Judgment Sheet

PESHAWAR HIGH COURT, BANNU BENCH.
(Judicial Department).

Cr.A No. 171-B of 2019

Javed Khan

Vs.

The State & another.

JUDGMENT

Date of hearing:	**21.09.2021.**
For Appellants:	**Muhammad Rashid Khan Dirma Khel Advocate.**
For State:	**Mr. Saif-ur-Rehman Khattak Addl: A.G.**
For Respondents:	**Mr. Iftikhar Durrani Advocate**

SAHIBZADA ASADULLAH, J.- The convict/ appellant Javed Khan has called in question the judgment dated 29.5.2019, passed by learned Additional Sessions Judge-II, Bannu, whereby the appellant, charged in case F.I.R No. 130 dated 02.04.2017, registered at Police Station Mandan, District Bannu, has been convicted under section 302(b)/34 P.P.C and sentenced to life imprisonment with Rs.6,00,000/-, (six lac) as compensation to the legal heirs of deceased under section 544-A Cr.P.C, or in default thereof, to further undergo for six months SI. Benefit under section 382-B Cr.P.C has also been extended to the convict.

2. The complainant Adar Khan being aggrieved from the impugned judgment filed Cr.R. No. 43-B/2019, for enhancement of sentence of appellant.

3. As both, the appeal and revision petition are the outcome of one and the same judgment, are going to be decided through this common judgment.

4. Brief facts of the case, as divulged from the first information report Ex: PW 2/1, are that on 02.04.2017, at 17.00 hours, the complainant Adar Khan alongwith dead-body of his brother Imran Khan, reported the matter at Civil Hospital, Bannu, to the effect that he along with his brother Musharaf Khan were riding on one motorcycle, whereas his brother Imran Khan, on the other, were proceeding from Bannu Bazaar to their village. Imran Khan was ahead of them, when they reached near the road leading to Dandy Kala on Miran Road, at about 16:00 hours, all of a sudden accused Javed Khan, Amir Khan and Zahid Khan, armed with pistols emerged and started firing at Imran Khan, as a result whereof, he was hit, sustained injuries and fell down from the motorcycle. Accused after commission of the offence decamped from the spot. The injured Imran Khan succumbed to his injuries at the spot. Motive for the offence alleged by the complainant was previous blood feud. The report of the

complainant was reduced in shape of Murasila by the scribe Raqiaz Khan ASI and sent to the Police Station through constable Amjad Ali No.5712, while he prepared injury sheet and inquest report of the deceased and sent the dead-body under the escort of constable Ghufran No.5751 to the doctor for postmortem examination, hence, the F.I.R (ibid). On 04.4.2017 accused was arrested by the local police, having in his possession a 0.30 bore pistol along with a fitted and a spare magazine. He was also booked for the offence under section 15 Arms Act in case F.I.R No. 254, dated 04.04.2017, Police Station Cantt:, Bannu.

5. After completion of investigation, complete challan was submitted before the learned trial Court, where at the commencement of trial, prosecution produced and examined as many as twelve (12) witnesses, whereafter, statement of accused was recorded under section 342 Cr.P.C, wherein he professed his innocence and false implication, however, neither he wished to be examined on oath as provided under section 340(2) Cr.P.C, nor opted to produce defence evidence. Learned trial Court after hearing arguments from both the sides, vide impugned judgment dated 29.05.2019 convicted the appellant and sentenced him, as

mentioned above. Hence, the instant criminal appeal as well as connected criminal revision petition.

6. We have heard arguments of learned counsel for the appellant and learned Addl: A.G representing the State assisted by learned counsel for complainant and gone through the record with their valuable assistance.

7. The unfortunate incident claimed the life of one Imran Khan, while travelling in the company of the complainant and another. The incident occurred on 02.04.217 at 16.00 hours, whereas the matter was reported to the local police in the Civil Hospital, Bannu at 1700 hours. It was the complainant, who while reporting the matter charged the appellant alongwith the absconding co-accused for murder of the deceased. The appellant was arrested on 04.4.2017, by the local police of Police Station Cantt: and from his personal possession a .30 bore pistol was taken into possession and an F.I.R under the relevant section of law was registered. The appellant was later on handed over to the Investigating Officer of Police Station Mandan, who was investigating the case against the accused/ appellant and during spot pointation, when the appellant allegedly disclosed the weapon of offence to be in possession of the police of Police Station Cantt, he visited Police Station Cantt: and as such, a .30 bore pistol was

taken into possession; and in that respect, recovery memo was prepared. The accused/ appellant after his arrest, faced trial and ultimately the learned trial Court convicted the appellant vide impugned judgment. The learned trial Court was pleased to assess the matter from different angles and after applying its judicial mind to the collected evidence on file, passed the impugned judgment. Though the impugned judgment is comprehensive in all respects, yet this being the Court of appeal, we are under the obligation to assess and reassess the already appreciated evidence, to know as to whether the learned trial Court was justified in holding the appellant guilty and that, as to whether the reasoning advanced by the learned trial Court suits the situation; that as to whether the prosecution succeeded in bringing home guilt against the appellant, that too, by producing convincing and confidence inspiring evidence. We are conscious of the fact that both the sides involved in the episode are reaping the harvest of the miseries created by them or created for them, and in order to redress the grievance of either side, they are faced with, this Court is under the bounded duty to approach the core issue by adopting the parameters laid down for the purpose, so to avoid miscarriage of justice. True, that the like incidents bring the society at halt, but the outright dejection will further

deteriorate the prevailing situation, as there is always a ray of hope and these are the Courts of law to discover the same, to bring the parties to justice as, every dark cloud has a silver lining.

8. The incident was reported by the complainant to the local police, who soon after the incident shifted the dead-body of the deceased to Civil Hospital, Bannu, where the police of the local Police Station were already present. The matter was reported at 17:00 hours, to one Raqiaz (PW-4), who after drafting Murasila, prepared injury sheet and inquest report, and thereafter, sent the dead-body to the mortuary for postmortem examination. Though the dead-body was examined by the doctor, yet the time of examination and arrival of the dead-body does not find mention in the postmortem report and it was later on disclosed by the doctor that he examined the dead-body at 06.30 p.m.

9. The moot question for determination for this Court is as to whether the witnesses, more particularly, the complainant was present at the time of incident, and as to whether the incident occurred in the mode, manner and at the stated time. The complainant was examined as PW-8, who stated that on the day of incident he was informed by the deceased regarding the interest of a party in their shop, to

purchase and in order to negotiate the price, he alongwith eyewitness went to the place where his shop was situated. The complainant further stated that party who was interested in purchase of their shop was Dawar, hailing from Waziristan. He further stated that the matter was negotiated, but the bargain could not be stuck between the parties. The record tells that the only and only purpose of the complainant to visit his brother, at Bannu, was the negotiation regarding the sale of their shop, but the complainant admitted that it was not his routine to visit, we deem it appropriate to appreciate this particular aspect of the case in light of the collected evidence, so to understand that presence of the complainant with the deceased at the stated time was a natural phenomenon. We are to look for independent evidence in this respect, as we are conscious of the fact that, if complainant fails to convince us in that respect, then in that eventuality, his status will transform to that of a chance witness. The site-plan was prepared at the instance of the complainant, where the accused are shown at point No. 4, 5 and 6, with their motorcycle left behind at point-D, whereas the deceased at point-1, and his motorcycle at point-A. The complainant and eyewitness are shown at points-2 and 3 with their motorcycle at point-B. The record tells that the deceased was few paces

ahead while the complainant a few paces behind and that it was at 16.00 hours, when the accused attracted to the spot and fired at the deceased. It is pertinent to mention that the deceased was the youngest, whereas the complainant was the eldest, and that it was the complainant, who was charged for the murder of the brother of absconding co-accused Zahid. The complainant is to tell that when it was broad day light and that when he was chasing the deceased with a distance of few yards, then why the accused did not kill the complainant and that why the deceased fell a prey. The complainant being the real enemy would have been the prime target, but the lack of interest in killing the complainant indicates his absence from the spot at the time of incident. Had he been present he would have been the prime target. The deceased was shown at point-1, down the metal road i.e. on Kacha Gola, and the Investigating Officer recovered blood stained earth from there. If the deceased was riding a motorcycle, then instead of driving on the metal road, he would have not selected unpaved path to drive on. The situation helps in making an opinion that the deceased was on foot. It is interesting to note that the Investigating Officer was examined as PW-10, who stated that on arrival to the spot during spot inspection, he took into possession blood-stained earth, three empties of .30

bore along with a motorcycle belonging to the deceased, in the same breath he stated that he revisited the spot on the next day of the incident and photography was made. It is interesting to note that while making snap shots on the following day of occurrence, the motorcycle is shown standing there with the same registration number, left by the deceased. The learned counsel for the appellant, during trial, exhibited the same as PW 10/DX-1. The prosecution is to tell that when Investigating Officer had already taken into possession the motorcycle on the day of incident, then instead of having been parked in the concerned Police Station, who brought it to the spot and for what purpose. It indicates that at the time and on the day of incident the deceased was not riding on a motorcycle. The presence of the complainant, is further doubted from the fact that the report was made at 17:00 hours, in the same hospital where the postmortem was conducted, but the dead-body was examined at 06.30 p.m, surprisingly, when report had already been made and the injury sheet alongwith inquest report were prepared, then why the postmortem examination was postponed till 06.30 p.m. The delay caused in examining the dead-body when read in juxtaposition with non-mentioning of time of arrival and

examination of dead-body in the postmortem report belies the stance of the complainant.

In case titled ***'Nazir and others Vs. The State' (PLD 1962 S.C. 269),*** it was held that:-

> *"By what we said in Niaz v. The State we were not laying down any rule of law though we were explaining for the guidance of Courts our own approach to the problem that generally confronts the Courts in cases of crime by violence. It is possible to lay down a rule of law that a witness belonging to a particular category is to be presumed to be unworthy of credit without corroboration. In the case of an accomplice such a rule has already been accepted by the Courts. But we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration".*

10. Another intriguing aspect of the case is that neither the complainant, nor the eyewitness identified the dead-body before the police at the time of report and before the doctor at the time of postmortem examination. The witnesses cited in the column of identification, both in the inquest and postmortem report belong to the village of the deceased and it is for the prosecution to tell that who informed them regarding arrival of the dead-body to the hospital. The complainant when appeared before the trial Court, stated that when they reached to the hospital, the

concerned police of Police Station was already present, to whom the matter was reported. It adds to our anxiety, that how the police of the concerned Police Station reached to the hospital, when the dead-body was still on the way, and that who informed them. The time spent between the report and examination of the dead-body leaves no room to doubt that the dead-body was taken from the spot by the people present on the place of incident, and that it was after securing the attendance of the complainant that the report was made. The record further reveals that the distance between the place of incident and Police Station is 9/10 kilometers, that too, connected through a metal road, even then it took one hour to reach there. We cannot ignore that soon after reporting the matter, the complainant left the Police Station for the spot and he reached to the spot at 06.35 p.m, the time when the dead-body was still to be examined. The conduct of the witness is unnatural, being real brothers, their first priority would have been to attend the dead-body at the time of postmortem examination. The Investigating Officer, when appeared before the trial Court stated that after arrival to the spot the complainant alongwith another person arrived there on motorcycle. This witness further explained that the second person, who arrived to the spot alongwith the complainant,

was not the eyewitness, and his this assertion further discredited the testimony of the complainant, had the eyewitness been present at the time of incident and at the time of report, then he would have accompanied the complainant during spot pointation, when the complainant was examined before the trial Court numerous enmities with numerous people of the locality were put to him, to which he did not deny and in most of the enmities the complainant and his family involved, were blood feud, hence, the possibility cannot be excluded that it was doing of some unknown accused.

11. The appellant was allegedly arrested on 04.4.2017 by the local police of Police Station Cantt;, Bannu, from his possession a .30 bore pistol was recovered and a separate F.I.R under section 15 Arms Act was registered. The concerned police official from the Police Station Cantt: was examined as PW-12, who stated that he arrested the accused/appellant and prepared his card of arrest. The witness categorically admitted that he did not mention the recovered pistol alongwith ammunition in the card of arrest. He was further examined as to whether after arrest of the appellant the information was conveyed to the Police Station Mandan, he replied in affirmative, it was on the following day that the

Investigating Officer, who was investigating the murder case, came to the Police Station Cantt:. At this particular aspect of the case, the Investigating Officer Mir Daraz Khan was examined, who admitted that on the day of arrest he visited the Police Station Cantt:, but it was on the following day when the appellant was formally arrested in the present case, when the accused was brought to the District Courts, but when the two statements are read in juxtaposition, it smells foul, despite the fact the appellant was arrested and a .30 bore pistol was recovered from his possession, the Investigating Officer of Police Station Mandan, did not take interest to rush to the Police Station Cantt, there and then and to arrest the accused, who was badly needed in the present case. This is surprising that the Moharrir of the Police Station Cantt. did not inform the Police Station Mandan and even the weapon of offence was not handed over on the day when the appellant was arrested. The Moharrir of the Police Station was examined as PW-5, who stated that a .30 bore pistol with fit and spare magazine along with 13 live rounds were handed over to the Investigating Officer of the present case, which were lying in the *Malkhana* of Police Station Cantt, who sealed the same and recorded his statement under section 161 Cr.P.C. This witness was cross-examined, who admitted that

no application was submitted by Abdul Samad Khan to him for sending the case property i.e. 0.30 bore pistol No.31035024 to the Arms Expert. He further admitted that on 04.4.2017, the pistol was handed over to him in unsealed condition, and that the entries were made in the relevant Register of the case property i.e. Register No.19, of the Police Station. He went on to say that he did not produce copy of the said Register to the Investigating Officer of the present case, this is surprising to note that PW-5 candidly conceded that he did not give any documentary proof about the safe custody of the recovered pistol from 04.4.2017 to 05.4.2017. The circumstances do tell that neither the convict/appellant was arrested in the manner nor the pistol was taken into possession, rather it was a conscious attempt on the part of the prosecution to generate evidence to connect the appellant with commission of the offence, when the prosecution failed to prove recovery of crime weapon and its safe custody, then in that eventuality this piece of evidence cannot be taken into consideration against the appellant. The apex Court has time and again expressed its reservations on this particular aspect of the case and we are fortified from the judgment reported as ***'Jehangir v. Nazar Farid and another 2002 SCMR 1986'***, wherein it has been held that:-

> *"The occurrence had taken place on 21.1.1996, Nazar Farid was arrested on 1.2.1996. The rifle in question had been allegedly recovered from him on 12.2.1996 and it was at least 7 days thereafter i.e. on 19.2.1996 that the crime-empties in question had been received in the Forensic Science Laboratory. In the circumstances this piece of evidence is not credible and is of no assistance to the prosecution as against Nazar Farid accused."*

12. The medical evidence is in conflict with the ocular account, as in the site-plan the deceased is shown at point No.1, when he had nearly crossed the accused and in that eventuality, the deceased must have received firearm entry from his right to left or on his back with its exit on the front, but the situation is otherwise. True, that medical evidence is confirmatory in nature and equally true that in presence of the direct eyewitness account, it has a little significance but, here it speaks to the contrary. In the present case, as the witnesses failed to prove their presence on the spot and their statements are not trustworthy being chance witnesses, so it is the medical evidence that steers the wheel, and the conflict between the two has spoiled the prosecution case to a greater extent. Reference may be made to case law reported as ***2011 SCMR 323 'Amin Ali and another Vs. The State and 2019 SCMR 1306 'Mansab Ali Vs. the State'.***

13. The motive was stated to be the blood-feud between the parties, but the Investigating Officer failed to collect either documentary or oral evidence in that respect and even the complainant failed to substantiate the same. The complainant himself is uncertain regarding his enmities, as admittedly his family was involved in several blood feud with different people and to fix the responsibility on a single side is next to impossible, that too when complainant was spared as he should have been the prime target, there is no cavil with the proposition that the prosecution is not under obligation to prove the motive and even its weakness or absence will not damage the prosecution case, but we cannot ignore that once the prosecution alleges motive, then it is under obligation to prove the same, if it did not, then it is only and only the prosecution to suffer. The complainant failed to connect the appellant with the alleged motive, so we cannot hold otherwise, but that is the prosecution to suffer. In case titled ***"Muhammad Ashraf alias Acchu Vs. The State" (2019 SCMR 652)***, it was held that:-

> *"7. The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but*

it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."

14. The cumulative effect for what has been stated above, leads this Court to an inescapable conclusion that the prosecution failed to bring home guilt against the appellant and that the impugned judgment is the outcome of haste and without application of judicial mind to the collected evidence on file, which calls for interference, resultantly, the instant criminal appeal is allowed, impugned judgment is set aside and the appellant is acquitted of the charge levelled against him. He be set-at-liberty forthwith, if he is not required to be detained in any other criminal case. Since we have set aside the conviction and sentence awarded to the appellant by the trial Court, so, the connected Criminal Revision No.43-B/2019 stands dismissed.

15. Above are the detailed reasons of our short of even date.

Announced:
Dt: 21.09.2021

Azam/P.S

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Sahibzada Asadullah
Hon'ble Mr. Justice Muhammad Naeem Anwar