

JUDGMENT SHEET

**PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Death Criminal Appeal No. 127-M/2020
With Murder Reference No. 03-M/2020

Subhan Ullah Khan son of Rozamin Khan (Appellant)
Versus

- (1) *The State through A.A.G.*
(2) *Mst. Jehan Sultan wife of Hayat Khan*

(Respondents)

Present: *M/S Sajjad Anwar and Abdul Fayaz,
Advocates.*

Mr. Sohail Sultan, Astt: A.G.

Mr. Hazrat Rehman, Advocate.

Criminal Appeal No. 141-M/2020

Mst. Jehan Sultan wife of Hayat Khan (Appellant)
Versus

- 1) *The State through A.A.G.*
2) *Nasar Khan & another*

(Respondents)

Present: *Mr. Hazrat Rehman, Advocate.*

Mr. Sohail Sultan, Astt: A.G.

*M/S Sajjad Anwar and Abdul Fayaz,
Advocates.*

Date of hearing: **18.02.2021**

JUDGMENT

WIOAR AHMAD, J.- Appellant namely

Subhan Ullah Khan is aggrieved of his conviction

and sentence recorded vide judgment dated

18.03.2020 of the Court of learned Sessions

Judge/Model Court, Dir Lower at Timergara,
whereby he has been sentenced as follows;

U/S 302 (b) PPC to death along with payment of compensation of Rs. 300,000/- (three hundred thousand) under section 544-A Cr.P.C payable to legal heirs of the deceased.

The co-accused namely Nasar Khan and Badshah Umar Khan were acquitted of the charges by extending them benefit of the doubt.

2. Report of the occurrence was lodged by the complainant namely Mst. Jehan Sultan at casualty ward of Timergara hospital in the presence of dead body of her brother namely Rahat Ullah deceased. She stated in her report that she along with her deceased brother namely Rahat Ullah had come to District Courts Timergara in connection with date of hearing fixed in a murder trial pending against another brother of the complainant namely Hidayat Ullah. She was returning therefrom along with her brother namely Rahat Ullah (deceased) to their house. When they reached the place of occurrence the deceased then alive went towards a pushcart vendor for purchasing fruits. The appellant namely Subhan Ullah along with co-accused Nasar and Bacha Umar came there at

13:00 hours on 27.08.2018 by riding a motorcycle.

The appellant was alleged to have been armed with a pistol, who de-boarded from the motorcycle and made firing at the deceased namely Rahat Ullah as a result of which he got hit on his head and died on the spot. Co-accused Bacha Umar and Nasar were alleged to have been waiting for the main accused i.e. appellant, while boarding their motorcycle who had also taken him away from the spot through the said motorcycle, after the occurrence. Previous blood feud enmity was stated to have been motive for commission of the offence. The occurrence was also stated to have been witnessed by a number of other persons. 'Murasila' Ex. PA was drafted on the basis of report of the complainant, which culminated into FIR No. 550 (Ex. PB) dated 27.08.2018 registered against the accused/appellant and other co-accused under sections 302, 34 PPC at police station Timergara District Dir Lower.

3. During the course of investigation, the Investigating Officer prepared site plan Ex. PB on pointation of the complainant. He also

took into possession blood stained *Shalwar* of the deceased (Ex. P-1) and blood stained Burqa of the complainant (Ex. P-2) vide recovery memo Ex. PW-1/1 dated 28.08.2018. He had also recovered blood soaked earth and one spent bullet of 30 bore from the spot vide recovery memo Ex. PW-6/1 dated 27.08.2018. The motorcycle used in the commission of offence was also shown recovered vide recovery memo Ex. PW-2/1 dated 29.08.2018. The Investigation Office also recovered a 30 bore pistol along with cover and five live rounds from possession of the appellant (statedly) vide recovery memo Ex. PW-12/10 dated 04.09.2018. Empty so recovered from the spot along with weapon of offence i.e. 30 bore pistol were also sent to Forensic Science Laboratory (hereinafter referred to as "*FSL*") for the purpose of comparison, report Ex. PW-13/39 received therefrom was in affirmative.

4. On completion of investigation in the case, complete *challan* was put in Court against the present appellant and other co-accused before learned trial Court. Charge was framed against the accused on 26.04.2019, to which they pleaded not

guilty and claimed trial. Prosecution was invited to produce evidence, who accordingly examined thirteen (13) witnesses and closed its evidence. Statements of the accused were recorded under section 342 Cr.P.C. The accused/appellant desired to produce evidence in his defence while rest of the two accused neither opted to record statements in their defence nor wished to produce evidence. The appellant accordingly examined Malak Muhammad Zaib Khan as DW-1 and Muhammad Darwaish as DW-2. On conclusion of proceedings in trial, accused/appellant was convicted for commission of the offence vide judgment dated 18.03.2020 of the Court of learned Sessions Judge Timergara, as stated earlier, while rest of the two accused were acquitted of the charges by extending them benefit of doubt.

Accused/appellant challenged his conviction and sentence through the instant appeal before this Court. The appellant/complainant also filed connected criminal appeal against acquittal of the accused/respondents namely Nasar Khan and Bad Shah Umar.

5. Learned counsel for appellant submitted during the course of his arguments that it was not usual for a lady to accompany male members of his family for attending Court proceedings, particularly when no case of her own had been pending in Courts. He also referred to the statement of doctor wherein he has stated that he had examined the deceased about 01:00 P.M on 27.08.2018 and then drew attention of this Court towards the time of occurrence given in the 'Murasila' Ex. PA as 13:00 hours. He argued that the time of occurrence had wrongly been shown as 13:00 hours which had in-fact been the time of examination of the deceased and this fact makes presence of the PW further doubtful, beside making the mode and manner of commission of the offence questionable. Regarding recovery of blood stained Burqa of the eyewitness the learned counsel stated that same had been recovered on 28.08.2018 i.e. on second day of the occurrence and therefore not reliable. He also added that another eyewitness of the prosecution have disowned witnessing the occurrence during the course of his cross-examination and therefore

said fact had shattered the whole case of prosecution. Regarding the recovery of weapon of offence, the learned counsel stated that the appellant had himself surrendered before the police as is evident from statements of DW-1 as well as DW-2 but the local police had instead shown him arrested from a place near the police station along with a pistol and therefore recovery of the pistol from accused/appellant was not believable at all. In order to bolster his arguments, learned counsel placed reliance on the judgments reported as 1998 SCMR 279, 1999 SCMR 1220, 1997 P Cr.LJ 2075 and 1990 P Cr.LJ 2042.

6. Learned counsel for complainant submitted in rebuttal that the lady had come to meet her brother namely Hidayat Ullah who had been facing a murder trial, while being in custody and as such the prosecution have been able to establish presence of the PW. Learned counsel also added that statement of the lady had remained unshaken during the course of cross-examination, whose statement was sufficient for maintaining the conviction. The learned counsel

also added that statement of the complainant had fully been confidence inspiring. He further stated that existence of motive has also been established as Hidayat Ullah another brother of the complainant had been facing trial in a triple murder case, FIR in respect of which had also been brought in evidence as Ex. PW-13/12. The deceased therein was claimed to be near relative of the appellant and therefore motive for commission of the offence had stood established on record according to the learned counsel. He placed reliance on the judgments reported as PLD 1980 Supreme Court 225, 2001 SCMR 177, 2008 SCMR 917, 2011 SCMR 1394, 2011 SCMR 725, 1988 P Cr.LJ 1523, 2013 P Cr.LJ 692, 2012 P Cr. LJ 1274, 2013YLR 1215 and 2014 P Cr. L J 374. The learned Astt: A.G. for State adopted the arguments of learned counsel for complainant and supported the impugned judgment in respect of the conviction recorded as well as the sentence of capital punishment awarded to the appellant.

7. We have heard arguments of learned counsel for the parties, learned Astt: A.G

appearing on behalf of State and perused the record.

8. Perusal of record reveals that mainstay of the prosecution case has been statement of the complainant namely Mst. Jehan Sultan recorded as PW-11. She has stated in her examination-in-chief that she along with her deceased brother had been returning from District Courts Timergara and when they reached the place of occurrence her brother went towards a pushcart vendor for purchasing fruits. Appellant along with other two co-accused was stated to have come, de-boarded from the motorcycle and fired at the deceased then alive with his pistol, as a result of which he had fallen down on the ground and died at the spot. Previous blood feud enmity was stated to have been motive and cause of the occurrence. This witness has been subjected to the test of cross-examination but she has remained firm in her statement and nothing beneficial to the case of defence could be brought out from her mouth. She has also stated in her examination-in-chief as well as in her cross-examination that she had come to the Courts so

as to meet her incarcerated brother namely Hidayat Ullah. It is admitted that Hidayat Ullah had been facing a murder trial in which a date of hearing was fixed that very day. Prosecution have also brought on record order sheets showing proceedings of the Court – taking place on the relevant day i.e. 27.08.2018 – as Ex. PW-13/14. She has also stated that they reached the Court premises at approximately 09:00 A.M and left the premises at about 12:30 P.M. This witness has successfully stood the test of cross-examination whose presence had also remained established by the prosecution. Regarding her presence, a question had also been asked from doctor namely Abshar Ahmad who had conducted postmortem examination of the deceased, while he was being cross-examined as PW-7. He had replied that when the dead body had been brought to the hospital it was being accompanied by Amir Zada and sister of the deceased as well as members of the local police. The Investigating Officer had also taken in possession the blood stained Burqa worn by the lady at the time of occurrence vide recovery memo Ex. PW-1/1. In support of the recovery

memo prosecution had examined Shah Zameen, ASI as PW-1 and the Investigating Officer namely Gul Zameen Khan Inspector also deposed in support thereof as PW-13. The Burqa along with blood soaked earth and blood stained garments of the deceased had been sent to FSL for chemical analysis wherein the report Ex. PW-13/38 had also been received and produced in evidence showing that all the three items had been containing human blood and of the same group. This piece of evidence had given an added vigor to the case of prosecution vis-à-vis presence of the PW at the place of occurrence. The assertion of learned counsel for appellant that the Burqa had been taken in possession on the second day of occurrence and therefore not reliable, was divested of any force. Complainant was a *Pardnasheen* lady wearing a Burqa at the time of occurrence and thereafter in the hospital, which could not be taken off, unless the lady had gone back to her house. It is also understandable that 13:00 hours was the time of occurrence and the lady had also accompanied dead body to the hospital, so after return to her house along with

the dead body it would have been substantially late and it was the day following i.e. 28.08.2018 that the Burqa had been handed over to the Investigating Officer. On the date of recovery of the blood stained Burqa, dead body of the deceased would have been buried. Matching of the blood stained on the Burqa with samples collected from the spot has therefore further fortified the case of prosecution vis-à-vis presence of the PW on the spot.

9. So far as the other witness namely Anwar Shehzad is concerned, he has resiled from his testimony while deposing in Court as PW-6. He was also declared hostile witness and was cross-examined by the defence side. This witness had not been cited as an eyewitness by the complainant in the FIR. His testimony even if he had not resiled would not have been of much worth for the prosecution. When he had resiled from his statement and has been declared as hostile, he cannot be considered to be a witness for and in support of the case of defence or the prosecution. It was laid down by Hon'ble Supreme Court of Pakistan in the case of "Dr.

Javaid Akhtar v/s The State” reported as PLD 2007 Supreme Court 249 that a Court would be justified in ignoring statement of a hostile witness. Relevant part of observations of the august Court is reproduced hereunder for ready reference;

“It is admitted fact that P. W.13 Khurshid Ali was declared hostile, therefore, both the Courts below were justified to ignore his statement. See Parita's case 47 Cr.LJ 232 and Habibullah's case PLD 1969 SC 127.

Further reliance in this respect may also be placed on the judgments of Hon'ble Apex court reported as 1995 SCMR1144 as well as P L D 2007 Supreme Court 223.

10. Statement of a solitary eyewitness is sufficient for maintaining conviction provided it is confidence inspiring. In the case of *Farooq Khan v/s The State*” reported as 2008 SCMR 917, Hon'ble Supreme Court of Pakistan had observed in this respect;

“As to the argument of learned counsel for the appellant that the solitary statement of injured P.W.8 was the basis of conviction, suffice it to observe that the injured prosecution witness had given the number of injuries caused to the deceased in the incident by attributing the responsibility to the appellant. Evidence of this witness has been supported by medical evidence furnished by Dr. Muhammad Maqsood P.W.6 who conducted post-mortem examination on the dead body of the deceased Zahir Khan. The evidence of injured witness is worthy of credence,

independent and natural and there was no lawful justifiable cause to discard his evidence. The credence of statement of solitary witness has already been examined by this Court in a number of cases. In this context reference can be made to Mali v. The State 1969 SCMR 76; Muhammad Ashraf v. The State 1971 SCMR 530, Muhammad Siddique alias Ashraf alias Achhi and 3 others v. The State 1971 SCMR 659 and Muhammad Mansha v. The State 2001 SCMR 199. Moreover, conviction in any murder case can be based on the testimony of a single witness, if the Court is satisfied that the witness is reliable. In other words, the "emphasis" is on quality of evidence, and not on its quantity. In this behalf reliance can be placed on the case of Allah Bakhsh v. Shammi PLD 1980 S C 225. "

"emphasis supplied"

Similar observations had also been recorded by Hon'ble Apex Court in the case of "Shamshad Ali v/s The State" reported as 2011 SCMR 1394 in the following words;

"The place of occurrence admittedly was the house of the complainant and the appellant, therefore the complainant was a natural witness. After her examination-in-chief, she was subjected to lengthy cross examination but nothing in favour of the appellant came out in the same. The complainant had no motive to falsely implicate the appellant in the present case. Her statement is confidence inspiring and solitary statement coming out of the mouth of a natural witness, even if it is not corroborated by any independent piece of evidence, is sufficient to bring home the guilt of the accused.

Further reliance in this respect may also be placed on the judgment of Hon'ble Apex Court given in the case of "Niaz-ud-Din and

another v/s The State" reported as 2011SCMR

725.

Witness in the case in hand had been found fully consistent with her first narration, medico-legal evidence. Her statement had also been getting support from recovery of blood soaked earth from the spot and the fact that the spot of occurrence had not been seriously disputed by the prosecution. Report had also been lodged by her with reasonable promptitude i.e. after 30 minutes of the occurrence, in the hospital and in presence of dead body of the deceased. Her address indicates that she had been resident of a different Tehsil, and procuring her attendance in a short span of thirty minutes from her house would have been very difficult, had she been not present on the spot. No reason exists as to why should testimony of this eyewitness, be discarded.

11. Report of the medico-legal examination of the deceased Ex. PW-7/1 also reveals that the dead body was carrying a single firearm injury at his head, and therefore goes in synchronization with the assertion of complainant

given while lodging her first report. The doctor has also testified in support thereof as PW-7. During his cross-examination nothing beneficial to the case of appellant could be brought out from his mouth. Case of the prosecution stood fully established on the force of statement of a reliable eyewitness and the requisite corroboration for her statement has also been forthcoming.

12. The weapon of offence has also been recovered from the appellant at the time of his arrest. APW-12 Rauf Khan IHC and Investigating Officer namely Gul Zameen Khan C.I.O PW-13 were examined in support thereof whose testimony have remained consistent. The defence side has though examined DW-1 and DW-2 in support of their assertions that the appellant had not been arrested in the mode and manner shown in the instant case, but had rather been handed over to local police by elders of the locality. During the course of cross-examination of DW-1 has stated that he had been belonging to same village to which the appellant belonged. The deceased had been belonging to another village namely Safray. This person was also a

political figure who would be needing services of the appellant's family for political purposes, and as such his testimony is not entirely reliable. Similarly, DW-2 has also stated in his cross-examination that he had been working as driver with Malak Muhammad Zaib Khan (DW-1) since 12 years. This witness had also shown ignorance about the exact date of handing over of the appellant to local police, therefore his statement is also of no worth to the prosecution. The evidence of the defence regarding handing over of the appellant to the local police, voluntarily, is therefore not credible and reliable.


13. So far as the quantum of sentence awarded to the appellant is concerned, it is important to be noted that he had fired a single fire shot at the deceased at the time of occurrence. The minor weaknesses in evidence

2 of prosecution may not be taken as a justification for the outright acquittal of the appellant, but such weaknesses may be considered for reduction of the sentence as held by Hon'ble Supreme Court of Pakistan in its

judgment rendered in the case of "Falak Sher v/s The State" reported as 1999 SCMR 2432, wherein the Hon'ble Court had taken into account minor inconsistencies existing in the case of prosecution as a reason for reduction of death sentence of an accused to life imprisonment by observing;

"In the overall circumstances of the case, where motive had become suspect and where the prosecution version suffers from inconsistencies, other than of a fatal character, it appears proper not to resort to the death penalty, touching the guilt of the accused. For such reasons, this appeal is partly allowed converting the capital punishment, awarded by the High Court, into life imprisonment coupled with fine and identical provisions, as to distribution of compensation under section 544-A, Cr.P.C., returned by the trial Court together with the benefit of section 382-B, of the same Code."

Similarly, in the case of "Muhammad Riaz and another v/s The State & another" reported as 2007 SCMR 1413 the Hon'ble Apex Court had converted the sentence of death to life imprisonment by holding that;



"No doubt, normal penalty for an act of commission of Qatl-i- Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

Further reliance in this respect may also be placed on the judgments of Hon'ble Apex Court reported as 1980 SCMR 859, 2008 SCMR 984, 2009 SCMR 1188 as well as 2020 SCMR 1214.

In the case in hand also the slight variation in time of the occurrence as well as time of examination of the dead body and the fact that one of the prosecution witnesses had gone hostile while another witness though claimed by the prosecution to have seen the occurrence, had not been examined, are such circumstances benefit of which should go to the appellant in determination of quantum of his sentence.

14. For what has been discussed above, we partially allow the instant appeal and reduce the sentence of death to that of life imprisonment under section 302 (b) PPC. Rest of the sentences awarded by learned trial Court through the impugned judgment shall remain intact. Benefit of section 382-B Cr.P.C is also extended to the appellant. Murder Reference

No. 03-M/2020 sent by learned trial Court to this Court is accordingly answered in "negative".

15. As far as connected criminal appeal filed by complainant against acquittal of co-accused Nasar Khan and Bad Shah Umar Khan is concerned, it is important to be noted that both the accused/respondents had been assigned the role of presence on the spot and helping the appellant. They were alleged to have come to the spot of occurrence in the company of principal accused Subhan Ullah while boarding a motorcycle. The principal accused Subhan Ullah was alleged to have de-boarded from the motorcycle and fired at the deceased with his pistol and to have decamped from the spot on said motorcycle after commission of the offence. Prosecution have though been claiming to have recovered the motorcycle on pointation of one of the accused namely Nasar Khan vide recovery memo Ex. PW-2/1 but it is important that the complainant while lodging report of the occurrence had not mentioned any registration number of the motorcycle. No evidence was led

in support of the fact that whether it had in-fact been same motorcycle which had been used in commission of the offence. Besides the charge, to the extent of these two co-accused for abetting commission of the offence appears to be exaggerated for the reason that even if the principal accused was to be facilitated he could have been facilitated by a single rider of motorcycle and there had not been a need for putting an extra person on the motorcycle, just for facilitating the principal accused and playing no other role in commission of the offence. Besides they had neither been stated to have been armed with firearms at the time of commission of the offence, nor had any weapon been recovered from their possession, or on their pointation. Going for an offence of murder, to the very spot of occurrence, without any arms even for the purpose of abetting, does not stand to reason. The above-mentioned two co-accused/respondents have rightly been given benefit of doubt by the learned trial Court through the impugned judgment. Besides they have earned a double presumption of innocence with earning of an

order of acquittal from the learned trial Court and the reasons for reversal of such order has not been forthcoming so far as case of the acquitted accused/respondents are concerned. Reliance in this is placed on judgments of Hon'ble Apex Court rendered in the case of "Ghulam Sikandar and another v/s Mamaraz Khan and others" reported as "1985 SCMR 11", the case of "Muhammad Iqbal v/s Abid Hussain alias Mithu and 6 others" reported as 1994 SCMR 1928 and the case of "The State through A.G. v/s Mehmood Khan and others" reported as "2007 SCMR 1390". Criminal Appeal No. 141-M of 2020 filed by complainant against acquittal of accused/respondents namely Nasar Khan and Badshah Umar is dismissed for the reasons mentioned above.

Announced
Dt. 18.02.2021

JUDGE

JUDGE

NAWAB

(D.B) Hon'ble Mr. Justice Ishfaq Ibrahim
Hon'ble Mr. Justice Wiqar Ahmad

01/03/2021
W/R