

**THE PESHAWAR HIGH COURT,**  
**BANNU BENCH.**

*[Judicial Department].*

**Cr.A No. 20-B of 2018**

***Imtiaz Khan***

**Vs.**

***The State***

**JUDGMENT**

*Date of hearing:*     **22.10.2019.**

*For Appellants:*     **Mr.Muhammad Javed Aslam, Advocate.**

*For State:*           ***Mr.Shahid Hameed Qurashi Addl:A.G.***

*For Respondents:*   **Mr. Najibullah advocate.**

**SAHIBZADA ASADULLAH, J.---**

Appellant Imtiaz

Khan, being aggrieved from the judgment dated 10.01.2018 of the learned Additional Sessions Judge-II, Lakki Marwat in Juvenile Sessions Case No. 05 of 2016, by which the appellant was convicted U/S.302(b)/34 PPC, and sentenced to suffer life imprisonment with fine of Rs.5,00,000/-(Five Lacs), recoverable as arrears of Land Revenue out of which on its recovery half of the amount of fine shall be paid to the legal heirs of the deceased

within the meaning of Section. 544-A Cr.P.C, as compensation. In default of payment of fine the accused was directed to further undergo six months SI. Benefit of Section-382-B Cr.PC was extended in favour of accused in the case vide FIR No. 468 dated 13.12.2015 registered U/S.302/109/34 PPC at PS, Pezu, District, Lakki Marwat. Hence, has preferred this appeal against his conviction and sentence.

**3-** Briefly stated facts of the prosecution case are that on 13.12.2015, Muhammad Usman s/o Jan Muhammad Khan at 10:10 hours in injured condition at Rural Health Center Tittar Khel reported the matter vide murasila EX.PA/1 to the effect that on the eventful day Imtiaz (appellant), his friend, called him that that he is waiting for him at the shop of one Sattar “Pulaw Ferosh”, thus, he must reached there forthwith. Complainant reached there, where Imtiaz and his father Abdul Farid were present. After eating “Pulaw” at the said shop, they all reached near Basic Health Unit Dara Pezu at 09:00 hours, complainant and Imtiaz suddenly exchanged hot words and grappled, and meanwhile, Abdul Farid father of appellant commanded his son Imtiaz to kill, thereby Imtiaz took out his pistol from the trouser fold and fired at

complainant with intention to commit his Qatl-e-amad, who resultantly got hit, seriously injured and fell down. Accused decamped from the crime venue. No previous motive was advanced except the altercation and quarrel between the complainant and appellant. On the initial murasila report of complainant, the FIR was registered U/S. 324/109/34 PPC, but after expiry of the complainant Section-302 PPC was inserted in the FIR.

It is to be mentioned here that SHO of concerned PS while on Gasht on receipt of information in respect of the occurrence, he reached the spot, he shifted the deceased then injured to hospital while he along with police contingent chased the accused who was apprehended in the fields near Wanda Joogi after exchange of firing along with Kalashnikov with fitted magazine containing ten live cartridges, spare magazine containing 25 live cartridges of 7.62 bore and a .30 bore pistol along with two live rounds of the same bore, therefore, in this respect a separate case vide FIR No. 469 of the even date U/S. 324-353 PPC r/w Section-15 AA was also got registered against the appellant.

3- On completion of investigation, challan was submitted against the accused before the learned trial court and after compliance of provisions of Sec:265-C Cr.P.C, formal charge was framed against the accused on 04.7.2016, to which he pleaded not guilty and claimed trial.

4- In order to prove guilt of the accused, the prosecution examined as many as eight witnesses.

5- Kaleemullah IHC was examined as **PW-1**, who incorporated the contents of murasila report EX.PA/1 into FIR EX.PA.

6- Zarif Khan 535 appeared as **PW-2**, who took the inquest report and the dead body of the deceased to the doctor for PM examination and thereafter he handed over the dead body to the legal heirs while garments and PM documents of the deceased were produced by him to the I.O on the spot.

7- Javed Khan SHO **PW-3**, during spot inspection handed over .30 bore pistol with fitted magazine containing two live rounds of the same bore duly recovered from the accused and

one mobile phone set with Sims which the I.O had taken into his possession vide recovery memo: Ex.PW-3/1 and Ex.PW-3/2.

8- Amir Khan ASI appeared as **PW-4** incorporated the report of deceased then injured in shape of murasila Ex.PA/1, and prepared the injury sheet Ex.PW-4/1.

9- Ahmad Noor Medical Officer RHC Tittar Khel appeared as **PW-5**, who conducted medicolegal examination of the deceased then injured vide Ex.PW-5/1 and after expiry of the injured, conducted Postmortem examination vide report Ex.PW-5/2.

10. Fazal Rehman brother of deceased then injured appeared as **PW-6**, on the day of incident at the relevant time had seen Muhammad Usman along with Imtiaz and Abdul Farid accused. H narrated that at about 09:00 hours, he heard fire shots, rushed there and found his brother Muhammad Usman disclosing that he was fired at by the accused Imtiaz with his pistol on the command of his father, he rushed the injured to RHC Tittar Khel for medical treatment, there the local police came to whom the injured narrated the matter. He verified the signature of his brother on the murasila. The injured was then shifted to D.I.Khan,

who on the way succumbed to the injuries, thus, the dead body was returned to RHC Tittar Khel . He identified the dead body of the deceased before the doctor and the site-plan Ex.PB was prepared by the I.O at his pointation. He also witnessed the recovery memo: E.PW-6/1 and Ex.PW-6/2 vide which blood-stained mud, six empties of .30 bore and blood-stained clothes were preserved by the I.O.

**11.** Zairi Gul ASI/Investigating Officer appeared as **PW-7**, carried out complete investigation in the instant case while Farman Khan SHO appeared as **PW-8** who submitted complete challan against the accused.

**12-** After closure of prosecution evidence the accused was examined U/S. 342 Cr.P.C, wherein he denied the allegations of the prosecution and stated that he was innocent and had falsely been implicated. However, he neither opted to be examined on Oath nor produced defence.

**13-** On the conclusion of trial the accused were convicted and sentenced as stated above.

**14-** The learned counsels for the parties were heard at length and with their precious assistance the record was read from cover to cover.

**15-** The incident occurred at 09:00 AM, when the deceased was allegedly called on his mobile cell by the appellant and his father namely, Abdul Farid. The deceased as per his statement came to them and chit chat started where after the accused asked him to follow and as such they reached to the place where the tragedy was enacted. The report of the deceased which was allegedly taken vide murasila Ex.PA/1 explains the situation that initially the parties talked to each-other and gradually altercation started accused/appellant pulled out his pistol from the fold of his Shalwar and fired at the deceased. The overall situation does not appeal to a prudent mind that, when no motive was alleged then what need was felt by the co-accused to accompany his son to the place and to meet the deceased. It looks abnormal that in absence of any strong motive, father would command his son to kill. The report of the deceased is silent regarding the presence of PW-6 Fazal Rehman at the time of occurrence, had he been present his name would find mention in the report. Fazal

Rehman latter on introduced himself as eye-witness, and stated that when the deceased received Fire-arm injuries, he rushed towards the injured, who told him that he was fired upon by the appellant/accused commanded by his father. This witness further stated that the deceased then injured pointed the specific places of the accused at the time of firing. The story took another turn when PW-3 Javed Khan SHO came forward and stated that he was around the place of occurrence, when he heard fire shots, he rushed to the place where the deceased then injured was lying on the ground, who narrated the events to him and pointed out the way accused had fled. This witness further stated that on the spot he saw PW-Fazal Rehman and also make arrangements for shifting the injured to the hospital and himself with other police officials ran after the accused. PW-3 further stated that they were chasing the accused and it was a little distance from the spot that accused turn around and opened indiscriminate firing on the police party, the accused was shown arrested and a .30 bore pistol with live cartridges and a Kalashnikov was recovered from his immediate possession and a case FIR No. 469 dated 13.12.2015 U/S. 324/353 PPC/ 15 AA was registered. We are surprised to see that the accused/appellant after firing at the deceased then injured



when ran away and admittedly the police in a hot pursuit arrested him near the place of occurrence then how the Kalashnikov came to his hands when he had left the spot with a .30 bore pistol in hand. Two things has added to our anxiety, one that if the report of the deceased then injured was taken to be correct the SHO finds mention nowhere and the other than when the appellant was arrested there and then how the other weapons came to his possession, what can we gather from is that the witnesses are telling a lie and the weapons recovered were planted with the sole purpose to make the prosecution case a success and this stance is further belied by the age of accused/appellant being of 15 years as in such a tender age this act of retaliation cannot be expected.

**16-** The presence of PW-6 on spot is not established, as established on one hand this witness was not named in the report whereas on the other he admittedly runs a service station situated in Lakki Cement Factory. The time of incident is 09:00 AM, so he must have been present at the place of his business, his presence on or around the spot at the time of occurrence is unnatural and we feel no hesitation, but to hold that this witness was a chance witness.

The apex court in case titled **Muhammad Ashraf alias Acchu Versus the State** (2019 SCMR 652) held:-

*"It is well-settled that benefit of slightest doubt must go to an accused and in a case where the court reaches a conclusion that the eye-witnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story is concocted by the PWs, then the case of accused merits plane acquittal"*

17- The entire case of prosecution hinges upon the dying declaration. The prosecution was duty bound to prove that in fact the deceased was well oriented in time and space and that all legal precautions were taken while the scribe was scribing his report. This is on record that the deceased in injured condition was taken to hospital, where the scribe PW-4 reached at 10:08 AM and prepared his injury sheet. This PW-4 was thoroughly cross-examined, but when a particular question was put to him that why he did not obtain a fitness certificate from the doctor regarding the capability of the injured to speak, his reply was strange that he did not feel the need. This is on record that at the time of report, the doctor was also present in the emergency room and this was one of the legal requirements that a fitness certificate

should have been requested and the doctor should have endorsed the murasila, but this legal requirement was willfully ignored which leads us to a conclusion that in fact the injured was brought by the local people and was unable to talk and later on the eye-witness was procured and the report was taken down. The doctor who was examined as PW-5 was cross-examined, who while replying in respect of entry wound No.1, stated that injury No.1 and 2 the muscle of the tongue got detached from mandible bone, the mandible bone was fractured and this situation directly affect the speech, so when all these things are placed together, it comes out that the deceased then injured was not in a position to talk and as such the so-called dying declaration cannot be taken a report made by the deceased.

The apex court in case titled **Tahir Khan Versus the State (2011 SCMR 646)** held:-

*"It is thus absolutely clear from the principles laid-down by this court that dying declaration is a weaker type of evidence which needs corroboration and that conviction can be based on the basis of such a declaration when fully corroborated by the other reliable evidence. Thus the facts and circumstances of each case have to be kept in view and also the*

***credibility, reliability and acceptability of such a declaration, by the court. "***

18- The prosecution stressed the recovery of pistol from accused and six empties of .30 bore from the place of occurrence, which matched together and to them was sufficient for conviction. It is pertinent to mention that allegedly the appellant was arrested in hot pursuit and a .30 bore pistol along with a Kalashnikov was recovered from the appellant after exchange of heavy firing. PW-3 Javed SHO who is also scribe of the report in that respect stated that the pistol recovered from possession of appellant/accused was sealed on the spot and was handed-over to the investigating officer of case FIR No.469. There is mystery all around that when and at what time, the pistol was handed over to PW-7 Zairi Gul ASI when admittedly this SHO did not meet the investigating officer at 1:30 PM on the spot. Our anxiety increased that whether it was the pistol used by the appellant in commission of the offence and recovered from the possession of the appellant ? We safely hold it "No" for the reason that the recovered pistol was stated to be sealed at the time of recovery and this pistol was produced in unsealed condition to the I.O which speaks nothing, but malafide on part of the prosecution and fabrication. The pistol

along with empties were sent to FSL where these articles were received on 22.12.2015 after a delay of ten days, but this delay has never been explained that where these articles were lying for these long ten days and even the Muharrir of the Malkhana and the constable who took it to the office of Chemical Examiner were not examined.

The apex court in case titled **Muhammad Ashraf alias Acchu Versus the State (2019 SCMR 652)** held:-

*"After scrutiny of evidence, it has been observed by us that no such corroboration is available on record because the empties secured from the spot and the .30 bore pistol allegedly recovered from the possession of appellant at the time of his arrest were sent to the office of FSL on the same day, i.e, on 21.3.2002, after the arrest of the appellant on 23.01.2002. In these circumstances, the report of FSL cannot be relied and is legally inconsequential."*

19- The record is silent that what led to the death of the deceased, as no motive was given. The ages, i.e, of the deceased 19 years, and of the accused 15/16 years, lead us to draw an inference that in fact the matter between the two was something

which none was ready to disclose for the purpose better known to them, but either side made a conscious attempt to suppress the truth.

Be that as it may the prosecution failed to convince this court that it was non-else but accused who killed the deceased.

**20-** After thoroughly evaluating the evidence available on file this court reaches to a conclusion that the prosecution has miserably failed to prove its case against accused/appellant. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appeal recorded by the learned trial court is set-aside and he is acquitted of the charge by extending him the benefit of doubt, he shall be released forth with from jail, if not required to be detained in connection with any other case.

**21-** These are the detailed reasons of my short order of the even date.

Announced:  
22.10.2019

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