

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

...Cr.A.....No...22-A....Of.....2012.

JUDGMENT

Date of hearing.....16.06.2015.....

Appellant...(Khawas Rasool) by Mr. Wajih-ur-Rehman Khan Swati,
Advocate...

Respondent(s)...(The State etc) by M/S Muhammad Nacem Abbasi,
AAG and Qazi Shams-ud-Din Advocate

QALANDAR ALI KHAN, J:- By this

single judgment, we shall dispose of

Criminal Appeal under Section 410 Cr.P.C,

titled 'Khawas Rasool Vs. The State' (Cr.A

No.22-A/2012), Criminal Revision under

Section 439 Cr.P.C, titled 'Ali Muhammad

Vs. The State etc' (Cr.R No.10-A/2012)

and Criminal Appeal under Section

417(2-A) Cr.P.C, titled 'Ali Muhammad Vs.

Khan Shah and others' (Cr.A No.38-

A/2012), relating to case FIR No.183 dated

10.06.2010 under Sections 302/34 PPC,

Certified to be True Copy

By order
Peshawar High Court
Abbottabad Bench
Authorized Under Sec 75 Act 1973

Police Station Oghi., District Mansehra,
and emanating from common judgment/
order dated 21.02.2012 passed by learned
Additional Sessions Judge-II, Mansehra,
Camp Court, Oghi.

2. In the said judgment, appellant-convict, Khawas Rasool, (Cr.A No.22-A/2012), was convicted under Section 302 (b) PPC for committing 'Qatl-i-Amd' of deceased Muhammad Riaz and sentenced to imprisonment for life and also held liable to pay compensation of Rs.100,000/- under section 544-A Cr.P.C, to be paid to the legal heirs of deceased. However, Benefit of section 382-B Cr.P.C was extended to the appellant/accused. While accused-respondents, Khan Shah son of Akbar Shah and Muhammad Sajid son of Abdul Jalil (Cr.A No.38-A/2012), were acquitted of the charges leveled against them in the case. Feeling aggrieved of the sentence passed by the learned trial Court in respect of Khawas Rasool and acquittal of Khan

Certified to be True Copy

By Order
President, High Court
Abdullah Khan
Authorized Under Section 10(1) of the
Judicial Officers (Control) Act, 1954

Shah and Muhammad Sajid, Ali Muhammad, father of deceased, filed Revision Petition (No.10-A/2012), seeking enhancement of sentence of said appellant/accused, and Criminal Appeal (No.38-A/2012), challenging acquittal of accused-respondents, Khan Shah and Muhammad Sajid.

3. The facts, as narrated in the FIR, are that on 10.06.2010 at 02.00 AM, Muhammad Iqbal Khan, ASHO PS Oghi, while on patrol duty received information about shifting of an injured to Civil Hospital, Oghi, whereupon he reached there, where Muhammad Riaz son of Ali Muhammad, resident of Hari Gah, in injured condition, accompanied by Anwar Khan, lodged report of the occurrence that he came to Oghi bazaar in connection with some private matter and while on his way back to home, reached in front of the house of Sher Bahadur son of Kala in village Maira Kalan at about 23.30 hours. It was dark and he called Sher Bahadur by asking

33

For the purpose of this case, the

For the purpose of this case, the

him for a torch. Meanwhile, Khawas son of Ghulam Rasool, appellant/accused, came there and asked him as to why he came to their village at night time, and fired at him with 30 bore pistol from close range, as a result whereof, he sustained injuries on his abdomen and back and fell down. On his alarm, Khawas decamped from the spot.

He informed Anwar Khan, his relative, on mobile phone, who came to the spot and shifted him to the hospital. He stated that there was no previous enmity; and charged the appellant/accused, Khawas, for attempting at his life. The report was recorded in the shape of 'Murasila' (Ex.PA/1) and the case was registered under Section 324 PPC vide FIR (Ex.PA).

4. Muhammad Riaz, complainant, then injured, was examined by Doctor Niaz Muhammad, Senior Medical Officer, (PW-2) on 10.06.2010 at 2.10 AM and he found the following:-

"1. An entry wound measuring 1" in dia is noted on the abdomen on the left hypochondrium and epigastrium region. The margin of wound dark and charring marks are also present. Some part of the wound margin are burn.

2. An exit wound measuring 1½ cm in dia is noted on the left lumber region.

Cause: Firearm injuries.

Nature: Patient is in shock but can talk consciously-seriously injured.

Duration: past 02-03 hours.

Remarks:

First aid treatment given and is referred to DHQ, Mansehra for investigation and management."

5. The said Medical Officer at Civil Hospital, Oghi, also conducted postmortem examination of the deceased and noticed as under:

"External Examination

Stout young man, rigor mortis and P.M lividity in developing stage. Clothing stained with blood.

Injuries

1. An entry wound measuring 1" in dia with burn and charring marks around the wound on the epigastria region slightly toward the left side.
2. An exit wound measuring 1½ cm in dia is noted on the left lumber region posteriorly. bleeding noted. Corresponding holes and burn

is noted on the overlying clothing." 36

Internal Examination

Cranium, spinal cord and thorax:

Normal

Abdomen:

Walls, peritoneum, pancreas, small intestines, large intestine and spleen are injured. Stomach is also injured and had blood mixed fluid contents. Rest of the organs were intact.

Remarks:

"In my opinion the cause of death is firearm injuries, causing damage to vital organs, stomach, spleen, intestine and great vessels in the abdominal region, leading to hemorrhage, shock and death.

Probable time between injury and death: Four to five hours approximately.

Between death and postmortem: Four to five hours approximately."

6. During investigation, Abdul Khanan, SI (PW-7), the investigating officer, inspected the spot and prepared site plan (Ex.PB) and also recovered blood stained earth and one empty of 30 bore pistol (Ex.P-1). He also received blood stained garments of the deceased and a phial containing swab. He dispatched the blood stained articles to the FSL and also arrested the appellant/accused, Khawas, on 16.06.2010. During further investigation, the

Certified to be True Copy

16.06.2010
16.06.2010
16.06.2010
16.06.2010

eyewitnesses of the occurrence disclosed the names of acquitted accused Khan Shah and Muhammad Sajid as accomplices of appellant/accused, Khawas, in the commission of the offence. The I.O also arrested the said acquitted accused on 18.06.2010. The I.O took into possession torch, mobile phone of the deceased as well as that of the appellant/accused on his pointation and also placed on record data of mobile phones. The I.O further recovered an unlicensed 30 bore pistol on the pointation of appellant/accused and registered a separate case under Section 13 A.O against him vide FIR No.197 dated 20.06.2010. After completion of investigation, complete challan was submitted against the accused.

7. During trial, charge under section 302 read with section 34 PPC was framed against the appellant/accused and acquitted co-accused, to which they pleaded not guilty and claimed trial. The prosecution produced as many as eight PWs, including medical

Certified to be True Copy

Peshawar High Court
Abbottabad Bench
Authorized Under Sec 75 Acts Ordms

officer who conducted medical examination as well as postmortem examination of the complainant/deceased (PW-2), Muhammad Iqbal Khan, ASHO (PW-1), who drafted Murasila on the report of Muhammad Riaz, deceased, then injured, Mst. Zakria Bibi (PW-3), eyewitness of the occurrence, Anwar Khan (PW-4), Sabir Sultan (PW-5) and Sher Muhammad (PW-6), the marginal witness to the recovery memos, the investigating officer, Abdul Khanan (PW-7) and Muhammad Ajmal Khan SHO (PW-8), who registered the case vide FIR (Ex.PA) on the basis of 'Murasila' (Ex.PA/1) and submitted complete challan.

8. After prosecution closed its evidence, statements of Khawas Rasool, Khan Shah and Muhammad Sajid accused were recorded under section 342 Cr.P.C, wherein, they refuted the allegations of the prosecution against them, but declined to be examined on oath under section 340(2) Cr.P.C or produce defence evidence. On conclusion of the trial,

Certified to be True Copy

Examiner
Peshawar High Court
Abbottabad Bench
Authorized Under Sec 75 Acts Oromis

the learned trial Court / Additional Sessions Judge-II, Mansehra, Camp Court Oghi, rendered the impugned judgment dated 21.02.2012.

39

9. Arguments of the learned counsel for the appellant, learned State counsel assisted by learned counsel for the legal heirs of deceased/complainant heard, and record perused with their assistance.

10. The entire prosecution case hinges on the so-called dying declaration of the complainant, which was incorporated in Murasila (Ex.PA/1), reduced into writing by Muhammad Iqbal Khan, Additional SHO (PW-1). It may be observed at the very outset that despite presence of PW Anwar Khan as shown in the F.I.R at the time of lodging of report by deceased Muhammad Riaz, then injured, he did not sign / thumb impress the report as a rider. Likewise, no report of the Medical Officer was obtained on the Murasila showing the complainant fully conscious and capable of making the report, in order to lend

Certified to be True Copy

Examiner
Peshawar High Court
Abbottabad Bench
Authorized Under Section 75 of the Oaths Act, 1964

credence to the report as a dying declaration.

Although the Medical Officer (PW-2), later on,

tried to cover the deficiency / omission by

reporting on the injury sheet that the patient

was in shock but could talk consciously; but

the belated report of the Medical Officer would

hardly make up the deficiency / omission

when neither there is a certificate by the

Medical Officer in support of the dying

declaration nor even presence of the Medical

Officer at the time of report by the deceased,

then injured, is established. The presence of

the Medical Officer at the relevant time is not

proved; as he stated that he was present in

the hospital when the injured was brought

there, but Muhammad Iqbal Khan, Additional

SHO (PW-1) categorically stated that the

doctor was not present at the time of report

and that the hospital staff told him that doctor

had been informed and further that he was

about to reach the hospital. He, however,

admitted that the doctor did not reach the

hospital in his presence, though,

Certified to be True Copy

Examiner
Peshawar High Court
Abbottabad Bench
Authorized Under Section 75 of the Ordinance

according to the PW, it might have taken him 30/45 minutes in drafting the Murasila and preparing the injury sheet. Needless to say that the deceased, then injured, was under shock, as he was seriously injured, and the wound had been bleeding, as reported by the Medical Officer, obviously, after the occurrence at 23.30 hours on 09.06.2010 till his medical examination at 02.10 AM on 10.06.2010, thus creating further doubt about the capability of the deceased to remain conscious and lodge report, giving therein graphic details of the occurrence. In such a situation, the so-called dying declaration was to be accepted for the purpose of holding the convict-appellant guilty of the offence, with great care and caution, especially when maker of the dying declaration is not subjected to cross-examination. (2015 YLR 624), (2015 MLD 690), (1999 P.Cr.L.J 707), (2008 P.Cr.L.J 1655), (2012 YLR 636), (2012 P.Cr.L.J 1918), (PLJ 2012 Cr.C (Peshawar)

Certified to be True Copy

Examiner
Peshawar High Court
Abbottabad Bench
Authorized Under Sec 75 of the Ordinance

97 (DB)), (2013 MLD 1879) and (2014 P.Cr.L.J 715).

11. Being conscious of the onerous duty of taking the so-called dying declaration with care and caution, one also feels obliged to look into the intrinsic value of the report of the deceased (then injured). The deceased alleged in his report that he had gone to Oghi bazaar in connection with his personal work and was returning home from Oghi bazaar and reached Maria Kalan at night time, i.e. 11.30 pm, and asked Sher Bahadur whose house was situated on the road side for a torch and in the meantime, Khawas, the convict-appellant, reached there and asked him about his presence in their village at night time and then fired at him with his 30 bore pistol from a close range, causing him injury on abdomen and back side. The story narrated in the FIR does not appeal to common sense for multiple reasons. Firstly, going to bazaar at late night time, when bazaar in places like Oghi close at early

Certified to be True Copy

Examiner
Peshawar High Court
Abbottabad Bench
Authorized Under Sec 275 A & B Ord 19

hours; and then returning from bazaar at midnight i.e. 11.30 pm and asking Sher Bahadur, who was not present in his house, nor were his other family member except Mst.

Zakria. The statement of the deceased to the effect that house of Sher Bahadur was situated on the road side is not only belied by the record but also by the site plan showing the house situated on a path leading to the house from the main road. The demand of torch by the deceased from the house of Sher

Bahadur at midnight, when other inmates of the house were not present and when there were other houses nearby as well as on the road from Oghi bazaar to the village, many more pertinent questions were left unanswered, more so, when the I.O expressed in his case diary dated 12.12.2010, brought on record, suspecting intimate relationship between the deceased and PW Zakria Bibi, and the fact further augmented by twenty four calls made by PW Zakria Bibi from her cell phone to the cell phone of deceased and

Certified to be True Copy

For Officer
Peshawar High Court
Abbottabad Bench
Authorized Under Sec 75 Acts Ordinance

seventy calls made in return from the other side.

12. The FIR showed the deceased standing near the door outside the house, but the site plan, prepared on the pointation of PW Mst. Zakria, Mst. Khudeja and Anwar Khan, shows the place of occurrence inside the house, wherefrom the blood stained earth and empty shell of 30 bore were also recovered by the I.O. and positive reports were obtained from the Forensic Science Laboratory as well as Firearms Expert, thereby, confirming the scene of the occurrence, shown in the site plan, as against the one recorded in the FIR by the deceased-complainant.

13. In her statements under section 161 and 164 Cr.P.C, the so-called eyewitness, Mst. Zakria Bibi, mentioned the presence of her aunt, Mst. Khudeja, in the house when her other family members were away for participation in the marriage ceremony of a relative. Indeed, it was Mst. Khudeja who

Certified to be True Copy

called the convict-appellant, the deceased and co-accused Khan Shah as to who were they and what were they doing; but only Mst. Zakria Bibi was produced and the said Mst. Khudeja was abandoned for the reasons best known to the prosecution. Anyhow, Mst. Khudeja was the best available evidence, but her statement before the Court was withheld for undisclosed reasons, thereby creating a serious doubt in the case of the prosecution, especially, when credentials of Mst. Zakria Bibi were seriously jeopardized by the defence. Besides, statement of Mst. Zakria Bibi creates further serious doubts when she claims identification of the accused in the torch light, because availability of electricity light is not denied, and further when she also mentioned names of Khan Shah and another unknown person (co-accused Muhammad Sajid) on the roof of the house at the time of occurrence, who were nowhere mentioned as co-accused in the so-called dying declaration of the deceased-complainant.

Certified to be True Copy

By order

Peshawar High Court

Abbottabad Bench

Authorized Under Sec 75 Act 1973

14. It is also something beyond comprehension that no one from the nearby houses, shown in the site plan, was attracted to the spot despite noise, grappling between the accused and the deceased, preceding the occurrence, which, allegedly, attracted Mst. Zakria and Mst. Khudeja, followed by firing in the house, the inmates of which, excepting Mst. Zakria, were away. On the other hand, in the FIR, the deceased-complainant specifically stated that he contacted PW

Anwar Khan on his cell phone who arrived at the spot and removed him to the hospital.

Apart from the fact that contact of PW Anwar Khan from the cell phone of the deceased was never established from the cell data, his presence in the hospital could also not be proved through his signature / thumb impression on the FIR besides the thumb impression of the deceased-complainant in order to substantiate case of the prosecution and his statement before the Court. PW

Muhammad Anwar Khan was uncle of the

Certified to be true copy

Respected Magistrate
 Peshawar High Court
 Atm. Office No. 100
 Peshawar

46

[Handwritten signature]

deceased, but himself admitted that he would not have gone to the spot had he not received call from the deceased on his cell phone. His testimony is also not worthy of reliance when he admits that the doctor was present in the hospital when they reached there alongwith the injured, whereas Muhammad Iqbal Khan, Additional SHO stated that the doctor did not reach the hospital in his presence, where he stayed for 30/45 minutes for drafting Murasila and preparing the injury sheet. The other two co-accused, namely, Khan Shah and Muhammad Sajid were acquitted of the charges by the learned trial Court / Additional Sessions Judge-II, Mansehra, vide impugned judgment dated 21.02.2012, and appeal against their acquittal also stands dismissed vide this judgment, owing to lack of even an iota of incriminating evidence against them. Likewise, the convict-appellant also stands acquitted of the charge of recovery of alleged weapon of offence, vide a separate judgment of even date.

Certified to be True Copy
 Examiner
 Peshawar High Court
 Abbottabad Bench
 Authorized Under Sec 75 Act 1973

15. Above all, the motive for the offence remained shrouded in mystery. In the FIR, the deceased-complainant categorically stated that he had no previous enmity. According to the deceased-complainant, the convict-appellant reached the spot when he had just asked for torch from Sher Bahadur while standing at the door of his house, and inquired from him as to why he had come to the village at night time and then fired at him with his 30 bore pistol. The important questions like how the convict-appellant reached the spot immediately after the deceased-complainant had arrived there and had just asked for the torch and why he got so annoyed with the visit of the deceased-complainant to the village at night time that he, allegedly, took his life, without having any previous enmity or ill-will, as stated by the deceased-complainant in his so-called dying declaration, nevertheless, remained unanswered. It may also be added here that the deceased-complainant stated in his report that soon after inquiring from him

48

3

Certified to be True Copy

Examiner
Peshawar High Court
Abbottabad Bench
Authorized Under Section 75 of the Ordinance

the purpose of his visit to the village at night time, the convict-appellant fired at him with his pistol, without disclosing the factum of grappling of the convict-appellant and co-accused Khan Shah with him, which was not only important part of the statement of PW Mst. Zakria Bibi under section 164 Cr.P.C but was also reiterated by the PW in her statement before the Court. The non-disclosure of motive for the offence, which, indeed, took place in mysterious circumstances tends to create serious dent in the case of prosecution, the edifice of which was raised on the dying declaration of the deceased-complainant.

16. In view of the above stated discrepancies and glaring contradictions in the case of the prosecution against the convict-appellant, it was not safe to rely on the so-called dying declaration of the deceased-complainant in the absence of credible corroborative ocular and circumstantial evidence. Therefore, Criminal Appeal No.22-

Certified to be True Copy

Examiner
District Court
Dhaka
Dated: 15/05/2019

A of 2012 is allowed and the conviction and sentence of the appellant recorded vide judgment of the learned trial Court / Additional Sessions Judge-II, Mansehra, Camp Court, Oghi dated 21.02.2012 are set aside and the appellant is acquitted of the charges leveled against him. The appellant be set at liberty if not required in any other case.

17. Resultantly, Criminal Revision No.10-A/2012 by the father of deceased-complainant for enhancement of the sentence awarded to the appellant-accused, Khawas Rasool, is dismissed.

18. The Criminal Appeal No.38-A of 2012 under section 417(2-A) filed by the father of the deceased/appellant challenging the acquittal of accused/Khan Shah and Muhammad Sajid, is also dismissed.

These are the detailed reasons for short order of this Court of even date.

Announced.
Dt.16/06/2015.

Spin
JUDGE
[Signature]
JUDGE

Certified to be True Copy

Examiner
Peshawar High Court
Abbottabad Bench
Authorized Under Sec 75 Acts Ordns