Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr.A.No.834-P/2020.

J U D G M E N T

Date of hearing ------ 02.05.2023.

Appellant by --- Mr.Shabbir Hussain Gigyani, Advocate.

State by --- Mr.Jalal-ud-Din Akbar Azam Gara, A.A.G.

Complainant by --- Syed Abdul Fayyaz, Advocate.

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SAHIBZADA ASADULLAH, J:- This criminal appeal is directed against the judgment dated 14.10.2020 of the learned Additional District & Sessions Judge/Model Criminal Trial Court, Peshawar delivered in case FIR No.530 dated 03.07.2017 registered under sections 302/324/34 PPC at police station Pahari Pura, Peshawar, whereby the appellant has been convicted under section 302 (b) PPC and sentenced to imprisonment for life as *Tazir* and to pay Rs.400,000/- as compensation to legal heirs of the deceased within the meaning of Section 544-A Cr.P.C or in default whereof to undergo six months SI. He has also been convicted under section 324 PPC and

sentenced to undergo imprisonment for a period of seven years RI with fine of Rs.100,000/- or in default whereof to suffer 06 months SI. All the sentences were directed to run concurrently while benefit of section 382-B Cr.P.C. was extended to the convict.

2. Brief facts of the case are that on 03.07.2017, the complainant (P.W-3) in injured condition along with Arif deceased (then injured) reported the matter to the local police in the Casualty of LRH, Peshawar to the effect that he along with Usman were eating crush ice from an Ice Seller at Ring Road Yousafabad, meanwhile Arif came there and started altercation with the Ice Seller. In the meantime, father of the Ice Seller Shal Bacha (accused-appellant) also came there duly armed with firearm and the Ice Seller asked him to kill them. On the direction of his son, Shal Bacha started firing at them resultantly; the complainant and Arif got hit and sustained multiple firearm injuries. The report was reduced in form of *Murasila* (Ex.PA/1) and sent to police station on the basis of which FIR (Ex.P.A/2) was registered initially under section

324/34 PPC, but later on injured Arif succumbed to his injuries, hence, section 302 PPC was added therein.

3. On arrest of the appellant and completion of investigation, complete challan was submitted before the court of competent jurisdiction. The accused was charge sheeted to which he did not plead guilty and claimed trial. As such the learned trial court was pleased to direct the prosecution to produce its evidence. In order to prove its case, prosecution produced and examined as many as 14 witnesses, whereafter statement of the accused was recorded wherein he professed his innocence but did not opt to record his statement under section 340 (2) Cr.P.C. On conclusion of trial, the learned trial court held him guilty and as such he was convicted and sentenced, whereagainst he has filed the instant appeal.

4. The learned counsel for parties as well as the worthy Additional Advocate General, were heard at length and with their valuable assistance the record was scanned through.

5. The tragic incident occurred on 03.07.2017 where one Arif lost his life and the complainant Shabbir Rehman got seriously injured. Both the complainant and the deceased then injured were rushed to the hospital where the matter was reported to P.W-05 who drafted the *Murasila* (Ex.PA/1) prepared the injury sheets and the injured were referred to the doctor for their medical examination. The complainant was examined by the doctor at 1818 hours and it was thereafter that he reported the matter at 1845 hours. It is pertinent to mention that out of the injured, the injured Arif succumbed to the injuries and on his death section 302 PPC was added. The investigation officer after getting copy of the FIR, visited the spot and on pointation of the eyewitness Usman prepared the site plan. During spot inspection, the investigation officer collected blood stained earth from the divider in the middle of the road where the complainant and the deceased at the time of eating crush ice, were sitting. The investigation officer also collected 05 empties of .30 bore pistol from point “B” situated near

the place assigned to the accused-appellant. The accused were arrested and from possession of the convict-appellant a .30 bore pistol was taken into possession whereas from possession of his other son namely, Sardar Badshah a licensed .30 bore pistol was recovered. The pistols collected from the accused were sent to the laboratory along with the recovered empties, where it was opined that none of the empty was fired from the pistol recovered from the personal possession of the appellant. The trial commenced which ended in the conviction of the appellant.

6. The learned trial court considered the material aspects of the case and after application of its judicial mind to the evidence recorded, convicted the appellant. As in the instant case one person lost his life and the other got seriously injured, so this court deems it appropriate to re-visit the entire case and to judge as to whether the presence of the eyewitness and the injured complainant is established from the record of the case and as to whether the injuries on the person of the complainant are by itself sufficient to hold the

appellant responsible for the death of the deceased. True that in the instant case we have an injured eyewitness, but it is not the rule of thumb that under all circumstances an injured eyewitness will tell nothing but the whole truth. In order to avoid miscarriage of justice we deem it desirable to scan through the record once again and to re-assess the findings rendered by the learned trial court.

7. The points for determination before this court are as to whether the incident occurred in the mode, manner and at the stated time; as to whether the complainant along with the eyewitness was present at the place of incident with the sole purpose to eat the crush ice; as to whether the parties were known to each other prior to the occurrence and that the complainant succeeded in identifying the accused, who actually participated in the episode and the accused who was selling the crush ice; as to whether the witnesses remained consistent qua involvement of the appellant and another in the incident and as to whether the medical evidence is in harmony with the eyewitness account. There is no denial

to the fact that the incident occurred at the stated place, as therefrom, during spot inspection the investigating officer collected blood and also 05 empties of .30 bore pistol. In the unfortunate incident, the complainant received injuries on his body, whereas the deceased was done to death for the sole reason that an altercation took place between the deceased and the accused. The learned counsel for the appellant submitted that the parties were not known to each other and that the incident did not occur in the manner as has been portrayed; that neither the handcart, which was used for selling of the crush ice, was taken into possession, nor the utensils used for the purpose were collected by the investigating officer. True that the name of the co-accused i.e. crush seller was not known to the complainant, rather the name of the co-accused was known to him and as such at the time of report the Ice Seller was charged by using the word “crush ice-seller” whereas the convict appellant was charged as Shal Badshah son of unknown. No ambiguity is left that the convict-appellant was known to the

complainant as well as to the eyewitness and he was specifically charged by name for the murder of the deceased and it later on come to knowledge that the name of the crush ice-seller was Sardar Bacha and as such when father of the deceased recorded his statement under section 164 Cr.P.C he named the crush ice seller, as Sardar Bacha and the convict-appellant as Shal Badshah. The defence wanted to reap the harvest of the created uncertainly, regarding the name of the accused charged, but we are not convinced, as admittedly, both the parties were the residents of village Yousaf Abad, a village that is lying adjacent to the place of incident. Another alarming aspect of the case is the arrival of the deceased after the complainant, when the eyewitness had already started eating crush ice. The report tells that the deceased arrived later to the arrival of the complainant and the eyewitness, and on his arrival he altercated with Sardar Bacha (crush ice-seller) and in turn the accused Sardar Bacha asked his father to kill. The approach of the deceased Arif after the arrival of the complainant and eyewitness, to

the place of incident, suggests that the place of incident was lying adjacent to the place of residence of the complainant party and that in routine the complainant party used to visit the place. Had it not been so, the deceased Arif would have no knowledge regarding the presence of the complainant and eyewitness at the place of incident and there was hardly an occasion for him to come to the spot. The circumstances further tell that the co-accused Sardar Bacha was known to the deceased as well as to the complainant and the eyewitness, as on arrival to the spot the deceased Arif started querling with him. When the parties had not already altercated and when soon after his arrival the deceased started querling with the crush ice seller, no ambiguity is left that either the deceased attracted to the spot with a pre-occupied mind or they had a previous grudge against one another. Much was voiced regarding identity of the accused and the inter-se relationship of the complainant party and the accused, but the record tells that when the complainant was examined as P.W.03, he categorically stated that the accused had a

shop in the premises and when the shop of the accused near the house of the complainant party is admitted, on record then no ambiguity is left that the parties were known to each other. The defence could not convince as to what prompted the complainant to charge the accused for commission of the offence and that what mala fide the eyewitness and the complainant had against the convict-appellant. The defence right from the beginning till the end could not build up a case which would suggest that either the incident did not occur in the mode and manner, or the real facts were twisted by the complainant and the eyewitness. True that some minor discrepancies are lying on the surface of record and equally true that the eyewitness Usman was not believed by the learned trial court, but we cannot ignore that this case has its peculiar characteristics, which need appreciation, strictly in light of its characteristics and the manner in which the incident occurred. As the defence could not point out any previous ill-will between the parties, so this court is not ready to accept that the accused were substituted and that the real

culprits were let off. The uncertainty regarding the identity of the accused, pointed out by the learned counsel for the appellant, compelled us to go through the relevant part of the statements of the witnesses and as such we visited the same. No ambiguity is left that the incident occurred near village Yousaf Abad and that both the complainant party and the accused were the residents of the same village. As the accused and the complainant party, except the appellant were of the same age so it appeals to a prudent mind that there might have taken altercation between the accused Sardar Bacha and the complainant party and the father i.e. the appellant who was present near the place of incident could not resist the same and fired at the complainant and the deceased.

8. The injured were rushed to the hospital soon after the incident, where the matter was reported by the complainant, who too, was in injured condition. The bona fide of the prosecution can be gauged from the fact, that soon after arrival to the hospital, complainant did not make the report rather he was

examined by the doctor at 1818 hours and his medico legal certificate was prepared. The complainant was examined as (P.W-03) who stated that on his arrival to the hospital he was in miserable condition and was examined by the doctor and it took him 30 minutes to regain his senses and after he turned stable, he reported the matter. The time of report and the time of examination of the injured, by the doctor, confirm, the statement of the complainant regarding this particular aspect of the case. True that while reporting the matter, the complainant could not tell the name of the co-accused Sardar Bacha rather, used the word crush ice-seller but his father's name was duly mentioned. Had the prosecution mala fide, then instead of using the word "crush ice seller" the complainant would have collected the real name of the co-accused and would have named him, instead of using an ambiguous term for his identity. It is evident from the record that the accused was running the business of selling crush ice and the handcart finds mention in the site plan and from adjacent to the place of accused 05 empties of .30 bore

pistol were taken into possession. As on one hand, the accused were also the residents of village Yousaf Abad and they had the place of business adjacent to their village, so no ambiguity is left that the exact name of the co-accused was easily ascertained. Another important aspect of the case is the subsequent arrival of the father of the deceased namely, Badam Gul, who recorded his 164 Cr.P.C statement and he also supported the case of the complainant and charged both, i.e. convict-appellant and the acquitted co-accused by name. As the matter was promptly reported and that the injured were duly examined by the doctor, who confirmed the injuries on their bodies, so the time of arrival to the hospital, the time when the matter was reported and the time when the injured were examined by the doctor are in harmony. We cannot ignore that the complainant who himself got injured in the incident, is not a relative of the deceased, and that he had no interest to falsely implicate the accused, that too, for the benefit of the deceased and his father, rather the record tells that he being the natural witness deposed

consistently and categorically. True that the injuries on the person of an injured witness are not by itself sufficient to hold an accused charged, responsible for commission of the offence, but equally true that when the injured has no mala fide to charge and when the prosecution could not succeed in proving him an interested witness, then his statement can be taken into consideration and that the stamp of injuries on his body can validly be considered as a token of his presence on the spot, at the time of the incident. As in the instant case the complainant received injuries and so his presence on the spot cannot be doubted. We are benefited from the case titled ***"Khadija Siddique Vs Shah Hussain" (PLD 2019 SC 261)*** which reads as follows:-

> ***"The ocular account of the said occurrence had been furnished before the trial court by three eye-witnesses namely Riaz Ahmed complainant (PW5), Khadija Siddiqui (PW6) and Sofia Siddiqui (PW7) out of whom the last two witnesses had the stamp of injuries on their bodies vouchsafing their presence at the scene of the crime at the relevant***

> ***time. The said eye-witnesses had consistently pointed their accusing fingers towards respondent No. 1 as the sole perpetrator of the alleged offences and ostensibly they had no earthly reason to falsely implicate respondent No. 1 in a case of this nature or to substitute him for the actual culprit."***

9. It was voiced by the defence that in fact the matter was reported by father of the deceased i.e. Badam Gul, when his attendance was procured but the record is silent regarding this particular aspect of the case and the investigation officer could not bring on record his interest to let off the real culprits and to substitute the innocent persons, that too, for the death of his real son. As in the instant case the real father of the deceased also appeared before the learned trial Court and supported the stance of the complainant, so it does not appeal to a prudent mind that a real father would substitute innocent persons for the death of his son, by letting free the actual culprits. The situation in hand has been highlighted in

case titled ***"Aqil Shah Vs The State (2023 SCMR 831)"*** which reads as follows:

> ***"Learned counsel for the petitioner could not point out any plausible reason as to why the complainant has falsely involved the petitioner in the present case and let off the real culprit, who has committed murder of her mother and sister. Substitution in such like cases is a rare phenomenon. The medical evidence available on the record further corroborates the ocular account so far as the nature, time, locale and impact of the injuries on the person of the deceased and injured is concerned. Even otherwise, it is settled law that where ocular evidence is found trustworthy and confidence inspiring, the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused."***

The peculiar circumstances of the present case must be tested on the touchstone other than the ordinary mode, and as in case in hand the defence could not bring on record another theory, so the one advanced by the complainant will hold the field and can happily accepted. True that the learned trial court did

not accept the statement of the eyewitness and that his testimony was excluded from consideration, but equally true that even if the statement of the eyewitness is taken out of consideration, even then the prosecution is left with an injured and disinterested eyewitness, who reported the matter, and stood the test of searching cross-examination whose credibility could not be shaken. As the complainant is enjoying the status of an independent witness, so this court is confident in holding that in case the eyewitness is disbelieved, even then the statement of this witness is sufficient for holding the appellant responsible for the injuries caused and murder committed. As the quick succession of events left a little room for the prosecution to consult, so we are confident in holding that the prosecution succeeded in establishing its charge against the appellant, the issue in hand has been answered in case titled ***"Khadija Siddique and another Vs Shah Hussain and another (PLD 2019 Supreme Court 261)"*** which reads as follows:-

> ***"The ocular account of the said occurrence had been furnished***

before the trial court by three eye-witnesses namely Riaz Ahmed complainant (PW5), Khadija Siddiqui (PW6) and Sofia Siddiqui (PW7) out of whom the last two witnesses had the stamp of injuries on their bodies vouchsafing their presence at the scene of the crime at the relevant time. The said eye-witnesses had consistently pointed their accusing fingers towards respondent No. 1 as the sole perpetrator of the alleged offences and ostensibly they had no earthly reason to falsely implicate respondent No. 1 in a case of this nature or to substitute him for the actual culprit."

10. It was argued that the medical evidence does not support the eyewitness account and that the injuries caused to both, the deceased and the complainant could not be caused from such a long distance, but the defence forgot that the deceased received only one entry wound on his back and the rest on his chest. The places where the deceased and the complainant were sitting, at the time of incident, when taken into consideration, no ambiguity is left that the injuries were caused from the places assigned to the accused. The doctor was cross-examined on this particular aspect of

the case who also remained consistent regarding the dimension of injuries and the number of accused involved in the episode. The doctor has rightly explained that the dimensions were different for the reasons that some of the injuries are caused on the soft parts of the body, whereas some on hard, and in such eventuality, the size of injuries may vary. There is no cavil with the proposition that medical evidence is confirmatory in nature and that in presence of the confidence inspiring eyewitness account, the same plays a little role. As in the instant case the complainant remained consistent in respect of the incident, the number of accused and the manner in which the report was made, so the medical evidence is in harmony with the eyewitness account and the same has rightly been relied upon by the learned trial court.

11. True that the motive remained shrouded in mystery, and that the prosecution could not produce independent witness in that respect, but equally true that it was because of that uncertainty, that the learned trial court was pleased to convict the appellant to life

imprisonment instead, of awarding the normal penalty of death. The atmosphere does suggest that the incident occurred due to timely altercation and no pre-occupied mind, so the learned trial court was justified to convict the appellant in the stated manner. There is no denial to the fact that absence or weakness of motive would be fatal to the prosecution, but in exceptional circumstances, which are missing in the instant case. When the incident is otherwise proved and when witnesses remained consistent on material aspects of the case, then the weakness or absence of motive would be only a determining factor to determine the quantum of sentence, which the learned trial court was pleased to determine.

12. The cumulative effect of what has been stated above leads this court nowhere but to hold that the prosecution has succeeded in bringing home guilt against the appellant and the impugned judgment is suffering from no irregularity or inherent defects which would call for interference. The impugned judgment is well reasoned and the learned trial court fully appreciated the evidence on file, which calls for

no interference. The instant criminal appeal, being bereft of any merit, is hereby dismissed.

J U D G E

Announced. ***J U D G E***
Dt.02.05.2023.

HON'BLE MR.JUSTICE ISHTIAQ IBRAHIM &
HON'BLE MR.JUSTICE SAHIBZADA ASADULLAH..

(A·K·KHAN Court Secretary)