IN THE PESHAWAR HIGH COURT,
BANNU BENCH

CRIMINAL APPEAL .NO. 115-B OF 2011
With murder reference No.3-B of 2011.

J U D G M E N T

Date of hearing ___03.6.2015_____

Appellant-petitioner : **Sultan Mehmood &**

Anwar-ul-Haq,

Advocates.

Responden: **Complainent By**

Farooq Khan, Sokari

Advovate.

State by Saif-ur-Rehman,

Addl. A.G.

MUHAMMAD YOUNIS THAHEEM J.---

Through the instant appeal filed under section 410 Cr.P.C, the appellant, namely, Shamsullah Khan has challenged the judgment and order dated 04.6.2011 passed by the learned Additional Sessions Judge-III, Bannu, whereby the appellant/ accused has been convicted Under section 302 PPC and awarded him the sentence of Death penalty with payment of compensation amounting to

Rs.1,00,000/- (rupees one lac) payable to the legal heirs of the deceased in terms of section 544-A Cr.P.C, in default to suffer six months simple imprisonment. The benefit of Section 382-B Cr.P.C is also extended to him.

2. Precisely, facts of the case are that on 17th of December, 2005, Complainant Fazal Mehmood Khan reported to Akhtar Ali ASI on his visit to the place of occurrence at 0830 hours that on the same day he alongwith his brother Haji Akhtar Khan (deceased) was proceeding towards Bannu Bazar, when they reached near the fields of Mursaleen at 08.00 a.m, appellant/convict Shamsullah who was already present there duly armed with Kalashnikov, shouted at Haji Akhtar Khan to halt, Haji Akhtar turned his face towards him, but appellant/convict Shamsulah started firing at him with intention to commit his murder, as a result of which, he was hit, fell down on the ground and expired on the spot. After the occurrence, appellant/convict decamped from the

spot. Motive behind the occurrence was stated to be a dispute over women folk.

3. The report of complainant Fazal Mehmood Khan was reduced into writing in shape of murasila, the contents of which were read over to him and after verifying its contents, he signed his report as a token of its correctness. The Investigating officer sent the murasila for registration of case through Constable Zar Khan No.483 to Police station, on the basis of which case FIR No.345 dated 17.12.2005 under section 302 PPC was registered in police station Mandan, District Bannu.

4. Investigation was conducted in case, as the appellant/convict remained absconder therefore, challan under section 512 Cr.P.C was submitted on 8.01.2006 against him. After recording prosecution evidence in his absentia, he was declared proclaimed offender and perpetual warrant of arrest was issued against him vide order dated 22.12.2006

5. Then appellant was arrested on 23.8.2008 and supplementary challan was submitted against him on 30.8.2008. The learned trial court after observing the formalities of Section 265-C Cr.P.C, formal charge was framed against the appellant, to which he denied and claimed trial.

6. To prove the guilt against the appellant/convict, the prosecution examined as many as (11) witnesses, brief resume of which is as under:-

PW-1 is the statement of Shafiq Khan DSP who has submitted complete challan against appellant u/s 512 Cr.P.C on 8.1.2006, on arrest of appellant, Muhammad Jan CO Rural Bannu (PW-2) has submitted supplementary challan on 30.8.2008, Muhammad Ali Shah DFC 57 (PW-3) has completed proceedings in pursuance of warrant U/S 204 and proclamation notices U/S 87 Cr.P.C, Mir Ali Khan ASI (PW4) has incorporated the contents of murasila in shape of FIR (Ex.PW 4/1),

Naimatullah Khan SHO (PW-5) has arrested appellant Shamsullah on 23.8.2008 and issued his card of arrest, Dr.Khalid Mehmood Khan (PW-6) has conducted autopsy on dead-body of deceased Haji Akhtar Khan, Sher Ali Baz (PW-7) has identified dead-body of deceased, Akhtar Ali ASI (PW8) has taken down the report of the complainant in shape of murasila, prepared injury sheet and inquest report of deceased, Sakhi Zaman SI Investigation (PW-9) has produced appellant /convict before the Magistrate concerned on his arrest by the SHO. PW-9 is the statement of complainant Fazal Mehmood, who has furnished same scenario as that of FIR. Beside that he is also marginal witness to the recovery memo vide which the IO in his presence took into possession blood through cotton from the place of deceased and secured one empty of 7.62 bore from the place of appellant/convict as well as garments of deceased sent by the doctor from the hospital through constable. Site plan Ex.PW 10/2 has also been

prepared by the IO at his instance. In the last, statement of Hazrat Ali Shah Circle officer has been examined as PW-11, who has conducted complete investigation in the instant case. Thereafter, statement of the convict/ appellant was recorded under section 342 Cr.P.C, but neither he had produced any evidence in defence, nor opted to examine himself on oath in terms of section 340(2) Cr.P.C. The learned trial Judge after considering the arguments of the learned counsel for the parties addressed at the bar and scanning the record, being found the accused guilty of the offence, convicted and sentenced him as mentioned above, vide the judgment, dated 25.5.2010.

7. Aggrieved from the conviction and sentence, appellant preferred Cr. Appeal No.71/2010 before the Hon'ble Peshawar High Court, Bench DIKhan, which was accepted, the judgment was set aside and the case was remanded back to the learned trial court with the direction to

provide full opportunity to appellant for producing his defence witnesses. The case was received back to the learned trial court on 25.01.2011. Appellant was summoned. In his defence he produced Aminullah alias Taranai whose statement was recorded as DW-1 on 4.5.2011, wherein he has stated that he knows nothing about the present occurrence, as he belongs to village Mira Khel while the parties belong to village Baist Khel. After close of defence evidence, arguments of learned counsel for the parties were heard and vide impugned judgment dated 04.6.2011, appellant /accused was awarded with the sentence of death, subject to confirmation by Hon'ble Peshawar High Court Peshawar (Bench DIKhan). Fine of Rs.1,00,000./- (one lac) is also leveled against him to be paid to the L.Rs of deceased as compensation under section 544-A Cr.P.C. In case of default in payment of fine, appellant shall undergo simple imprisonment for a term of six months. Benefit of

Section 382-B Cr.P.C is also extended in favour of appellant. Hence the instant criminal appeal .

8. Learned counsel for the convict/ appellant vociferously argued that the impugned judgment/order of conviction is against facts, law, thus not sustainable under the law. He argued that the prosecution had not been able to prove its case against the convict beyond any shadow of reasonable doubt, therefore, the learned trial Judge has fallen into an error while passing the impugned judgment of conviction and sentence; that there are serious contradictions in the evidence of the prosecution due to which its case is totally untenable as there is not an iota of independent evidence to substantiate the charge against the appellant, while complainant Fazal Mehmood is an interested witness being brother of deceased. The learned counsel, therefore, argued that the learned trial Judge has failed to appraise the evidence brought on record in its true perspective while

convicting the appellant through the impugned judgment which is liable to be set aside.

9. On the other hand, the learned Asstt. Advocate General representing the State assisted by the learned counsel for the complainant argued that the convict/appellant has rightly been found guilty of the charge leveled against him and thus defended the conclusion drawn by the learned trial Judge on almost the same grounds enumerated in the impugned judgments; that the medical evidence fully supports the prosecution version. They further submitted that since the learned trial Judge has held responsible the convict/appellant for the murder of deceased and the offence carries capital punishment, therefore, the sentence of awarding penalty of death to him through the impugned judgment is much enough to meet the ends of justice which needs not to be discouraged.

10. We have heard the learned counsels for both the sides and gone through the entire record of the case and anxiously considered the

valuable arguments of the learned counsel for the parties.

11. Perusal of the record reveals that in the instant case occurrence took place on 17.12.2005 at 0800 hours, whereas the report has been lodged on the same day at 0830 hours after arrival of Akhtar Ali ASI (PW-8) to the spot on receiving information about the occurrence, hence the FIR has promptly been lodged within no time on the spot. There was no chance for deliberation, consultation, false implication or substitution. It is a day light occurrence, appellant /convict is the first cousin of complainant and deceased, well known to each other, hence neither any question of misidentification can arise, nor any such plea has been taken by the appellant.

12. The single accused/convict has been charged for murder of deceased Haji Akhtar Khan (brother of the complainant). In such like cases, when a close relative, near and dear has been done to death , leaving the actual culprit and charging an

innocent person is rear phenomena. In this regard reference can be made to a case titled "***Muhammad Iqbal VS The state" (PLD 2001-SC-222), "Zahoor Ahmad Vs the State (2007 SCMR 1519)*** wherein it is held that ***:-***

> ***"The petitioner is a maternal cousin of the deceased, as also the first cousin of the deceased through paternal line of relationship and thus, in the light of the entire evidence it has correctly been concluded by the learned High Court that the blood relation would not spare the real culprit and instead would involve an innocent person in the case"***

The Hon'ble Supreme Court of Pakistan in case titled ***"Khizar Hayat Vs the State" (2011 SCMR 429),*** has held that :-

> ***"In addition to that, it is a case of single accused, who has fired upon the***

deceased –Ghoulam Ghous, therefore, substitution of a culprit is not possible besides it is a rare phenomenon where a witness whose close relative has been murdered would substitute the accused with an innocent person thereby allowing the actual accused to go scot-free"

13. As per prosecution case the occurrence has been witnessed by the complainant Fazal Mehmood (PW-10). No doubt the eye witness is closely related to the deceased being his real brother but his testimony could not be discarded only on this ground, unless it is shown that he is partisan, inimical, or interested witness. Guidance can be taken from the case titled "***Abdur Rauf Vs the State" (2003 SCMR 522),*** wherein it is ruled out that***:-***

"We may observe that relationship itself is no ground to discard and discredit the testimony of eye-witnesses unless it is shown that

they are partisan and interested witnesses. The eye-witnesses in the present case undoubtedly are related to the deceased but they have been found entirely independent and truthful, therefore their testimony without looking for any other corroborative evidence, would alone be sufficient to establish the charge"

14. The PW/complainant Fazal Mehmood (complainant) has given natural and cogent picture of the occurrence and his testimony could not be shattered despite being lengthy and taxing cross examination. The contention of the learned counsel for the appellant/convict that statement of PW-10 is contradictory on material points, i.e his presence on the spot, mode and manner of the occurrence and identification of the accused. When the learned counsel for the appellant/convict was confronted with the situation that to point out specific

contradictions instead of general allegations, he could not point any major contradiction which may shatter the case of prosecution. Some discrepancies are inevitable bound to occur on account of lapse of memory owing to the intervening period, as in the instant case admittedly the statement of eye witness recorded after lapse of more than two and half year and after passage of such a long period minor discrepancies may occur in the statements of PWs and the accused cannot be get premium thereof. In this respect, the Hon'ble Supreme Court of Pakistan in case titled ***"Allah Bakhsh Vs Ahmad Din (1971 SCMR 462)*** observed that minor discrepancies in deposition of prosecution witnesses of inconsequential nature cannot reasonably be considered as good grounds in disbelieving independent and disinterested witnesses. If importance be given to such insignificant inconsistencies there can hardly be any conviction, for seldom is there a witness

whose evidence does not suffer from such inconsistencies.

15. The prosecution case besides the ocular account also get supports from circumstantial evidence in shape of recovery of blood through cotton, blood stained last worn clothes of the deceased taken into possession by the IO during the spot inspection and sent to the FSL for chemical analysis. According to Serologist report, it was human blood and of same group. The doctor during post mortem examination also observed the cause of death due to fire arm injuries. All these material pieces of circumstantial evidence established the place of occurrence as alleged by the complainant and proved that the deceased was done to death at the same place by the accused in the mode and manner as alleged by the complainant.

16. As per version of the complainant, motive is stated to be a dispute over women folk. This contention was not only agitated in FIR, but

also in his statement before the Court. During cross examination the complainant has stated that

> "***It is correct that accused Shamsullah was demanding the hand of daughter of deceased Akhtar Khan but the same was not accepted"….***
>
> ***The daughter of Akhtar Khan was studying in religious Madressa while the accused was not a man of good character"***

Otherwise too if the alleged motive is not proved, it cannot fatal the prosecution case. In this regard, reliance can be placed on NLR 2010 Criminal page-9. The relevant citation (d) is reproduced below:-

> ***"For the last so many years, the judicial consensus seems to be that it is not for the prosecution to prove the motive irrespective of the fact whether it has been alleged or otherwise. Question of motive, its importance and***

its significance examined by the Hon'ble Supreme Court in the case. Reliance is also placed on 1995 SCMR page 1776.

17. Medical evidence also fully corroborates the version of complainant. Deceased received 06 inlet and 6 exit fire arm injuries. The recovery of blood stained earth from the place of deceased and recovery of 7.62 bore empty shell from the place of accused also supports and strengthen the prosecution version. Furthermore, as per site plan, appellant/convict is shown at point No.3, deceased at point No.1, complainant at point No.2 in the site plan Ex.PB and all of them are visible to each other and there was no visual hindrance between three places.

18. So far as the long abscondence of appellant/convict is concerned, suffice it to say that occurrence took place on 17.12.2005 while

appellant was arrested on 23.8.2008, meaning thereby that he remained fugitive from law for more than 2 years and half year for which the learned defence counsel could not furnish any plausible explanation. Had, the appellant been innocent, he should have to participate in the funeral ceremony of the deceased being his cousin or at least appear within a reasonable time, but he could not. When accused absconds after the commission of offence an adverse inference can be drawn against him because he has committed an offence and absconded himself to hamper the process of investigation of the case. ***In this respect, reliance is placed on 2003 SCMR page 647.*** Furthermore prolonged and noticeable abscondence of accused would go a long way to corroborate and strengthen the truth of prosecution version.

19. No doubt that the case is based on testimony of a single witness but if the court is

satisfied that the witness is reliable, conviction can be based on his testimony because it is the quality to be considered and not the quantity. In -this respect reliance can be placed on ***PLD 1980 Supreme Court page 225.*** The relevant citation is reproduced below:-

> "***Conviction, even in murder cases, held, can be based on testimony of a single witness if court satisfied as to witness being reliable---Emphasis, held further, laid on quality of evidence and not on its quantity"***

20. The evidence of a number of witnesses shall not stamp the genuineness of an occurrence nor evidence of single witness in criminal case be discarded only on the ground that it was not corroborated by other witness.

In case of "***Mandoos Khan VS… the state" .the state (2003-SCMR 884)*** wherein the apex court has held that :-

(c) ***Ss. 302/34 & 307/34… Number of witnesses…Prosecution must produce best kind of evidence to establish accusation against accused facing trial but simultaneously it has no obligation to produce a good number of witnesses because it has an opinion to produce as many as witnesses which in its consideration are sufficient to bring home guilt against the accused, following the principle of law that to establish accusation, indeed it is not the quantity but quality o the evidence which matters….”***

21. It is pertinent to mention here that Cr.Appeal No.71/2010 against the first judgment dated 25.5.2010 was accepted by the Hon’ble Peshawar High, Bench DIKhan, whereby the impugned judgment was set aside and the case was remanded back to the learned trial court with the direction to provide full opportunity to appellant for producing his defence witnesses.

After remand, appellant was given opportunity to produce his defence, In his defence he produced Aminullah alias Taranai whose statement was recorded as DW-1 on 4.5.2011, wherein he has stated that he knows nothing about the present occurrence, as he belongs to village Mira Khel while the parties belong to village Baist Khel. To a question, whether he and Fazal Mehmood Khan (complainant) during the month of December, 2005 were working with the same broker or not? …he replied that…he and Fazal Mehmood (complainant) were working with same broker during the relevant days, however, he does not know that on the relevant day whether Munshi Fazal Mehmood was present or he was working somewhere else. He does not know whether on 17.12.2005 at early morning time, telephone call was received at the office of said broker about the present occurrence or not", meaning thereby that false charge of appellant by the complainant

could not prove. In such a situation when the evidence produced by the appellant/convict by himself as DW is against him then there would be no reason to disbelieve the evidence produced by the prosecution. There is no reason for the complainant to charge the accused who is his first cousin falsely and substitute him with actual culprit. In case of murder, substitution of an accused for real culprit is a rare phenomenon, particularly when a single accused is involved.

22. It is the culture, habit and now an established routine that whenever such like occurrence took place, several or some time the entire family members are charged, which for the time being do harass and pressurize the accused party, but ultimately the accused get its benefit and the case fails due to false charge. But, the case in hand is an exception to the common practice of the locality. Here, one person is charged and neither his brother, father or any other member of his

family is charged, which makes it crystal clear that complainant has reported the matter with clean hand and narrated the true story before the local police in such a tense moment as well as before the court and inspite of the fact that he was lengthy cross examined by the defence counsel but no contradiction could be extracted from his mouth.

23. The genuineness of the above is that appellant/convict is directly charged in a promptly lodged FIR. There was no chance for complainant to charge him falsely, malafidely, for ulterior motive or with consultation and deliberation. Motive has been mentioned in the FIR, statement as well as in cross examination, which was the proposal of appellant/convict for engagement of daughter of deceased and refusal of deceased has been proved. Medical evidence in shape of recovery of blood through cotton and one empty of 7.62 bore is in line with the prosecution version. Long and un-explained absconding of accused is there. All the PWs are consistent, coherent and

corroborating each other. No material contradiction favourable to the accused was brought on record.

24. So far as quantum of sentence is concerned, the appellant has been charged for murder of deceased Haji Akhtar which has been proved beyond any shadow of doubt. The appellant /convict is aged about 35 years and the role of firing with intention to cause death solely attributed to him and learned counsel for the convict/appellant could not brought on record any mitigating circumstance which could be taken into consideration, hence the sentence awarded by the appellant by the learned trial court is in accordance with law and no exception can be taken from it.

25. For what has been discussed above, the learned trial court has rightly appreciated the evidence in its true perspective. We find no illegality or irregularity, which may warrant interference in the well reasoned findings of trial

court. Thus instant appeal stands dismissed and conviction and sentence recorded by the trial court is maintained. Murder reference No.3-B of 2011 is answered in affirmative.

ANNOUNCED **JUDGE**
03.6.2015

JUDGE