After the commission of offence, the accused went into

hiding thus, after completion of investigation, challan u/s 512 Cr.PC was submitted against him.

3. On 27.11.2017 the convict-appellant was arrested in the present case and; after completion of investigation, supplementary challan against him was submitted. He was summoned and provisions of section-265-C Cr.PC were complied with. Formal charge against the appellant was framed to which he did not plead guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as ten (10) PWs and; after closure of prosecution evidence, statement of accused was recorded under Section 342 Cr.P.C wherein he negated the prosecution story, professed innocence and alleged false involvement in the present case. However, he neither wished to be examined on Oath within the meaning of Section 340(2) Cr.P.C nor desired to produce evidence in defense.

5. On completion of trial, after hearing the arguments of learned counsel for the parties and appraising of evidence on the file, the learned trial Court vide impugned judgment dated 08.10.2020, convicted the appellant and sentenced him as mentioned hereinabove. Feeling aggrieved from his conviction and sentences, the appellant has approached this Court by filing the present criminal appeal.

6. Learned counsel for the accused-appellant vehemently contended that impugned findings of conviction and sentence are illegal; being against the evidence so produced by the prosecution. Further, that the prosecution miserably failed to bring home the charge against the accused-appellant. That case of the prosecution is full of contradictions and improvements and; thus, not worth for maintaining the conviction and sentence so rendered by the learned trial court under any circumstances. Further, contended that it was an unseen and night occurrence. That the medical evidence is in conflict with the ocular account so furnished by the PWs; which belies the prosecution version. That the crime empties so recovered from the crime spot had not been sent to the FSL to ascertain as to whether these were fired from one weapon or more. That the learned trial Court had wrongly been influenced from the judgement passed in the case of the co-accused Dawar Khan. Further, that the case of convicted co-accused and the present accused-appellant is distinguishable from each other; that at the time of arrest of the accused-appellant nothing incriminating was recovered from his personal possession nor at his pointation any discovery was effected. Mere abscondence of accused-appellant is no ground for holding him guilty of an offence punishable with imprisonment for

life or death sentence. Lastly, he contended that the prosecution has miserably failed to establish its case beyond any reasonable doubt; therefore, the judgment of the learned trial Court requires reversal.

7. Conversely, learned counsel representing the complainant-respondent strongly opposed the arguments so advanced by the learned counsel for the appellant and; argued that earlier co-accused namely Dawar Khan was inducted in the case by the learned trial Court and; upon conclusion of his trial he was convicted and awarded death sentence; which was commuted to life imprisonment by this Court; therefore, the accused-appellant deserve no leniency. Further, that the prosecution has fully established its case against the accused-appellant beyond reasonable doubt. That the accused-appellant remained absconder for sufficient long time and; he failed to provide any plausible explanation for his abscondence. Lastly, prayed for dismissal of the appeal in hand; being meritless.

8. Arguments heard and record perused.

9. In the present case two accused namely Dawar Khan and Muntazir Khan were charged for the murder of Muhammad Ali deceased. On 30.07.2003 accused Dawar Khan was arrested and inducted in the case, after conclusion

Muntazir

of trial, the learned trial Court vide judgment dated 08.06.2004 convicted and sentenced him to death penalty and; against his conviction he filed Criminal Appeal No.488 of 2004 before this Court and; vide judgment dated 30.11.2004, his conviction was maintained; however, the sentence of death penalty was altered to life imprisonment. On 27.11.2017 convict-appellant Muntazir Khan was also arrested in the present case and; supplementary challan was submitted against him before the trial Court; wherein, he was inducted in the case and; upon conclusion of trial, vide impugned judgment dated 08.10.2020 he was convicted u/s-302(b) PPC and sentenced to life imprisonment.

10. In view of the contention of the learned counsel for the complainant, so raised at the bar qua the earlier trial and conviction of the co-accused Dawar Khan and; its impact on present case. We would like to first discuss the same. It is the golden principle of Criminal Justice that evidence adduced against an accused in a trial, is to be adjudged and scrutinized independently without being influenced from the evidence and findings of acquittal or conviction of co-accused so rendered in a separate trial. For the sake of arguments if the contention of the learned counsel for complainant is acceded to; then, certainly

holding of an independent trial of co-accused upon his arrest would be nothing; but, a trial in futility; which is neither, desirable; nor, permissible under the law. Therefore, the earlier trial and conviction of the co-accused Dawar Khan has no bearing upon the instant case. *PLD 1960 S.C (Pak) 18* titled "*Allah Ditta..vs..The State.*", *P.Cr.LJ 1997-510* titled "*Zalay Mir..vs.. The State*", *2011 YLR-1014* titled "*Sher Akbar..vs.. Mst. Sajida and another*", *2018 YLR Note-43 Hayatullah V. The state & another.*

11. As charge leveled against the convict-appellant entails capital punishment, therefore, for recording conviction in such like cases, strong and corroborative evidence of unimpeachable character is the required criteria, as findings of guilt against an accused must not be based on probabilities to be inferred from the evidence; rather, such findings must rest surely and firmly on the evidence of unimpeachable character, otherwise, the golden principle of benefit of doubt would come into play.

12. Complainant Raj Wali (PW-8) (brother of deceased) and eyewitness Qaiser Khan (PW-9) son of

deceased Muhammad Ali had charged the convict-appellant Muntazir Khan and convicted co-accused Dawar Khan (brothers inter-se) for the murder of Muhammad Ali by firing at him with their respective Kalashnikovs during night hours on the motive that Mst. Aqal Meena, sister of the accused, eloped with the deceased Muhammad Ali some 19 years prior to the occurrence. However, the complainant in his report EX.PA as well as in his Court statement stated that the matter of elopement had already been patched up. If it is so, then, the very murder of the deceased is beyond comprehension against the motive so forwarded by the prosecution. Both the PWs in their respective statements have stated that they identified the accused in the light of electric bulb; but, distance from the place of bulb and that of complainant or accused has not been mentioned therein, from which it could be ascertained that a person from such a distance can be identified or not. Moreover, they did not utter a single word that where the bulb was lit at the time of occurrence. The investigating officer prepared the site plan EX.PB at the instance of complainant Raj Wali (PW-8) and Qaiser Khan (PW-9); wherein the bulb has been shown to be affixed on the wall

of the house of Shah Zaman son of Sher Zaman at point-A and; was allegedly lit at the time of occurrence; while from point-B four empties of 7.62 have been shown recovered; but, the distance between point-A and point-B has not been mentioned in the site plan. The distance between the house of accused and the place of occurrence has been mentioned as 35 paces; while the distance between the accused and eyewitnesses have been shown as 13/14 paces; but, no point had been allotted to the house of accused in the site plan, whereas the house of accused and that of Shah Zaman have been shown opposite to each other of the thoroughfare. Although, the eyewitnesses alleged that they identified the accused in the light of bulb, which was lit at the wall of the house of one Shah Zaman; but, said Shah Zaman has not been produced before the court in order to establish that at the crucial time of occurrence, it was lit or otherwise. It is noteworthy that the I.O has not given distance between point-A, where the bulb was lit and points 4 & 5; where the complainant and eyewitness have been shown respectively. However; the distance between points 3 & 4 and 4 & 5 allotted to accused and PWs respectively had been shown as 13/14 paces respectively; whereas the distance between the house of the accused and; place of occurrence has been mentioned as 35 paces and; when we add the same with the

distance of complainant and accused i.e. 13/14 paces, that comes 48/49 paces (140 feet). In our view from such a long distance recognition of accused is not possible. The complainant during cross-examination stated that the distance between the spot and that of his house might be 250/300 paces; but, neither his house nor such distance has been shown in the site plan by the I.O, which was prepared at his instance. Furthermore, the complainant in his report EX.PA as well as in his Court statement, stated that he was coming back after easing himself, when reached the spot, he saw his deceased brother Muhammad Ali and his son Qaiser Ali coming from their house towards him on the path. During cross examination, he stated that he had shown the place where he had gone for easing to the I.O during investigation; but, no such reference has been given in the site plan EX.PB, which could support his contention.

13. During investigation, the Investigating Officer recovered four empties of 7.62 bore from the crime spot through recovery memo EX.PC. During cross examination the complainant stated that; *"I cannot say regarding the number of fire shots as whether 20, 30 or 40 shots were fired by the accused. Similarly, I cannot say as to from whose fire shots the deceased was hit."* Qaiser

Ali PW-9 in his cross examination stated that; *"I cannot give the number of fire shots at the time of occurrence nor can say with whose fire shot the deceased was hit."*

However, perusal of recovery memo EX.PC reveals that during spot inspection, the I.O recovered bloodstained earth from the place of deceased Muhammad Ali, four empties of 7.62 bore and; a bulb of 100 watt; but, the complainant did not utter a single word qua recovery of the bulb, which was alleged to be lit at the time of occurrence. However, the empties of 7.62 bore so recovered from the crime spot, were not sent to the FSL to ascertain as to whether the same were fired from one weapon or more than one weapon. Although both the eyewitnesses have forwarded the ocular account of occurrence; but, both in their respective cross examination stated that they cannot say that with whose fire shots the deceased was hit. It is also pertinent to mention here that at the time of arrest of the convict-appellant, no crime weapon has been recovered either from his direct or indirect possession nor he has made any discovery.

14. Qaiser Khan PW-9 in his examination in chief stated that; *"I and my deceased father took our evening meal*

whereafter came out from our house and were proceedings to village side." However, the ibid stance of PW-9 is belied by the statement of PW-3 Dr. Inamullah Khan, who conducted autopsy on the dead body of the deceased Muhammad Ali; who while examining the abdomen found that; "*Walls, peritoneum, small intestine found injured. Stomach healthy and empty.*" which belies the stance so taken by PW-9. The complainant during cross examination stated that; "*...I have not disclosed the object of presence of the deceased Muhammad Ali and PW Qaiser on the spot at the time of occurrence..... After the occurrence people of the locality attracted to the spot and lifted the deceased for taking to the Police Station. Similarly, hands and clothes of the PW Qaiser also not besmeared with the blood of the deceased. It is not in my knowledge as to whether PW Qaiser signed or thumb impressed my report as the same will be in the knowledge of PW Qaiser. Similarly, in my presence PW Qaiser have not made any identification of the dead body in my presence before the police as well as before the doctor..... I cannot say regarding the number of people of locality who attracted to the spot after the occurrence. Similarly, I cannot name any one among them who attracted to the spot after the occurrence.*" Qaiser Khan PW-9 during his cross examination stated that; "....

that neither the time of occurrence was mentioned by me in the police statement nor the object of our work is mentioned on the spot. The deceased was not lifted by me or by my uncle/complainant. I cannot say regarding the names of those persons who lifted my deceased father from the ground. Neither I verified the report of the complainant nor identified the dead body of my father before the police or before the doctor." The deceased was real brother and father of the eyewitnesses; albeit, the pronounced aspect of the case is that neither, they had lifted the dead body of the deceased from the spot; nor, could they name those persons who attracted to the spot after the occurrence and; lifted the dead body of the deceased to the police station; which in the given circumstances is not appealable to a prudent mind; being against the natural human conduct. Furthermore, both the eyewitnesses in their respective statements have stated that no firing was made upon them and only deceased was fired at. It is also pertinent to mention that when both the accused were duly armed with Kalashnikov; then why they had not fired at the eyewitnesses; knowing well that they would become witnesses of the occurrence and would depose against them during the trial. On mere direct charge of the appellant by the eyewitnesses without strong

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corroboration of their testimony, conviction of the appellant would be against the principles of administration of justice.

15. For maintaining conviction under capital charge, evidence of unimpeachable character is required; which lacks in the instant case. The prosecution miserably failed to prove its case in the mode and manner as alleged and; upon re-appraisal of the evidence, we have no hesitation in holding that the occurrence was an unseen one and; the attendance of both the PWs was procured later on, in order to strengthen the case of the prosecution.

16. So far as, abscondence of the appellant is concerned, it is settled law that mere abscondence of accused would not be enough to sustain his conviction. Reliance is placed upon the judgment rendered by the honorable Apex Court in Muhammad's case (1986 SCMR 823). Since there is no credible evidence to support the prosecution version, so abscondence, itself, would not be sufficient to prove the guilt of the accused.

17. In the circumstances, case of the prosecution is pregnant with doubts and dents; benefit whereof shall go to the appellant. We hold that the prosecution miserably failed to prove its case against the appellant beyond reasonable shadow of doubt. Accordingly, this appeal is allowed, the

impugned judgment dated 08.10.2020 passed by the learned trial Court is set aside and the appellant is acquitted of the charges leveled against him. He is in custody, be set free forthwith if not required in any other case.

Above are the detailed reasons of short order of even date.

Announced:
30.03.2021


JUDGE


JUDGE

(D.B.)
Hon'ble Mr. Justice Lal Jan Khattak,
Hon'ble Mr. Justice S M Attique Shah

(K.Ali,PS)