

PESHAWAR HIGH COURT ABBOTTABAD
BENCH

JUDICIAL DEPARTMENT

JUDGMENT SHEET

Cr. A No. 422-A/2019.

Date of hearing 25.01.2023.

Appellant/s (Bakht Biland) by Qazi Muhammad Arshad and Mr. Ghulam Mustafa Swati, Advocate.

Respondent/s (The State) by Khurshid Alam Khan Tanoli, (State counsel) and complainant by Mr. Shad Muhammad Khan, Advocate.

FAZAL SUBHAN, J. Appellant *Bakht*

Biland son of *Zardad* has filed the instant appeal under section 410 Cr. P.C against the judgment dated: 21.11.2019 passed by learned Sessions Judge/MCTC, Kolai Pallas (Kohistan) at Besham in case FIR No. 33 dated: 14.06.2018 registered under sections 302, 324, 148, 149 PPC, Police Station, *Battera*, District, *Kolai Pallas Kohistan*, whereby, appellant was convicted under section 302 (b) PPC and sentenced to life imprisonment with fine of Rs. 5,00,000/-. Half of the fine i.e 2,50,000/- was ordered to be paid to the legal heirs of deceased *Sherin Baha* as compensation within the meaning of

section 544-A Cr. P.C. Appellant was also convicted and sentenced for three years R.I with fine of Rs. 50,000/- under section 148/149 PPC.

2. Facts of the case, in brief are, that on 14.06.2018 at 19:15 hours, Naeem-ud-Din son of Sarbiland (then injured now deceased) alongwith dead bodies of Sanor Khan son of Zardad and Mst. Shreen Baha wife of Aslam Beigh, reported the matter to the local police in the crime house that on the relevant day he alongwith his father Sarbiland, uncle Islam-ud-Din and other inmates were present in their house, when at 6:30 hours, an altercation took place between his uncle Sanawar Khan and his maternal cousin Waseem-ul-Haq on the quarrel of children and they started abusing each other. In the meanwhile, Noor Muhammad, Bakht Biland sons of Zardad (his uncles), Naeem-ur-Rehman (his cousin), Bilal and Waseem-ul-Haq (maternal cousins) duly armed with

Kalashnikovs entered in to his house and started firing at them, and as a result of fire shot of Noor Muhammad, his uncle Sanor Khan got injured on his chest, whereas, from the fire shot of Bakht Biland, Mst. Sherin Baha wife of his uncle Aslam Baig got hit on her chest. Both the injured died at the spot. He/complainant also got hit on left thigh with the fire shot of Bilal, while the other family members present on the spot had a narrow escape. On their hue and cry as well fire shots, residents of muhallah reached at the spot, whereas, the accused while making firing decamped from the spot. As per report of complainant, the occurrence besides him was witnessed by his father Sarbiland and uncle Islam-ud-Din. The report lodged by complainant Naeem-ud-Din was reduced into murasila Ex PW-1/1, whereupon, the instant FIR Ex PW-4/1 was registered. The complainant was shifted to the THQ, Besham in injured condition wherefrom,

he was referred to Swat for further treatment but on his way, he succumbed to injuries.

3. Initially, the present appellant remained absconder whereas, co-accused namely Waseem-ul-Haq and Naeem-ur-Rehman were arrested in the case and faced their trial but due to insufficient evidence brought against them by the prosecution, they were acquitted of the charges levelled against them on 01.04.2019. The appellant was arrested on 10.04.2019, and after completion of investigation, case was put in Court for trial against him. Provision of section 265-C Cr. P.C were complied, whereafter, charge was framed against the appellant. In order prove its case against the appellant, prosecution produced Muhammad Babar Khan SI/SHO as PW-1 who on the report of complainant scribed the murasila Ex PW-1/1, prepared the injury sheet (Ex PW-1/2 and Ex PW-1/3) of both the deceased as well as inquest

reports of all the three deceased Ex PW-1/4, Ex PW-1/5 and Ex PW-1/6 respectively. PW-2 is the statement of Shahzada No. 49 P.S, Batera, who brought murasila report from the spot to police station for registration of FIR, while PW-3 Muhammad Naseer SI prepared the card of arrest (Ex PW-3/1) of accused and drafted application Ex PW-3/2 for grant of police custody of accused. PW-4 Mushtaq Ahmad AMHC (PW-4), after receipt of murasila incorporated its contents into FIR Ex PW-4/1 and also handed over parcels No. 1 to 6 PW Mohsin No. 241 for delivering to the FSL authorities vide docit Ex PW-4/2 and on his return, handed over receipt Ex PW-4/3 to him. PW-5 is the statement of constable Muhammad Mohsin No. 241, who took the parcels No. 1 to 6 to Forensic Science Laboratory for analysis. PW-6 Mehboob-ur-Rehman SI on arrest of appellant conducted the investigation in the case. He prepared pointation memo Ex PW-6/1.

4. Sarbiland and Islam-ud-Din the alleged eye witnesses, recorded their statements as PW-7 and PW-8 reiterating the story narrated in the murasila/FIR. PW-9 Zain-ul-Abideen is marginal witness to the recovery memo vide which the IO took into possession blood stained earth and clothes of deceased Naeem-ud-Din and Sanor Khan. PW-10 Said-ur-Rehman is the investigating officer of the case, who conducted detailed investigation in the case.

5. PW-11 is the statement of Dr. Sana Ullah MO THQ Besham and according to him, he conducted external medical examination of then injured/complainant as per medical slip Ex PW-11/1 and verified it to be in his hand writing and bears his signatures. PW-12 Masheer Khan son of Sarfaraz, is the marginal witness to the recovery memo (Ex PW-10/3) vide which investigating officer took into possession

blood stained shirt of deceased Mst. Sherin Baha,

6. With these statements, the prosecution closed its evidence, whereafter, statement of accused/appellant was recorded under section 342 Cr. P.C. The learned trial Court, after hearing arguments, vide impugned judgment convicted the appellant as mentioned above, hence aggrieved from the judgment/order of conviction and sentence, he has preferred this appeal.

7. Arguments of learned counsel for appellant, learned AAG as well as learned counsel for complainant heard and record perused.

8. We have given anxious thought to the arguments advanced by the learned counsel for the parties and learned AAG for state and we are of the considered view that prosecution has remained unsuccessful in proving the guilt of the appellant, by host of circumstances, and we find that the learned trial Court has

failed to properly appreciate the evidence brought on record in support of prosecution case.

9. In this case, Naeem-ud-Din son of Sarbiland had lodged the report, purportedly, in injured condition and the murasila Ex PW-1/1 shows his thumb impression but no one has verified his report or thumb impression thereon, confirming that complainant Naeem-ud-Din had lodged the report, in injured condition, at his residence. Record further reveals that after the alleged occurrence, the complainant then injured was not shifted to the hospital and admittedly PW-1, Muhammad Baber Khan SHO, Batera, on getting information through telephone, himself visited the spot of occurrence. The statement of PW-1 Baber Khan reveals that he prepared injury sheets of the two deceased Sanor Khan and Mst. Shereen Baha, Ex PW-1/2 and Ex PW-1/3 and inquest reports Ex PW-1/4, Ex PW-1/5

and Ex PW-1/6 of Sanor Khan Naeem-ud-Din (complainant) and Mst. Shereen Baha. Careful analysis of inquest report Ex PW-1/5 reveals that there is cutting and overwriting in column No. 3, in respect of date and time, wherein, date and time of death was changed from 14.06.2018 to 15.06.2018 and from 1830 to 0030 hours. When the above inquest report of complainant and other deceased are seen in light of the cross-examination of PW-7 Sarbiland son of Zardad, there is clear admission that he conveyed the information of occurrence to PW-1 Muhammad Baber Khan and replied that:

میں نے بابر پولیس والے کو اپنے بھائی، بھابی اور
بیٹے کی قتل کی اطلاع دی تھی۔

10. Thus, the preparation of inquest report of Naeem-ud-Din complainant, the visible tempering in the date and time of preparation of his inquest report and admission of PW-Sarbiland Khan clearly shows that Naeem-ud-Din had already succumbed to his injuries and that is why,

the deceased were not shifted to the hospital for treatment nor taken to the police station for lodging the report. At the same time, the above circumstances show that at the time of arrival of PW-1 Muhammad Baber Khan, all the three deceased were dead and no injury sheet of Naeem-ud-Din was prepared and there is no description of the alleged injuries sustained by Naeem-ud-Din deceased to confirm that the injury on his person was on thigh and that he could talk and had lodged the report. This clearly arouse serious doubts about the factum of lodging of report by the deceased, the then alleged injured Naeem-ud-Din and there exist strong circumstance that PW-1 Muhammad Baber Khan SHO, in connivance and collusion with the complainant party, had lodged a false and fabricated report to twist the actual facts and to make the case one based on dying declaration, however, facts on record

strongly negate the story advanced by prosecution.

11. The medical evidence available on record is also manipulated and distorted one. PW-11 Dr. Sanaullah MO, has stated to have examined the injured (alleged) Naeem-ud-Din vide medical slip Ex PW-1/1 and his cross-examination is brimming with admissions that, there is no mention of the locate of injury in his report nor he has given time and duration of examination of injured. He also admitted that his report is silent about the oozing of blood from the wound, the identification mark of the injured and the police official who brought the injured to the hospital. This clearly indicates that the medical evidence was managed and manipulated to lent support to the prosecution case. It is also on the record that the complainant party, in order to screen of the actual facts from being surfaced, applied to the police vide applications Ex PW-1/8 and Ex PW-1/9,

for exemption from post-mortem examination of the deceased, hence, in the absence of post-mortem report, the nature, locale, the dimensions of injuries and the duration/time spent between death and post-mortem and other relevant facts relating to the alleged injuries on the bodies of the deceased, could not be established, and therefore, the non-conducting of post-mortem of the deceased cast serious clouds on the veracity and authenticity of the story advanced by the prosecution.

12. The spot of occurrence Ex PW-10/1, as described in the murasila/FIR is also shrouded in mystery. In the murasila/FIR, the spot of occurrence is mentioned to be the house of complainant Naeem-ud-Din, and after the occurrence PW-10 Said ur Rehman/ASI OII, prepared the site plan at the instance and pointation of PWs Sarbiland and Islam-ud-Din, however, except one room of Aslam Baig, no other residential room of

the complainant Naeem-ud-Din or any other member of his family are shown therein. PW-7 Sarbiland is father of the deceased Naeem-ud-Din and during cross-examination, he has answered that his house is at a distance of 3 minutes' walk from the house of Aslam Baig and there is a path intervening their houses, but at the same time, he denied that the occurrence has taken place in the house of Aslam Baig. In response to another question, he answered that in the site plan (crime house), there is no mention of his room or the rooms of his brothers Sarzamin, Rahem-ud-Din and Islam-ud-Din. On the other hand, PW-8 Islam-ud-Din, when confronted with the similar question replied that there is no distance between his house and the house of Aslam Baig, because Aslam Baig is residing with them. PW-10 Said-ur-Rehman IO/OII, in his cross examination answered that the room in the site plan is shown to be that of Aslam Baig and then

self-stated that in fact the said room belonged to Bakht Bilan but due to mistake it is mentioned to be of Aslam Baig. From these statements of PWs, it is evident that the witnesses have not stated the truth and the spot of occurrence is not proved to be the house of complainant and has been falsely shown to be their house, whereas, the house of complainant is admittedly at distance of three minutes' walk from the spot. Here a question arises that when the spot of occurrence was not the house of complainant party, then, their presence on the spot at the relevant time especially in the month of Ramadan, seems doubtful.

13. PWs Sarbiland and Islam-ud-Din have been examined as eye-witnesses of the occurrence and though in their examination-in-chief they have stated the facts about the occurrence in the same tone, however, on thorough appraisal of their statements, it is clear that PW-Sarbiland has informed the police officer

Muhammad Babar in respect of the death of his brother, sister in law and son, but had shown his ignorance about the telephone number. At the same time, he has replied that he informed police officer Baber about all the three deaths, which is total negations of his statement that on the arrival of police, his son Naeem-ud-Din lodged the report to the police on the spot. He in cross-examination replied that, his son Naeem-ud-Din was residing with him and his deceased brother Sanor Khan was living separately. He further replied that he is residing in separate house while his other four brothers are living separate. He also confirmed that the house of his brother Aslam Baig consists of a room, warandha, godown, kitchen, bath room and courtyard and that his house is at a distance of three minutes' walk from the house of Aslam Baig. He, in cross-examination, denied the presence of SHO Baber Khan when the IO of the case

visited the spot on the following day of occurrence.

14. PW-8 Islam-ud-Din during his cross-examination answered that the quarrel over their children took place in the house of Naeem-ur-Rehman accused and Naeem-ur-Rehman and Waseem-ul-Haq each made 2 fires, which hit the walls. He further replied that there is no distance between his house and the house of Asam Baig.

15. From the statements of these PWs, it is clear that both the alleged eye witnesses were not consistent in respect of their residences and they were found contradictory to one another. It was noticed that the alleged eye witnesses were continuously changing their stance and their statements suffered from willful improvements and in a bid to prove that the occurrence had taken place in their presence, they tried to negate the site plan, prepared at their own instance and pointation. The cross-examination of

these witnesses shows that all the brothers have separate houses and the house of Sarbiland father of the deceased Naeem-ud-Din is at sufficient distance i.e to be covered on foot in three minutes, hence, the presence of these alleged eye witnesses at the spot of occurrence, is not natural especially, when the occurrence took place in the month of Ramadan, and at a time when people are normally present in their own houses to break their fast. There is no independent corroboration available to support the stance of the two related and interested witnesses. At the same time, the statements of these alleged eye witnesses are neither found convincing nor confidence inspiring. It is well settled by now that when statements of eye witnesses suffer from willful improvements then reliance on such tainted evidence cannot be made for awarding conviction. In arriving to this conclusion reliance is placed on the case

of *Muhammad Mansha-Vs-The State*,
2018 SCMR, 772 [Supreme Court of
 Pakistan], wherein, it has been held that: -

Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that whenever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses. Reliance, in this behalf can be made upon the cases of Sardar Bibi and another v. Munir Ahmad and others (2017 SCMR 344), Amir Zaman v. Mahboob and others (1985 SCMR 685), Akhtar Ali and others v. The State (2008 SCMR 6), Khalid Javed and another v. The State (2003 SCMR 1419), Mohammad Shafiq Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474).

16. The prosecution has advanced the
 motive for the occurrence to be the

quarrel of the children, however, PW-10 Said-ur-Rehman ASI/OII in his cross examination has presented a motive all together to the one presented by the complainant side, who in cross examination replied that the daughter of Aslam Baig was married to co-accused Naeem-ur-Rehman and as a custom, he allowed his wife to visit her parent's house for ten days, whereas, she wanted to stay there for 2 months, which triggered a quarrel, resulting into the incident. Thus, the motive advanced by the complainant/deceased Naeem-ud-Din, is controverted and dislodged during investigation conducted by the PW-Saeed-ur-Rehman ASI/OII, and therefore, the appellant, as per record, had no motive to cause the death of deceased.

17. The prosecution case is that at the relevant time of occurrence all the five accused, duly armed with *Kalanshinkovs*, entered the house and started firing upon the complainant party, however,

surprisingly, not a single empty was recovered from the crime house nor any bullet marks have been shown on the surrounding walls. This again cast shadow of doubt about the site of occurrence, hence, the story advanced by the prosecution is neither believable nor proved beyond reasonable doubt. In the case of *Naseeb-ur-Rehman-Vs-Muqarab Khan and another* reported in **2013 MLD, Peshawar, 836**, it was held: -

In view of all these facts, the case of prosecution is doubtful, which does not satisfy the judicial conscious of the Court. For recording conviction in a capital charge, the evidence must be of unimpeachable character, having no shadow of doubt. Whenever there is any reasonable doubt in the prosecution case, benefit of the same is to be extended to the accused not as a matter of grace or concession, but as a matter of right.

Similarly, in the case of *Tajamal Hussain Shah-Vs-The State*, reported as **2022 SCMR, 1567**, the August Supreme Court of Pakistan has held that: -

The ocular account in this case is furnished by Zulfiqar Ahmed (PW-18) and Muhammad Daraz (PW-19). According to these PWs of the ocular account, the petitioner while armed with .30 bore pistol made a straight fire shot on Muhammad Sajjad, deceased, which landed on his chest, due to which he fell down and ultimately succumbed to the injury. However, this stance is contradicted by the medical evidence. According to Dr. Raheem Khan (PW-15), who conducted postmortem examination of the deceased Muhammad Sajjad, the injury on the chest, just above the nipple of the deceased, was an exit wound and the margins of the wound were black whereas the entry wound was on the back of the deceased i.e. at thoracic spine. The blackening around the wound shows that the fire shot would have been made from a close range but according to the site plan, the petitioner was shown standing at a distance of 18 steps away from the deceased. This major discrepancy raises serious doubts on the credibility of the

prosecution witnesses of the ocular account.

18. After due consideration of record we have found that the incident has not taken place in the mode and manner as narrated in the FIR rather a fake and fabricated story was developed to falsely rope the appellant in the case. The record was manipulated to show Naeem-ud-Din as complainant of the case, whereas, it is proved from the record that police was informed about the death of all the three deceased. The ocular evidence has been found highly inconsistent and unreliable. Motive of the occurrence has also belied through evidence and therefore, prosecution has been unable to prove the guilt of appellant beyond reasonable doubt, hence, the conviction recorded by the trial Court/MCTC, Kolai Pallas (Kohistan) at Besham cannot be sustained, hence, the appeal filed by the appellant is accepted and the impugned judgment is set-aside, and resultantly, appellant is acquitted in the case. He be

set-free, if not required in any other case. Resultantly, the criminal revision petition No. 68-A/2019 filed for enhancement of sentence of life imprisonment into death has become infructuous, therefore, same is dismissed, accordingly.

19. Record reveals that co-accused Noor Muhammad and Hazrat Bilal are still absconding and after their arrest, they have to face their trial and their case shall be considered through the evidence recorded during their trial, hence, the observations and findings recorded in this judgment shall have no bearing on their trial/case, and trial Court shall be at liberty to decide their case on the strength of evidence recorded in the said trial.

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

Announced.
25.01.2023.

Date of writing judgment 01.02.2023.

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