

Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A. No.197-B/2019.

Ghulam Jan
Vs.
The State & another.

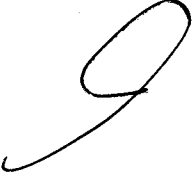
JUDGMENT

Date of hearing: **17.3.2021.**

For Appellant: Muhammad Rashid Khan Dirma Khel,
Advocate.

For State: Mr. Shahid Hameed Qureshi, Addl: A.G.

For Respondents: Muhammad Alamgir Khan Wazir, Advocate.



SAHIBZADA ASADULLAH, J.- This judgment shall dispose of Cr.A.No.197-B of 2019 titled 'Ghulam Jan Vs. The State & another' and the connected criminal revision bearing No.49-B/2019 titled 'Mujeeb ur Rehman Vs. Ghulam Jan' as both are the outcome of one and the same judgment dated 26.6.2019, rendered by learned Additional Sessions Judge-II, Lakki Marwat, whereby the appellant has been convicted under section 302(b) P.P.C and sentenced to life imprisonment with Rs.2,00,000/- (two lac) as compensation under section 544-A Cr.P.C. to the legal heirs of deceased or in default thereof, to undergo six months simple imprisonment. He was further convicted under section

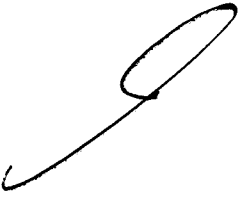
324 P.P.C and sentenced to five years imprisonment. All the sentences were ordered to run concurrently. Benefit of section 382-B Cr.P.C was extended to the convict.

2. The prosecution story as disclosed in the F.I.R (Ex. PW 4/1), registered on the basis of murasila (Ex. PW 2/1), in brief, is that on 27.10.2015 at 19:45 hours, complainant Mujib-ur-Rehman (PW-8), while present with dead-body of his cousin, Shams ud Din, made report on the spot to Sami Ullah Khan ASI (PW-2), to the effect that a few days ago, wife of the accused, namely, Mst. Nasim Bibi, was sitting deserted in the house of her parents situated in Kotka Alam Khel, due to strained relations with her husband; that on the eventful day, he alongwith his cousin Shams-ud-Din were on their way to the house of Muhammad Jan to settle the dispute between the spouses, when they reached near the house of Faqir Khalifa Amma Khel at about 17:00 hours, accused Ghulam Jan, duly armed with pistol was already present there, who on seeing them, raised *Lalkara* and started firing upon them with the intention to commit their *qatl-i-amd*, resultantly, his cousin Shams-ud-Din got hit and fell to the ground, while he fortunately escaped unhurt; that he could do nothing being empty-handed and ran towards nearby fields to save his life.

After the occurrence, the accused decamped from the spot; that when he attended the deceased, by then he had already expired. Motive for the occurrence was stated to be a dispute over women folk. On the report of complainant, PW-2 drafted Murasila (Ex: PW-2/1), prepared injury sheet and inquest report of the deceased and sent the dead-body to the doctor for postmortem examination, under the escort of Constable Qadir Khan No.502 (PW-3), while Murasila was transmitted to the police station, where Muhammad Ayaz Khan Incharge, DSB, Lakki (PW-4) incorporated its contents into the F.I.R (Ex. PW-4/1).

3. Initially, accused absconded, therefore, proceedings under section 512, Cr.P.C. were conducted against him. On arrest of the accused and after completion of investigation, complete challan was submitted against him to the trial Court, where on the commencement of trial, the prosecution produced and examined as many as nine witnesses, whereafter, accused was examined under section 342 Cr.P.C, wherein he denied the allegations and professed innocence, however, neither he opted to be examined on oath in terms of Section 340(2), Cr.P.C., nor produced evidence in his defence. The learned trial Court after hearing arguments

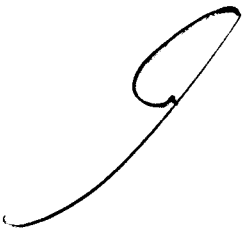
of learned counsel for the parties vide judgment impugned herein, convicted the accused and sentenced him, as mentioned in the earlier part of the judgment. The convict/appellant has assailed his conviction and sentence through the instant criminal appeal, while the complainant has moved connected criminal revision bearing No.49-B of 2019, for enhancement of sentence, which we intend to decide the two through this common judgment.



4. We have heard learned counsel representing the appellant, Additional Advocate-General assisted by learned private counsel at length and with their valuable assistance, the record was gone through.

5. The unfortunate incident occurred on 27.10.2015, when the deceased was done to death. The complainant reported the matter to the local police, who on receiving information reached to the spot. The appellant was charged as the sole accused, the motive was stated to be a dispute over women folk.

6. True, that in the episode, single accused is charged and that in the like cases substitution is a rare phenomenon, that too when the parties are closely related to each other. In case in hand, the deceased is no one else but a brother-in-law of the accused, with sister of the



accused married to him. The incident is the offshoot of strained relations between the husband and wife. The learned trial Court dealt with the matter comprehensively and fully dilated upon material aspects of the case. We are conscious of the fact that it was the direct charge against a single accused that prevailed with the trial Court, as the sole determining factor. The trial Court was highly swayed and travelled under the impulse that in case of single accused, substitution is rare a phenomenon, but it ignored that the proposition which perturbed, is not a rule of thumb, but is subject to interpretation when the situation arises. We are conscious of the fact that the wisdom behind is nothing more but a caution to the Courts of law for exercising great care and caution while dealing with the cases of a singularly charged accused. The burden never shifts to the accused to prove his innocence rather it is still the prosecution to discharge its liabilities. While sitting in appeal, this is the responsibility of this Court to assess and re-assess the already assessed evidence to confirm that the conclusion drawn was perfect and reasonable. This Court is to see as to whether the incident occurred in the mode, manner and at the stated time and as to

whether the complainant was present with the deceased when he received the fatal shot.

7. The incident allegedly occurred on the metal road when the deceased and complainant were a little short of their destination. The report tells that when they reached to the place of incident, the accused was present duly armed with a pistol, who fired at the deceased and the deceased after receiving firearm injury fell to the ground. The report further tells that the complainant ran away from the spot towards the fields to save his life and on return found the deceased dead.

8. The complainant being the sole eyewitness was examined as PW-8, who explained the way the incident occurred and the police arrived. This is admitted on record that the incident occurred at 17:00 hours, whereas the matter was reported at 19:45 hours, that too on arrival of the local police to the place of incident. It took nearly three hours that the police arrived to the spot that too on receiving information. We are yet to know that why the complainant did not inform the police despite the fact that he was in possession of his personal mobile phone. The site plan shows that incident occurred on the metal road with the traffic plying thereon, but the complainant was least interested to shift the dead body

either to police station or to Civil Hospital, Naurang. The complainant when appeared before the trial Court, stated that he left his village in the company of the deceased and reached to the spot at 17:00 hours. He further stated that the deceased at the time of incident was walking a head by ten (10) feet, when they were fired at. The stance taken by the complainant is belied by the site plan which was prepared on his pointation. It was the complainant who pointed the inter se distance as thirty (30) feet, we are anxious to know that when both, the complainant and deceased were on foot towards the village to settle the dispute, why they kept on walking with such an abnormal distance in between. The complainant stated that the accused fired at both of them, but he escaped unhurt as he ran from the place of incident towards the fields. He further stated that while running the accused did not fire at him. The complainant failed to explain that why he was fired at, as he was not connected with the alleged motive. There is no denial to the fact that the incident occurred at the deserted place with nobody around, both the complainant and deceased were at the mercy of the accused, had he the intention to kill the complainant, no hurdle was in between. The complainant stated that while running from the spot, he was not fired

at. His this explanation contradicts his own stance. What abnormality this was, that the dead-body was lying on the road with the complainant sitting around waiting for arrival of the local police. What a coincidence this was that the invited witnesses and local police reached to the spot at one and the same time, after three hours of the incident.

In case titled "Muhammad Ashraf alias Acchu Vs the State" (2019 SCMR 652), wherein it is held that:

"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 eye-witnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story is concocted by the PWs, then the case of the accused merits plain acquittal."

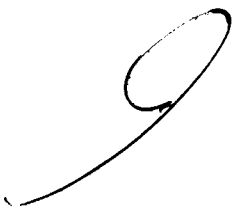
9. The site plan shows the house of one Faqir Khalifa Amma Khel near the place of incident and also the village *abadi* at a little distance, but the complainant did not move an inch to ask their help and even no one attracted to the spot till arrival of the local police. The matter was reported to one Sami Ullah Khan ASI, who was examined as PW-2. He stated that while on *Gasth*,

he received information from Moharrir of the police station, with further direction to visit the spot; and that on arrival to the spot, only the complainant was present, whereas the dead-body was lying on the ground. He went on to say that apart from *murasila*, he prepared the injury sheet and inquest report. He also admitted that no empty was lying on the spot. It is pertinent to mention that this PW admitted the presence of the complainant with the deceased, but maintained silence in respect of the other witnesses. If we admit that the inquest report was prepared on the spot, then wherefrom Naik Muhammad reached, as the complainant stated that on his information, Noor Muhammad and Bin Yamin arrived to the spot. This interesting to note that the scribe while preparing the inquest report, mentioned the word "Fire Arm" in the relevant column, whereas the complainant while reporting the matter specified the weapon used as pistol, again in the relevant column, the time of death is mentioned as 8:55 hours, and the complainant also admitted the time of death as 8:55 hours. If the complainant had reported the matter on the spot, then the scribe would have used the word pistol instead of firearm and the time of death as 17:00 hours, instead of 8:55 P.M; this anomaly on part of the police official, to whom

the matter was reported leads us to hold that the matter was not reported on the spot and at the stated time. This does not appeal to a prudent mind that the dead body remained on ground for long three hours despite the fact that the village *abadi* was situated nearby. PW Sami Ullah stated that nothing on search was recovered from the deceased, but surprisingly the doctor at the time of postmortem examination took into possession Rs.4100/-, a watch, mobile Nokia and *Tasbeeh* from the deceased, which were handed over to the complainant and in that respect a memo was prepared duly signed by the complainant. The conflict between the two in respect of recoveries from deceased tells nothing, but that the dead body was lying un-attended on the spot and someone from the village informed the local police, who collected the dead body from the spot and shifted to the hospital. We lurk no doubt in our mind that initially, the injury sheet and inquest report were prepared and it was on arrival of the complainant that the murasila was drafted. We cannot resist to hold that the police conducted preliminary investigation and when attendance of the complainant was procured the matter was reported.

In case titled “Nazir Ahmad Vs The State and others” (2019 SCMR 594), it is held that:

“The FIR in respect of the incident in issue had not been lodged at the Police Station giving rise to an inference that the same had been lodged and registered after deliberations and preliminary investigation”.



10. The doctor conducted autopsy on dead-body of the deceased who was examined as PW-7, who stated that he did not write the names of the identifiers in the relevant column and that the identifiers were summoned by his staff. He further stated that overwriting was made by him in the time of arrival and the time of examination. He surprised us to say that he could not rebut or affirm the suggestion that the dead body was examined at 00:55 hours i.e. midnight. Uncertainty prevailed throughout his statement, his conduct is not above board, his reckless tampering in the relevant columns confirms that neither the complainant nor the witnesses were present at the time of report and the postmortem examination. His uncertain reply in respect of 00:55 hours confirms the time of occurrence as 8:55 hours, as it was he who mentioned the time between the death and postmortem as 4 to 5 hours. The record tells that 08:55 hours is the time mentioned by the police official in the relevant column of the inquest report and by the complainant in his Court statement. The cumulative effect of what is stated above

leads us to hold that neither the incident occurred at the stated time nor the complainant was present when the deceased was done to death.

11. The Investigating Officer visited the spot, recovered blood through cotton from the place of the deceased, but no empty was recovered. This is astonishing that when 3/4 shots were fired, why no empty was found by both the police officials despite, the fact that the complainant remained present on the spot till the report was made. We are yet to know, as to whether the site plan was prepared on the night of incident or on the following day. It was suggested to the Investigating Officer that he visited the spot in the morning on the following day, to which he denied. The complainant stated that it was on his pointation on the night of incident that the site plan was prepared. It was intriguing on part of the Investigating officer that he again visited the spot at 7:00 a.m in the morning, but he failed to convince the purpose of his visit when he had already completed the proceedings on the night of incident. When assessed from all angles, we are confirmed in our belief that the site plan was not prepared on the night of incident, but early in the morning. When the complainant denied his second visit, it can safely be held that the site

plan was not prepared on pointation of the complainant, which in turn excludes his presence on the spot.

12. Motive was stated to be a dispute over women folk with further explanation that due to strained relations, the wife of the deceased had left his house and was residing at her parents' home and that on the day of incident the deceased went for reconciliation when the incident occurred. The Investigating Officer did not record statement of the wife of the deceased to confirm the motive and even no independent witness was produced in that respect. The prosecution failed to prove the same. True that absence or weakness of motive does not play a decisive role in the acquittal of an accused, but equally true, that once a motive is alleged the prosecution is bound to prove the same, failing which none else but the prosecution is 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."

13. It was agitated time and again that the accused / appellant soon after the occurrence disappeared and surfaced after a long time, which absence he failed to explain and this factor alone is sufficient to term the accused guilty. We are unable to understand that how in absence of positive and convincing evidence abscondence alone can lead to conviction, if we accede to the submissions so forwarded, we are afraid the results would be drastic. There is no cavil to the proposition that abscondence alone cannot be a substitute for the direct evidence and this aspect has been beautifully dealt with by the apex Court in case "Muhammad Sadiq Vs. State (2017 SCMR 144)", it is held that:

"The fact that the appellant absconded and was not traceable for considerably long period of time could also not be made sole basis for his conviction when the other evidence of the prosecution is doubtful as it is riddled with contradictions."

14. After evaluating the evidence available on file, this court reaches to an inescapable conclusion, that the prosecution could not succeed in bringing home guilt against the accused/ appellant through confidence inspiring witnesses and that the complainant failed to establish his presence on the spot at the time of incident. The learned trial Court failed to appreciate the evidence available on file and

did not apply its judicial mind to the facts and circumstances of the case. The impugned judgment is devoid of reasons, which calls for interference, resultantly, the appeal in hand is allowed and the appellant is acquitted of the charges. He be released forthwith, if not required to be detained in connection with any other criminal case. As the appeal filed by the appellant has succeeded, so the connected criminal revision bearing No. 49-B/2019, has become redundant is, dismissed as such.

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

Announced.
Dt: 17.3.2021.
Kifayat/*

[Signature]
28/3/2021

SCANNED

29 MAR 2021
[Signature]
Khaliq Khan

[Signature]
JUDGE
[Signature]
JUDGE

(D.B)
Hon'ble Mr. Justice S. M. Attique Shah and
Hon'ble Mr. Justice Sahibzada Asadullah