

Judgment Sheet

IN THE PESHAWAR HIGH COURT, ABBOTTABAD BENCH
JUDICIAL DEPARTMENT

J U D G M E N T

J.Cr.A. No.152-A/2010
Date of hearing...13.05.2015

Abdul Wahab Vs The State

Appellant(s) by.....

Respondent(s) by.....

QALANDAR ALI KHAN, J-. This single judgment shall also dispose of Criminal Revision No.50-A/2010, moved by complainant, Mian Khan, for enhancement of punishment awarded to convict/appellant by the learned Sessions Judge, Battagram, in case FIR No.22 dated 05.03.2009 under Sections 302/324/34 PPC Police Station Shamlai, Battagram, vide the impugned judgment dated 23.08.2010.

2. The FIR in the case would show that Muhammad Amjad SHO of the Police Station received information about an injured person brought to CH Hospital Battagram when he was present alongwith a police contingent in Battagram in connection with a meeting whereupon he rushed to the emergency ward of CH

Battartgram, where complainant, Mian Khan, lodged report at 14:10 hours that in the morning at 08:00 hours he alongwith his brother Umar, and Ishaq son of Toor were proceeding towards Jungle from their residence for grazing goats and the moment they came out of the house, they found the accused/appellant, Abdul Wahab, and co-accused, Muhammad Hilal, present there with Pistol and Kalashnikov and started altercation over cutting of tree, and also started firing at them, and with firing of Kalashnikov by the accused/appellant his brother Umar was hit on his head and died instantaneously, while he was hit with the firing of co-accused Muhammad Hilal who was armed with Pistol and sustained firearm injuries on different parts of his body, whereas Ishaq escaped unhurt. The complainant specifically named Ishaq as the eye-witness alongwith other persons while charging both the accused named above for the *Qatl-i- Amd* of his brother and attempt at his life by causing him firearm injuries.

3. After drafting murasila on his report, the SHO arrested the injured complainant as he was proclaimed offender in case No.23/01 under sections 302/34 PPC PS Shamlai. Meanwhile, dead

body of deceased Umar was brought to the hospital, and was referred to the Medical Officer for Post Mortem Examination. On receipt of *murasila* in the Police Station, the case was registered, and investigation in the case was assigned to the investigation branch of the local police.

4. During investigation, the I.O. visited the spot, conducted spot inspection, during which, he secured blood stained earth from the places assigned to the deceased and injured complainant in the site plan and also recovered two crimes empties each of 7.62 bore and 30 bore, respectively, from the places assigned to both the accused in the site plan prepared by the IO on the pointation of the eye-witnesses. The I.O. raided house of Raghbat Mian on prior information of presence of the accused/appellant in his house and arrested the accused/appellant and recovered the Kalashnikov from his possession, and both the Kalashnikovs and crime empties of 7.62 bore recovered during spot inspection were dispatched to the firearms expert, wherefrom the report was received in the affirmative. Likewise, the blood stained earth collected from the places of deceased and injured

complainant alongwith their blood stained garments were sent to the Forensic Science Laboratory (FSL), and the report received therefrom was also in the affirmative. The accused/appellant also reported to Muhammad Riaz Khan Inspector Investigation Battagram in village Nairay at the time of his arrest at 17:30 hours on the eventful day that he had gone to the Jungle for fetching wooden logs and when he was lifting the log, the complainant and his brother came there and altercation ensued on the ownership of log, resulting in axe blow on his head by brother of the complainant (not named in the report), while during scuffle, he snatched *Kalashnikov* from complainant and in the meantime firing also took place, and he managed to flee and take refuge in the house of Raghbat Mian and Aimal Mian; and handed over the *Kalashnikov* alongwith 15 rounds to the police and also surrendered himself to the police for his arrest. While also complaining injury on his left hand beside the stated injury on his head, the accused/appellant cited dispute over Jungle as motive for the offence, and cited co-accused Muhammad Hilal as the eye-witness. The report of the accused/appellant was recorded in the Daily

Diary of the Police Station at Serial.No.13 dated 05.03.2009. On the receipt of medical report, the report initially recorded in the Daily Diary of the Police Station was incorporated in FIR No. 25 dated 09.03.2009 under sections 337-A iii/F iii/34 PPC at Police Station, Shamlai, Battagram.

5. The deceased, Umar, was examined by the medical officer, who furnished the following post mortem report;

- "1. 5 cm circular wound with shetered pieces of bones on left temporal bone 10 cm deep 8 ½ cm lat to middle line vertex exit wound.*
- 2. 1 cm circular and 10 cm deep inverted margins wound on Right temporal site 6 cm about Right Ear lobe "Entry wound".*
- 3. Bruises around both eyes left and right side.*
- 4. Fresh bleeding from both ears."*

6. Similarly, the same medical officer examined injured complainant and furnished report as follows;

- "1. Circular 1 cm circumference and 4 to 5 cm deep wound. 8 to 9 cm above right iliac crest. Entry wound fresh bleeding.*
- 2. Circular averted margin around 2 ½ cm round situated at the base of left side chest base on left renal area. 8 to 9 cm deep exit wound, fresh bleeding.*
- 3. Left elbow wound 2 cm diameter dorsal aspect with crepitus.*
- 4. Left blue eye with sub conjunctival hemorrhage."*

7. The co-accused, Muhammad Hilal, could not be arrested and was therefore proceeded against under sections 204 & 87 Cr.P.C and challan was submitted against him under section 512 Cr.PC

when challan was submitted against the accused/appellant after completion of investigation.

8. The trial Court framed charge under section 302/324/34 PPC against the accused/appellant to which he pleaded not guilty and claimed trial. During trial, the prosecution produced 08 PWs. PW-1, Abdul Wahid, Muharrir Police Station Shamlai registered case/FIR on the receipt of murasila; PW-2, Muhammad Amjad, ASI drafted murasila on the report of the complainant and also prepared his injury sheet as well as injury sheet and inquest report of the deceased and referred both of them for medical and PM examination, respectively, and also submitted complete challan in the case after completion of investigation; PW-3, Mian Khan, is the complainant and lodger of FIR and furnished ocular account of the occurrence; PW-4, Mst: Saira, appeared as an eye-witness; PW-5, Dr. Lal Kumar, is the medical officer who conducted medical examination of the injured complainant as well as post mortem examination of deceased Umar; PW-6, Zahoor Ahmad, IHC is marginal witness to several recovery memos prepared by the I.O. during investigation; PW-7, Muhammad Riaz Khan, Inspector conducted

investigation in the case and PW-8, Muhammad Babar, was entrusted with warrant under Section 204 Cr.PC as well as proclamation against absconding accused Muhammad Hilal. The prosecution abandoned PW Ishaq "being won over", and also abandoned rest of the PWs being unnecessary, and closed its evidence; whereafter, statement of the accused/appellant was recorded under section 342 Cr.PC, wherein he refuted allegations of the prosecution but declined to be either examined on oath on the ground that he was already examined on oath in the cross case, or produce defence on the ground that he had already exhibited defence.

9. On conclusion of the trial, the accused/appellant was convicted under section 302-B PPC and sentenced to imprisonment for life as *Tazeer*. The accused/appellant was, however, acquitted of the charge under section 324 PPC; and benefit of Section 382-B Cr.PC was also extended to him, vide the impugned judgment of the learned trial Court/ Sessions Judge, Battagram, dated 23.08.2010; whereby, the co-accused Muhammad Hilal was declared a proclaimed offender.

10. Arguments of the learned counsel for the accused/appellant, learned Addl. AG assisted by learned counsel for the complainant heard, and record perused.

11. The learned counsel for the accused/appellant argued that there was a cross version to the version of complainant given in the FIR and that the accused/appellant had also sustained serious injuries on his head caused by sharp and blunt means and was therefore not in a position to cause firearm injuries to the complainant, who was a proclaimed offender and was having the weapons of offence i.e. Kalashnikov with him, which was snatched from him by the accused/appellant during scuffle and handed over to the police at the time of his arrest. The learned counsel further argued that the only eye-witness named in the FIR, Ishaq, was abandoned by the prosecution, and, instead, wife of Mian Khan complainant, namely Mst. Saira, was produced as an eye-witness, who was not mentioned as an eye-witness in the FIR. According to the learned counsel, there was no trustworthy ocular or circumstantial evidence to bring home charge against the accused/appellant.

12. The learned Addl: AG assisted by the learned counsel for the complainant, on the other hand, not only defended conviction of the accused/appellant but also prayed for awarding the normal penalty of death to the accused/appellant for the *Qatl-i-Amd*, and also his conviction and awarding him sentence under section 324 PPC, as, according to them, the accused was not only charged by name in the promptly lodged FIR, but he was also assigned the specific role of *Qatl-i- Amd* of deceased Umar by firing at him with Kalashnikov which was later on recovered from his possession at the time of his arrest. They contended that not only a positive report was received from the FSL in respect of blood stained earth collected by the I.O. from the spot and blood stained garments of the deceased and injured complainant but the firearms expert also furnished an affirmative report with regard to the weapon of offence and crime empties recovered from the place assigned to the accused/appellant in the site plan prepared after spot inspection by the I.O. They maintained that there was no doubt about the presence of the accused/appellant on the spot at the time of occurrence as he received injury and himself lodged

a report thereby admitting his presence on the spot at the time of occurrence.

13. The following striking features of the case need to be taken into consideration for just adjudication of the appeal by the accused/appellant and criminal revision by the complainant:

a) The occurrence took place in the Jungle at 08:00 AM while report was lodged by the complainant after more than 06 hours at 14:10 hours in CH Battagram to Muhammad Amjad SHO when he arrived in the hospital on receiving information about arrival of an injured person in the hospital. The SHO drafted murasila on the report of the complainant, and FIR was registered in the Police Station after 03 hours and 20 minutes at 17:30 hours; but according to the PM report, the dead body was brought by constable Gul Rehman No.237 from Police Station Shamlai at 03:00 PM and PM examination conducted at 04:00 PM. The lodging of report with considerable delay, that too in the hospital on arrival of the police, instead of Police Station Shamlai where the dead body was taken in the first instance and then brought therefrom to C.H. Battagram, thus creating serious questions about credibility of the FIR.

b) The complainant was admittedly a proclaimed offender in case No.23/01 under section 302/34 Police Station Shamlai at the time of lodging report to the police, and was arrested by the SHO after recording his report; but it remained a mystery as to how the SHO remembered even the case number while sitting away from the Police Station in the hospital.

c) It is not unusual that a proclaimed offender would carry some kind of weapon with him; but it is unlikely that the accused/appellant would carry Kalashnikov while present on the spot for lifting wooden logs. Therefore, the version of accused/appellant would ring true to the extent that the Kalashnikov was snatched by him from the complainant during scuffle, and was voluntarily handed over by him to the I.O. at the time of his arrest.

d) The Kalashnikov was, allegedly, recovered by the I.O. when he conducted raid on the house of Raghat Mian son of Aimal Mian, on prior information, for arrest of the accused/appellant; but neither the said Raghat Mian has been produced

as a PW, nor the persons shown present in the said house at the time of arrest of the accused and recovery of Kalashnikov from him have been examined as witnesses of the prosecution in support of the recovery of weapons of offence, thus making both recovery of the so called weapon of offence and report of firearms expert doubtful. Above all, the accused/appellant has also been acquitted of the charge against him in regard to recovery of the Kalashnikov under section 13-AO vide a separate judgment of today.

e) There is, admittedly, a cross version furnished by the accused/appellant vide FIR No.25 dated 05.03.2009 under section 337-A iii/ F iii/34 PPC Police Station, Shamlai, showing injuries caused to him, mainly, on his head by axe blows by the unnamed brother of the complainant, which have been confirmed during medical examination by the medical officer. This question remained unanswered as to how brother of the complainant could come closer to him when he was armed with Kalashnikov.

f) The only eye-witness mentioned in the FIR, namely, Ishaq was abandoned by the prosecution. The said Ishaq had not only made pointation of the spot to the I.O. but had also recorded statement

under section 164 Cr.P.C during investigation, whereby he supported version of the accused/appellant and negated the version given by the complainant in the FIR, despite being brother in law and cousin of the complainant. The other eye-witnesses, though not named in the FIR, yet mentioned in the site plan, namely, Maah Gul and Haroon were also abandoned, and only wife of the complainant, Mst. Saira, was produced as an eye-witness, who, besides being an interested witness, was not mentioned as an eye-witness in the FIR, and created serious doubts about the scene of occurrence when stated in her statement before the Court that the occurrence took place in their fields and further that the empties and blood were not recovered from banchar forest i.e. the scene of occurrence, but were recovered from a field. She made fatal improvements in her statement in order to make out a case against the accused/appellant on the one hand, and bring her statement in conformity with the case of the prosecution on the other.

13. The above narrated facts would show serious discrepancies in the prosecution case, thereby demolishing the edifice of the prosecution

case, which is replete with doubts. It is cardinal principal of criminal law that the prosecution must prove its case beyond any shadow of doubt, as benefit of even a single doubt must go to the accused. The prosecution has not been able to establish its case and bring home charge against the accused/appellant.

14. Consequently, the instant appeal is allowed. Impugned conviction and sentences of appellant, namely, Abdul Wahab son of Atiqullah recorded under section 302 PPC by the learned Sessions Judge, Battagram, vide judgment dated 23.08.2010 are set aside, and he be set free forthwith if not required in any other case. Resultantly, Cr.R. No.50-A/2010 is also dismissed.

Announced.
Dt. 13.05.2015.

J U D G E

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"Ayub"