

IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

Cr. A No. 01-B of 2014

Zarghoon Shah
Vs.
The State etc.

JUDGEMENT.

Date of hearing 01.06.2023

For petitioner: **M/S. Muhammad Rashid Khan Dirma Khel**
and Muslim Jan advocates.

For State: **Mr. Habibullah Khan , Asstt: A.G.**

For respondent: **Marghoob Hussain advocate.**

F.I.R No. 148, dated 08.05.1970, under sections 302/307/34
P.P.C, Police Station City, District, Bannu.

FAZAL SUBHAN, J.— Through this criminal appeal, the appellant Zarghoon Shah has challenged the judgment and order dated 16.12.2013, passed by learned Additional Sessions Judge-III, Bannu, whereby accused /respondent No.2, namely, Zer Muhammad has been acquitted from the charges.

2. Relevant facts of the case are that on 08.05.1970, the complainant Zarghoon Shah reported that he along with Gul Mir Shah s/o Piyo Shah, Asal Mir s/o Ghous Amir and Mohsan Shah, his cousin had gone to cloth market/ Mandi, Kotka Jumma Khan, for sale of

clothes and when were busy in their business, at about 11:30 hours, Zer Muhammad (the present respondent) along with Mir Sahib Shah and Amir Hamza came duly armed with Rifles/ topaks. Respondent Zer Muhammad fired at Moeen Shah with his Rifle, who was sitting in the shop got injured, with this Asal Mir and Ghous Amir caught up, however, they both were fired by Amir Hamza, Mir Sahib Shah and Amir Hamza fired upon them with their respective rifles and as a result he was hit and got injured. Asal Mir and Moeen Shah tried to catch hold the accused, but after covering 2 to 5 paces they fell on the ground. All the three accused announced that, whosoever came near to them, would face the same consequences, whereafter accused decamped from the spot of occurrence. Motive for the occurrence was stated to be a land dispute which they had purchased, some 15/20 days back, which was earlier mortgaged with all the three accused, which annoyed the accused party, he, therefore, charged the accused for firing and causing injuries to the above injured.

3. The injured were then shifted to the hospital, where they were provided medical treatment and at the same time, Doctor Ghulam Farid Khan medical Officer also recorded his statement, already on file. The injured

Asal Mir and Moeen Shah later on succumbed to their injuries and their Postmortem was conducted. After completion of investigation in the case challan was submitted against the arrested accused Noor Sahib Shah and Mir Hamza, who thereafter faced their trial in the case and vide judgment dated 17.08.1970, the then learned Sessions Judge, Derajat Division, Camp Bannu, while arriving to the conclusion that the prosecution has failed to prove its case against the accused beyond reasonable doubt extended benefit of doubt to them and were acquitted.

4. The respondent Zer Muhammad was arrested vide Naqal Mad No.30, dated 22.01.2013, and after completion of investigation challan was submitted against them.

5. On submission of challan, the learned Additional Sessions Judge-II, Bannu, summoned the accused from jail, where after proceedings under section 265- C Cr.PC were complied and charge was framed to which he pleaded not guilty and claimed trial. In order to prove its case the prosecution examined Doctor Faizuddin Qazi, SMO, as PW-01, who deposed that the injured was examined by doctor Ghulam Farid Khan (Late) and he also conducted their post mortem examination. The said medical officer had also recorded dying declaration of two

injured Moeen Shah Ex: PD/4 and dying declaration of deceased Asal Mir Ex: PD/5. On the request of prosecution the statement of Doctor Ghulam Farid (Late) was transferred from the previous trial into the trial of present respondent. Similarly, on the request of prosecution the statements of PWs , Ghulam Daud, Saadullah Khan Judicial Magistrate-II, D.I.Khan, Muhammad Aleem Rtd, Patwari and Mehrul Wahab Khan SI, Ghosa Mir, Gul Nawaz, Mir Qalam Khan FC No.158, Sattar Jan ?SI and Sadiq Ali shah SI, recorded in the earlier trial, as Ex: PW 4/2 to PW 4/12 were also transferred to the present trial on the ground that the said PWs were died and accordingly the trial court transferred their statements to the present trial. Thereafter state of eye-witness namely Zarghoon Shah and Gul Mir Shah were recorded as PW-02 and PW-03, respectively, while statement of Mehran Shah Khan and Muhammad Aslam Khan S.H.O were recorded, whereafter prosecution closed its evidence. learned trial Court recorded statement of accused under section 342 Cr.PC, wherein he professed innocence and false implication, however, he did not opt to produce defence evidence or to be examined on oath as provided under section 340(2) Cr.PC. learned trial Court after hearing arguments of learned counsel for the parties, vide

impugned judgment acquitted the accused/ respondents.
Hence, the instant criminal appeal.

6. The learned counsel for the parties alongwith Asstt: Advocate General were heard at length and with their valuable assistance the record was gone through.

7. It is on the record that as a result of firing by all the accused including accused facing trial, Asal Mir and Moeen Shah sustained injuries, whereafter they were shifted to the hospital for treatment. It is in the statement of PW Doctor, Ghulam Farid that he not only provided treatment to the injured, but also recorded their statements Ex: PD/4 and Ex: PD/5. To accept dying declaration there are certain preconditions which includes the factum that the injured must have apprehension of immediate death and that the person in whose presence dying declaration is recorded must endorse that the person recording his dying declaration is in proper senses and is able to talk and communicate and could give true and complete account of the incident. In this case the dying declaration was recorded by the PW doctor Ghulam Farid Khan, medical officer, Civil Hospital, Bannu and therefore, he qualify the criteria to declare that the injured at the relevant time was in proper senses and was capable to make his statement clearly and give complete account of the incident, hence,

his credibility to record dying declaration cannot be questioned, however, it is clear from the statement that the then injured recorded his statement before the Medical Officer in Pashto language and Dr. Ghulam Farid recorded his statement in English. He admitted that deceased Moin Shah told him that he did not "know" the names of other accused, who accompanied the accused facing trial Zer Muhammad and that he first wrote the word "know", but thereafter he strike down the word "know" and substituted the word "remember" because according to his mind the word "remember" conveys the proper meaning of the statement made by the said injured (deceased) in Pashto. Similarly said Medical Officer admitted that he has not mentioned father name of the deceased Asal Mir and that is why he has not written his father name at the time of recording his dying declaration. From the statement of PW Dr. Ghulam Farid, it is clear that he was changing the words which at his own whims and wishes. The word 'Know, convey a totally different meaning as compared to the word "remember" and if a person do not know any fact, it would mean that he had no knowledge in respect of the said fact, whereas "did not remember" means that the person know about the fact, but at the time of recording his statement he forget the said fact. In this view of the matter we are of the view that though PW-01, Dr. Ghulam Farid

was competent to record dying declaration of the then injured (deceased), but the way/manner he recorded /translated statement creates doubt and hence, said dying declaration cannot be accepted to be correct.

8. Besides the above fact there is contradictions with record to the presence of other persons at the time of recording of dying declaration of the above mentioned injured/ deceased. Admittedly one Mir Qalam FC accompanied the two injured, but subsequently PW Dr. Ghulam Farid negated as to whether the injured brought to the hospital by Mir Qalam FC or not. The said medical Officer also affirmed that two injured persons were accompanied by their relatives, whereas PW Zarghoon Shah in his cross-examination has stated that at the relevant time of recording dying declaration of the then injured no one was present with them. The cross-examination of Dr. Ghulam Farid further reveals that Asal Mir was literate, but he could not signed dying declaration due to injuries which has caused shock as well, this answer to the question further brings a cloud of doubt on the dying declaration for the reason that if the injured Asal Mir was in shock then how he could record his dying declaration. He further admitted that, while recording dying declaration of the injured Moeen Shah he did not knew names of two

other assailants, who accompanied Zer Muhammad present respondent. From the above, it is further clear that there are certain doubts about dying declaration recoded by the PW Dr. Ghulam Farid.

9. In the initial report, the complainant Zarghoon Shah has reported that all the three accused were armed with Rifles (Topaks), however, when examined in the Court he made improvement by replying that the accused were armed with single barrel shotgun known as Kohati Topak, similarly reply was given by PW Gul Mir Shah in respect of kind of weapon, this clearly indicates that both these witnesses have made willful improvements in respect of kind of weapon allegedly used in the offence.

10. So far as ocular account of the case is concerned PW Zarghoon Shah and PW Gul Mir Shah presented themselves as eye-witnesses of the case, but on thorough analysis it is clear that both these witnesses were inconsistent on many aspects of the case. PW Zarghon Shah in cross-examination replied that they, at the relevant time, were standing in front of their Chappar shop, but added that they were inside the Chappar shop. As discussed above, no description of the weapon was given in the F.I.R by PW Zarghoon Shah, but in his statement he has given the description by answering that it was Kohati

Topak. As per his reply after receiving fire shot the injured Asal Mir and Moeen Shah got up and ran away out of the shop, but fell down after covering 5/6 paces, however, the Investigating Officer did not recover or mention anything about trail of blood from the spot where he received fire shot and the place where they fell on the ground.

11. PW Zarghoon further admitted that accused did not fire upon him or at PW Gul Mir Shah. Admittedly the occurrence has taken place on Friday Mandi and as per site-plan the said Mandi was surrounded by Walls having numerous Chappar shops, none of them came forward to depose regarding the occurrence, no independent and disinterested evidence come up on the record to support the prosecution case.

12. In respect of the presence of customers both these witnesses have contradicted each other. It is also on record that one Ghulam Daud had also visited the spot, but PW Gul Mir Shah had contradicted by saying that at the relevant time said Gulam Daud had not seen the assailants decamping from the spot. In cross-examination PW Gul Mir Shah further reveals that another person had also received pellet injuries and had gone to the hospital, however, the prosecution has concealed the injuries

sustained by such person, who admittedly was sitting outside the shop. Thus from the statement of these witnesses it is doubtful as to whether they are actually present and had seen the entire occurrence, when the alleged eye-witnesses are closely related to the deceased and at the same time are inimical to the accused party, while in such a situation an independent corroboration is always required to believe the interested eye-witness, however, in the present case no such corroboration is available to support the statements of these eye-witnesses.

In the case of "Abid Ali and 2 others Vs the States" (2011 SCMR 208) the august Supreme Court has held that:

8 *"We have thoroughly discussed the statements of two eye-witnesses claiming to be present at the scene of crime but they on their own admissions were chance witnesses and have admitted their enmity with the appellants. Both these witnesses could not reasonably explain their presence with the deceased Muhammad Azam rather their conduct runs against the natural behaviour of normal human, therefore, their testimonies appears to be*

unbelievable in the circumstances of the case."

13. So far, motive aspect of the case is concerned PW Zarghoon Shah has admitted that the transfer of property through mutation of the land, which become bone of contention between the parties, was attested in his name and in the name of Gul Mir Shah PW, and father of Moeen Shah and that the names of Moeen Shah and Asal Mir (deceased) was not entered in the mutation of the land in dispute. Surprisingly the person, who allegedly attacked and murdered were not beneficiaries of the transfer mutation, whereas the complainant Zarghoon Shah and PW Gul Mir Shah to whom the property was transferred were not fired at, which further creates doubt about the motive of the occurrence. It is further noticeable that both the parties belong to the same village i.e. Warana, district Karak, and admittedly the complainant party visit their village twice in a month, then it does not appeal to prudent mind that why the respondent/ accused chose to commit the offence in the presence of large number of people in Jumma Bazar, while they could have achieved their target much easier in their village.

14. From reappraisal of the entire evidence and record, we have no doubt in our mind that prosecution has

badly failed to prove its case against the respondent Zer Muhammad through cogent, convincing and confidence inspiring evidence and, therefore, trial court after extending benefit of doubt to the accused was correct in acquitting the respondent in the case.

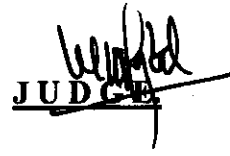
In the case of "Muhammad Akram Vs State"
(2009 SCMR 230), it was held that:

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

15. No illegality, irregularity, mis-reading or non-reading of evidence is shown in the impugned judgment, hence, this criminal appeal being meritless, stands dismissed.

Announced.
01.06.2023
Azam/P.S


JUDGE.


JUDGE

(D.B)
Hon'ble Mr. Justice Fazal Subhan and
Hon'ble Mr. Justice Dr. Khurshid Iqbal


31/7/2023
SCANNED
31 JUL 2023

Khulid Khan