

Judgment Sheet

IN THE PESHAWAR HIGH COURT, ABBOTTABAD
BENCH.

JUDICIAL DEPARTMENT

...Cr.A.No....30-A/2012.

JUDGMENT

Date of hearing.....27/05/2015.....

Petitioner...Abdul Latif by Abdul Amir Mustafa Khan Sivali Adv

Respondent...Adl. A.G. for State and Mr. (Hed. Muhammad) Khan, Adv. for repd./complainant

QALANDAR ALI KHAN, J:- The instant criminal

appeal by Abdul Latif, Abdul Qayyum, Nizamuddin

alias Jani sons of Alamzeb, Hakim Zai and Ameer Zai

sons of Pakhtun, convict/appellants, as well as

Cr.A.No.39-A/2012 and Cr.R.No.11-A/2012 by

complainant, Munawar Khan, arise out of the same

impugned judgment of the learned Sessions

Judge/Zilla Qazi, Kohistan dated 24.02.2012 in case

vide FIR No.09 dated 30.03.2011 under sections

302/148/149 PPC police station Karang; therefore,

judgment in this criminal appeal shall also dispose of

the said criminal appeal/ revision.

2. On conclusion of trial in case vide FIR No.9,

the learned Zilla Qazi/Sessions Judge, Kohistan,

convicted Abdul Latif, Abdul Qayyum, Nizamuddin

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Abbottabad Bench
Authorized Signatory

alias Jani, Hakim Zai and Ameer Zai, appellants, under section 302-B PPC and sentenced them to life imprisonment and fine of Rs.1,00,000/- each and in default of fine to further SI for six months each, with direction for payment of half of the amount of fine to the legal heirs of deceased, while extending benefit of section 382-B Cr.P.C. to the appellants; and at the same time acquitted accused Alamzeb (deceased) and Fazal-e-Wadood (Abdul Wadood) accused-respondents in Cr.A.No.39-A/2012 by the complainant, Munawar Khan, against acquittal of the accused-respondents. The Cr.R.No.11-A/2012 has been moved by the complainant for enhancement of the punishment awarded to the appellants/ respondents in the criminal revision, in the case, by the learned Sessions Judge/Zilla Qazi, Kohistan, vide the impugned judgment dated 24.02.2012.

3. The case was registered on the report of complainant, Munawar Khan, who reported to Tahir Khan, ASI, in his house at 0400 hours on 30.03.2011 that on 29.03.2011 at 1400 hours accused/appellants Abdul Qayyum and Abdul Latif sons of Alamzeb called them and when he along with his deceased brothers Anwar and Fazl-e-Qadir and injured Shamsul Qamar

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Abbottabad Bench
Authorized Under Section 75 of the Oaths Act, 1964

and relative, Muhammad Ali son of Abdul Hayee, went out they found the appellants present behind a nearby 'Bana' duly armed with deadly weapons and axes, and with the firing of appellants Hakim Zai and Qayyum, Anwar was hit and died on the spot; while Fazl-e-Qadir was also hit with the firing of Abdul Latif and Fazal Wadood and got injured and then succumbed to the injuries, and Shamsul Qamar was injured on his head and forehead with axe blows by appellants Nizamuddin, Ameer Zai and Alamzeb. The

complainant mentioned names of Muhammad Ali and Nizamuddin as eyewitnesses and cited quarrel of children two days prior to the occurrence as motive for the offence. The complainant charged the accused/appellants for the 'Qatl-i-Amd' of deceased and attempt on the life of the injured in the prosecution of their common object. However, the complainant was himself proclaimed offender in case FIR No.17/10 under sections 506/448/449/34 PPC police station Karang.

4. After registration of the case, investigation was conducted by the local police, but in keeping with the local custom/tradition, the deceased were exempted from postmortem examination on the

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 not obtained Bench
 as per order dated 20.05.2010

application of the complainant. However, spot was inspected by the I.O. during which, blood stained earth was secured from the places assigned to all the three deceased in the site plan, while four crime empties of 7.62 bore were shown to have been recovered from the places assigned to the accused/appellants in the site plan. The blood stained earth secured from the spot and blood stained garments of the deceased were dispatched to the Forensic Science Laboratory and report therefrom was received in the affirmative. The report of Fire Arms Expert in respect of the crime empties recovered from the spot and the 7.62 bore rifle, alleged weapon of offence, was also received in the affirmative with respect to the two crime empties and in the negative with respect to the remaining two crime empties. After arrest of the accused, recording statements of witnesses under section 161 Cr.P.C. and completion of investigation, challan was submitted in the case by the prosecution, and accused/appellants were sent up to face trial in the court of Zilla Qazi/Sessions Judge, Kohistan.

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 Abbottabad Bench
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5. The learned Sessions Judge/Zilla Qazi, Kohistan framed charge against the

accused/appellants under sections 302/148/149 PPC, to which they pleaded not guilty and claimed trial. During trial, as many as eight P.Ws were examined by the prosecution, namely, Munawar, complainant, (P.W.1); Nizamuddin, eyewitnesses mentioned in the FIR alongwith another eyewitness and his brother and cousin of the complainant, Muhammad Ali (P.W.2); Muhammad Abbas Khan SHO submitted challan (P.W.3); constable Syed Naseer, witness to the dispatch of various articles recovered in the case to the FSL and Fire Arms Expert (P.W.4); Muhammad Tahir ASI drafted *Murasila* on the report of the complainant (P.W.5); Khurshid Ahmad MHC registered FIR on receipt of the *Murasila* (P.W.6); Abdur Rashid ASI, marginal witness to several recovery memos in the case (P.W.7); and Muhammad Nazeer SI/OI, investigating officer in the case (P.W.8). The remaining P.Ws including the other eyewitnesses, namely, Muhammad Ali were abandoned, and prosecution evidence was closed; whereafter statements of the accused were recorded under section 342 Cr.P.C., wherein they refuted allegations of the prosecution but declined to be examined on oath or produce defence evidence. It may be added



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Abbottabad Bench
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here that one of the accused/appellant, namely, Abdul Latif also lodged FIR No.10 dated 03.04.2011 under section 337-F(ii)/34 PPC police station, Karang Kohistan, in respect of the same occurrence by giving his own version and therein charging both the eyewitnesses mentioned in the FIR, namely, Muhammad Ali and Nizamuddin for causing him injuries with axe blows. Anyhow, the trial culminated in the impugned judgment.

6. The judgment of the learned trial court leading to conviction and sentence of the accused/appellants is primarily based on the motive for the offence, ocular account of the eyewitnesses mentioned in the FIR, recovery of crime empties from the spot and weapon of offence, together with presence of accused/appellant Abdul Latif and eyewitnesses on the spot at the time of occurrence in view of report by the accused/appellant.

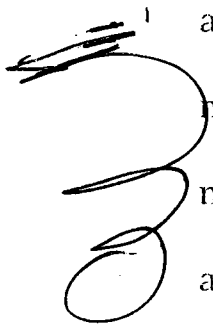
7. Arguments of learned counsel for the convict-appellants, learned Additional A.G. and learned counsel for the complainant heard, and record perused.

8. The FIR was, admittedly, lodged after delay of 14 hours at 04:00 hours on the following day of the occurrence i.e. 30.03.2011, while the occurrence had

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taken place at 1400 hours on 29.03.2011. The distance between place of occurrence and police station has been shown as 8/10 kilometers; but the report was not lodged by the complainant in the police station; and he reported the occurrence to the police on their arrival at his residence, where he was present alongwith the dead bodies of his brothers Anwar Khan and Fazal-e-Qadir; and even injured Shamsul Qamar was present there and not taken to the hospital for treatment. It is, indeed, noteworthy that the complainant was himself a fugitive from law and declared proclaimed offender in case FIR No.17/10 under sections 506/448/449/34 PPC of police station Karang. The inordinate delay in lodging the FIR in the house of the complainant instead of the police station or hospital, presence of seriously injured, Shamsul Qamar, who later on succumbed to his injuries, in the house even after 14 hours of the occurrence and his non-shifting to the hospital for treatment, together with the fact that the complainant was himself proclaimed offender and fugitive from law, would cast serious doubts about credibility of the report and authenticity of the FIR.

9. Neither the complainant nor the two eyewitnesses mentioned in the FIR received a single injury or even a scratch in the occurrence despite alleged indiscriminate firing, claiming three lives who have been shown in the close proximity of the deceased in the site plan, which would make it next to impossible for the persons in the line of firing to escape unhurt. These facts would also give rise to serious doubts about the presence of the complainant and eyewitnesses mentioned in the FIR, notwithstanding the fact that all the three deceased namely, Anwar Khan, Fazal Qadir and Shamsul Qamar are real brothers of the complainant while both the said eyewitnesses are his cousins, and apart from the fact that Nizamuddin furnished no explanation for his presence and presence of his real brother and other eyewitness, Muhammad Ali, on the spot at the time of occurrence, except that they had gone to the residence of the complainant on the eventful day. It may also be added here that both the eyewitnesses mentioned in the FIR are real brothers inter se, and cousins of the complainant. The prosecution, however, produced only Nizamuddin and abandoned Muhammad Ali alias Qari.



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10. One of the accused/appellant, Abdul Latif, also sustained axe blow injuries and lodged his report vide FIR No.10 dated 03.04.2011 under section 337-F(ii)/34 PPC police station Karang against both the eyewitnesses, Nizamuddin and Muhammad Ali, while giving a different version about the occurrence. If viewed in the context of cross case/version with regard to the same occurrence, one would find the scene of occurrence situated close to the house of the accused as compared to the residence of the complainant and deceased and genuinely suspect them for aggression.

11. The police could, allegedly, recover only one weapon of offence from the residential room of accused/appellant, Abdul Latif; but it is intriguing to note that the accused/appellant was arrested from the same room on 31.03.2011, while the weapon of offence was shown to have been recovered on his pointation on 3.4.2011. In any case, the crime empties recovered during spot inspection on 30.03.2011 and the so called weapon of offence recovered on 3.4.2011 were received in the Forensic Science Laboratory for their examination by the Fire Arms Expert with considerable delay on 8.4.2011, with no cogent

evidence with respect to their safe custody during the intervening period, thus eroding the evidentiary value of the report of Fire Arms Expert. Above all, accused/appellant, Abdul Latif, has been acquitted of the charge under section 13 AO, vide judgment/order of even date.

12. Likewise, the recovery of the other weapons of offence i.e. axes, which were handed over to the I.O. by the two accused/appellants, Hakim Zai and Nizamuddin, would be of no significance as the axes were not having blood stains and their handles were found freshly cut. Besides one of the axes was shown to have been recovered from accused/appellant Hakim Zai instead of Ameer Zai, which has been declared a clerical mistake by the learned trial court. It is noteworthy that axe blows to deceased Shamsul Qamar had been attributed to accused/appellants Nizamuddin and Ameer Zai, but the I.O. not only showed recovery from the accused/appellant Hakim Zai but also insisted recovery of the axe from the said accused/appellant.

13. Moreover, the accused/appellants have been shown arrested in the Card Of Arrest at 1245 hours on 31.03.2011 but in his statement in the court the

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I.O, mentioned the date of arrest as 30.03.2011, which fact was also supported by Muhammad Tahir ASI (P.W.5). On account of these contradictions/ discrepancies, the learned trial court was constrained to pass remarks against the I.O., and approach DIG Hazara Division and DPO Kohistan for action against him. Even then benefit of such discrepancies/doubts was not extended to the accused/appellants.

14. Apart from the above discrepancies/ infirmities in the case of the prosecution, the learned trial court acquitted co-accused, Fazal Wadood, on the ground that he was suffering from some kind of mental ailment and was charged for consultation alongwith co-accused Alamzeb by the mother of complainant in the court on 22.02.2012, though Fazal Wadood was specifically charged for the 'Qatl-i-Amd' of Fazal Qadir alongwith convict appellant Abdul Latif. Likewise, the co-accused, Alamzeb, who was specifically charged and assigned the same role of causing axe blows, as attributed to the co-accused Ameer Zai and Nizamuddin, was acquitted on the basis of concessional statement of the mother of the complainant in the court on 22.02.2012, coupled with

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the fact that he was aged about 70/71 years and no recovery was made from his possession.

15. The learned trial court took extra pain to explain that absence of postmortem report would have no adverse effect on the prosecution case, but lost sight of the fact that in view of substantial delay in lodging the FIR and fatal discrepancies in the ocular and circumstantial evidence of the prosecution, the absence of postmortem report could not be so easily overlooked.

16. In view of the foregoing discussion, the instant appeal is accepted and on setting aside the impugned judgment of the learned Zilla Qazi/Sessions Judge, Kohistan dated 24.02.2012, the impugned conviction and sentences of the appellants under section 302-B Cr.P.C. are set aside and they be set free forthwith if not required in any other case.



17. Resultantly, Cr.A.No.39-A/2012 by the complainant against acquittal of accused/respondents Alamzeb and Fazal Wadood, is dismissed as abated against the deceased accused/respondent, Alamzeb; and also dismissed on merits against accused/respondent Fazal Wadood in the light of this judgment.

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Signature
 District and Sessions Judge
 District and Sessions Judge
 District and Sessions Judge

18. Likewise, as a natural corollary, the Cr.R.No.11-A/2012 of the complainant for enhancement of sentence of the appellants stands dismissed.

Announced.
Dt.27.05.2015.


JUDGE

JUDGE