

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 253-M/2015

(1) *Azmatullah (Appellant)*
Versus

(1) *The State & another (Respondents)*

Present:

Mr. Sher Muhammad Khan, Advocate, for the appellant.

Hafiz Bakht Amin, State counsel.

Mr. Wilayat Ali Khan, Advocate, for the LRs of the deceased complainant.

Date of hearing:- **23.10.2018**

Date of announcement:- **13.11.2018**

JUDGMENT

SYED ARSHAD ALI, J.- This criminal appeal is directed against the judgment dated 17.11.2015 rendered by the learned Sessions Judge/Zila Qazi Dir Lower at Timergara, in case F.I.R No. 114 dated 19.03.2014 under sections 302, 337 A (i), F (i), 34 PPC registered at Police Station Lal Qila, District Dir Lower, whereby the appellant Azmatullah was convicted under section 302 (b) PPC and sentenced to life imprisonment alongwith payment of compensation of Rs.500,000/- (five lacs) payable to the legal

heirs of the deceased Muhammad Khan under section 544-A, Cr.P.C, or in default thereof, he was ordered to undergo further 6 months S.I. The said compensation shall be recovered as arrears of land revenue. The appellant was also extended benefit of section 382-B Cr.P.C.

2. The complainant Shehzad, PW-6 reported the incident to Muhammad Raza Khan, Sub-Inspector, PW-10 regarding the occurrence on 19.03.2014 at 19:30 P.M. at Lal Qila hospital, which was initially incorporated in daily diary No. 53, Ex. PW-2/1, wherein he has charged the present accused-appellant Azmatullah alongwith acquitted accused Muhammad Fayaz, Malang and Ihsanullah for inflicting injuries by pelting stones at them (complainant-party). The then injured now deceased Muhammad Khan was initially medically examined by Dr. Jamil Khan, PW-1 at Rural Health Center Lal Qila. He was then referred to DHQ hospital Timergara and subsequently to Lady Reading Hospital Peshawar for further treatment, however, on the way he

succumbed to the injuries and died. Hence, the FIR *ibid* was registered against the accused/appellant and other co-acquitted accused at PS concerned.

3. Investigation in the case was entrusted to Zahid-ur-Rehman, SI, PW-13, who in the company of SHO concerned had conducted raid at the houses of the accused for the purpose of their arrest but the said accused were not found in their houses, therefore, he has prepared sketch memo of the houses of accused Ex.PW-13/1 and on the same day visited the spot. He has prepared site plan Ex. PW-13/2 at the instance of the complainant and other eyewitnesses. The Investigation Officer has taken into possession blood stained earth from the spot at the pointation of the complainant alongwith stones 4 in number and *lathy*/stick (Ex-P-1 to Ex-P-3) vide recovery memo Ex. PW-13/3 in

presence of the marginal witnesses and sealed the same at the spot. He has also taken into possession blood stained *Qameez* and *Shalwar* of the deceased Muhammad Khan, Ex. P-4, blood stained garments of the injured Fahad, Ex. P-5, blood stained *Qameez* of injured Shehzad, Ex. P-6, blood stained *Dupatta* and *Shalwar* of the injured Mst. Shaista Bibi, Ex. P-7 & P-8 vide recovery memo Ex. PW-13/4 being handed over to him by the complainant of the present case. All these articles were sealed in parcels Nos. 2 to 5 in presence of the marginal witnesses. He has recorded statements of the eyewitnesses under section 161 Cr.P.C. Since the accused were already arrested by the SHO concerned in the present case and their cards of arrest were also issued by him, therefore, the said accused have been handed over to the Investigation Officer for

further investigation. He has produced the accused before the Court vide application Ex. PW-13/5 for obtaining police custody. During investigation, the accused have confessed their guilt and made pointation of the place of occurrence and in this respect the Investigation Officer has prepared pointation memo Ex. PW-13/6. He has also made necessary addition of places with red ink in the already prepared site plan (Ex. PW-13/2) after pointation of the accused vide memo Ex. PW-13/7. He has also recorded statements of the recovery witnesses u/s 161 Cr.P.C and vide application Ex. PW-13/8 the accused were produced before the Court for recording of their statements U/Ss 164/364 Cr.P.C but the accused refused to record their statements, therefore, they were sent to judicial lock up. The PWs Mubeen, Nasr-ud-Din and Mehraj-

ud-Din were produced in the Court vide application Ex. PW-13/9 for recording of their statements u/s 164 Cr.P.C, who have recorded their statements, which were placed on record.

He has also prepared list of the legal heirs of the deceased Muhammad Khan Ex. PW-13/10 and placed the same on file. Upon receipt of the injury sheets of all the injured, the Investigation Officer has issued '*Parwana*' Ex. PW-13/11 for addition of sections 337 A (i) and F (i) PPC in the present case. He has also sent the recovered blood stained articles to the FSL Peshawar for forensic test vide application Ex. PW-13/12 and upon receipt of the opinion/ report whereof, the same was placed on file as Ex. PW-13/13. Upon completion of the investigation, complete *challan* was forwarded to the SHO concerned for onward submission.

4. During the course of trial, the prosecution examined as many as 13 witnesses, whose statements were recorded and placed on file. On closure of the prosecution evidence, accused were examined under section 342, Cr.P.C, wherein they denied the charges, claimed innocence and stated to have falsely been implicated in the case.

5. On conclusion of the trial, the learned Sessions Judge/ Zilla Qazi Dir Lower at Timergara convicted and sentenced the accused/appellant Azmatullah vide the judgment impugned herein, whereas the co-accused Muhammad Fayaz, Ihsanullah and Malang were acquitted of the charges by extending them the benefit of doubt, hence the present appeal.

6. Arguments heard and record perused.

7. It is the case of prosecution, reported by the injured/complainant Shehzad, PW-6 on 19.03.2014 at 19:30 P.M, which was initially incorporated in daily diary No. 53, Ex. PW-2/1 that at 17:00 P.M on the same day near to their house in a thoroughfare where they were cutting fuel wood. In the meanwhile, Azmatullah, Fayaz sons of Malang, Malang son of Kashmali and Ihsanullah son of Shah Zafar residents of *Gumbatay* came on the path of their house and we (complainant-party) forbade them from passing through the said thoroughfare, they (accused-party) started pelting stones on them, which injured him on his head and other parts of the body, whereas Shah Zamin son of Mir Zaman sustained injury on his right hand,

Fahad son of Shah Zamin sustained injuries on his head as well as on other parts of his body, Mst. Shaista Bibi daughter of Shah Zamin sustained injuries on her left knee and other parts of the body, Mehraj-ud-Din son of Muhammad Khan received injuries on his left hand and other parts of the body and Muhammad Khan son of Mir Zaman sustained injuries on his head, right ear and rest of the body. It was further stated that the matter in addition to the complainant-party was witnessed by Nasir-ud-Din, Mobeen Khan sons of Muhammad Umar and Wahidullah son of Rehmat Khan. The injured/complainant also advanced specific motive, which was stated to be a dispute over the using of thoroughfare. It is important to note, that in the present case not only the complainant but all the injured/victims have

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thumb impressed/put signatures on the FIR in support of the version of the complainant.

8. It is also evident from record that counter-version of the accused-party was also reported at 20:00 P.M. on the same day i.e. 19.03.2014, wherein the present appellant Azmatullah aged about 22/23 years has reported the matter to the local police, which was incorporated in daily diary No. 54, Ex. PW-11/1 to the effect that there is a common thoroughfare at *Gumbatay*, which passes through the land of Shehzad, the complainant. On the eventful day, Miraj son of Muhammad Khan, Rafiullah son of Shah Wazir, Fahad son of Shah Zamin and the said Shehzad son of Shahadat Khan had hindered the passage by putting wood/trunk of the tree in the thoroughfare and he (Azmatullah) alongwith Hameedullah, Ihsanullah sons of Shah Zafar

while going through the said way towards their house, at the relevant time the aforesaid persons emerged and started beating them with axe and sticks. As a result thereof, he (Azmatullah) received injuries on his little finger and other parts of the body, whereas Hameedullah received injury on his head and Ihsanullah sustained injuries on his right foot and other parts of the body. The occurrence in addition to the complainant-party was stated to be witnessed by Saleemullah son of Alam Khan and Hashmat Khan son of Bakht Zada residents of *Gumbatay*. It is stated in the said *Mad* report, that the injury sheets of the complainant and other injured were prepared by the police and then they were referred to Dr. Jamil for medical examination, however, on record their medical examination reports are not available.



9. In the present case, the Investigation Officer on 20.03.2014 has visited the spot and prepared the site plan, Ex. PW-13/2. The visible fact in the site plan is the location of Muhammad Khan deceased and the observations of the Investigation Officer. The said Investigation Officer has observed that on the thoroughfare at places marked as "A" and "B", the deceased Muhammad Khan had put a huge trunk of tree in order to block the said road/thoroughfare for the passers, however, the said trunk was later removed which was present at the spot and from point "C" stones 4 in number and *lathy*/stick were recovered. At point "1" in the site plan, the deceased Muhammad Khan has been shown to have fallen from the thoroughfare in the fields, which is 12 feet deep and at the relevant he was unconscious

who was hit by the appellant on his head. From the said place, blood stained earth was also collected, which was sealed for forensic test.

The site plan was referred not for the reason that it a solid piece of evidence but its utility cannot be ignored being the first reflection of the spot as indicated or pointed-out by the eye-witnesses furnished a panoramic view of the occurrence to scrutinize the evidence tendered at the trial by prosecution witnesses. Reliance is placed on the case law cited as "Iqbal Shah vs the State (1998 P Cr. LJ 1177)".

10. Reverting to the ocular evidence, the ocular-version has been put-forward by Shehzad, the injured/complainant, who appeared as PW-6. In his examination-in-chief, he has narrated the entire incident as

stated above. The close perusal of his examination-in-chief would suggest that no specific role was given to any of the accused and there was general allegation of inflicting injuries from **PELTING STONES** at them and there is no allegation of stick blow. However, during cross-examination through a question by defence counsel, it came from his mouth that Muhammad Khan was injured by Azmatullah. Apart from that, the said witness has not uttered a single word about the role of each accused.

It is by now settled that the accused is not bound by admission made his counsel. Reliance is place on "Abdul Khaliq vs the State 1996 SCMR 1553". Hence, regarding attributing of specific role to the accused, the prosecution has produced Mobeen Khan, the said witness according to

the FIR is the eyewitness of the occurrence, who was examined as PW-7 and Fahad Khan son of Shah Zamin, who was one of the injured who appeared as PW-8. Mobeen, while appearing in the witness-box has extended specific role to each accused and regarding the present convict/appellant, he has stated that Azmatullah had inflicted stick blow on the head of Muhammad Khan deceased and as such he fell in the fields beside the thoroughfare, which according to the site plan is 12 feet deep, as a result thereof, the blood started oozing from his mouth and ear. The statement of the said witness was not only recorded at belated stage i.e. on 20.12.2014 but the story narrated by him in his court statement is also not in line with the contents of the FIR and the subsequent statement of the complainant recorded as PW-6. The FIR was



thumb impressed/signed by all the injured/ victims including Muhammad Khan deceased, who according to the cross-examination of the doctor Jamil Khan, PW-1 was conscious and able to record his statement, however, in the FIR neither any specific role was given to any of the accused nor the fact that any person has given stick blow to the deceased Muhammad Khan, rather it is the case of prosecution that all the injured including the deceased had sustained injuries by pelting stones at them by the accused. Although, the recording of statements by the prosecution witnesses at belated stage is no ground to disbelieve their testimony provided that the delay in recording the statement is explained in confidence inspiring manner, however, without such explanation the statement of a witness whose statement

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recorded at belated stage is to be ruled out of consideration. Reliance is placed on case law cited as "Muhammad Sadiq vs the State PLD 1960 SC 223" Sikander vs the State, PLD 1963 SC 17", Siraj-ud-Din vs Kala & others PLD 1964 SC 26 and Muhammad Akram vs the State & 3 others 1994 SCMR 550". The said witness in his statement has not explained that despite his availability why his statement was not recorded on the same day and furthermore he has made considerable dishonest improvements in his statement. It has now been settled that improvement made by eye-witness in order to strengthen the prosecution case, lose his credibility and evidentiary value and when a witness made contradictory statement or improvement changing his version to in line his testimony with the story of prosecution, if found to be

deliberate and dishonest, would cast serious doubt on his veracity. Reliance is placed on

"Muhammad Rafiq vs the State 2010 S C M

R 385.

11. Now moving on to the statement of the other injured witness Fahad Khan, the said Fahad has signed/thumb impressed the FIR as an injured/eyewitness, however, as stated above, in the said FIR no specific role was assigned to any of the accused, therefore, in subsequent statement which was recorded by him on 22.03.2014 before police he had given a specific role to the present appellant that he has inflicted a stick blow on the head of the deceased Muhammad Khan, as a result of which, he fell down in the fields. While appearing in the Court, he has also re-affirmed the said statement, therefore, there is a glaring contradiction between the first statement

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recorded in the FIR, the statement of the complainant Shehzad recorded in the Court and the subsequent statement of this PW before the Court, hence, he does not appear to be a truthful witness. In case of "Ghulam Sarwar vs the State reported as PLD 1983 Peshawar 152", a Division Bench of this Court has observed:- *"witnesses bearing injuries on his person, held, by itself does not indicate that he has stated the truth"*. Even during his cross-examination, this witness has admitted that he does not know the person who injured him, therefore, if a person does not make a statement in respect of his own injury then it is difficult to believe his testimony regarding the injuries caused to the other persons.

12. In the present case, despite the fact that five (5) persons got injured excluding

the deceased, however, all the injured/persons were not produced before the Court by the prosecution in support of its case except the complainant and other injured/eye-witness Fahad Khan. In the case of "Saeed Ahmad vs Zamarood Hussain 1981 SCMR 795" the august Supreme Court of Pakistan has held:-

"Fact of eye-witness being injured and injuries being not self-suffered. Not by itself indicative of witness having told truth. Witnesses closely related to deceased while other persons mentioned in the FIR not examined. Such fact shows injured eye-witnesses being desired to withhold material aspects of case from Court and prosecution being apprehensive that in case of independent witnesses being examined their deposition might support plea of accused."

Acquittal, held, rightly not interfered with by High Court."

13. Besides, the above ocular testimony of the injured and other corroborative evidence, in the present case, the then injured now deceased Muhammad Khan was examined by Dr. Jamil Khan, Medical Officer, RHC Maidan, PW-1, who after providing emergency treatment to the injured found the following injuries on his body:-

RHC Lal Qila District Dir Lower

Dated:- 19.03.2014

Time of examination: 7:30 PM

Name:- Mohd. Khan s/o Mir Zaman Khan

Village: Gumbatai Maidan Dir Lower

Age:- 60 years male.

H/O Fight.

Unconscious comatosed (coma) with bleeding from right ear, wounds on right side of skull and right jaw with vomiting, bruises on right side of the face bleeding from nose and throat.

Referred to DHQ Hospital.

Nature of wounds:- Dangerous

Kind of weapon:- Blunt.

The said injured was initially referred to DHQ Hospital Timergara and

afterwards to LRH Peshawar for further treatment, but on the way he succumbed to the injuries and died, therefore, the postmortem of the deceased was also conducted by the said doctor Jamil Khan (PW-1), his postmortem report revealed the following observations:-

“That on surface examination of his body some dangerous wounds on right ear with bleeding from right skull wounds and bruises on right face were found.

Cause of death:- Head injury

Nature of wound:- Dangerous

Kind of weapon:- Blunt.

14. The overall impression of the entire evidence and the *Mad* No. 54, Ex. PW-11/1, if viewed in *juxta* position with the site plan, Ex. PW-13/2, it appears that there was a free fight between the two parties, however, it is uncertain that who had inflicted injuries to the deceased Muhammad Khan. It is also in the evidence of prosecution that the deceased had fallen from the path in the fields, which is

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12 feet deep and the doctor in his cross-examination has also confirmed the suggestion that injuries on the body of the deceased Muhammad Khan could be due to fall from a higher place. In this regard, reliance is placed on "Farid alias Kala and others vs The State and 4 others" (1989 SCMR 939) wherein it was held by the august Supreme Court of Pakistan:- *"None of the witnesses had said anything as to how injury to accused was caused and at whose hands. Injuries on the person of accused and other people were conveniently suppressed by the eye-witnesses against accused thus was not free from doubt. Accused acquitted in circumstances"*

Therefore, the rule of safe administration of justice would be that the benefit of this doubt must be extended to the

appellant/accused not as a matter of grace but as of right.

15. The gist of the whole discussion is that the prosecution case against the accused/appellant is pregnant with doubts and it is settled principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace. In this regard, reliance is placed on the case law cited as "Daniel boyd (Muslim name Saifullah) vs the State" 1992 SCMR 196 , wherein it has been held:-

Nobody is to be punished unless proved guilty on the basis of reliable or true evidence---Benefit of every reasonable doubt is to go to the accused.

This view is also reflects in the judgment of the Hon'ble apex Court titled as "Ghulam Qadir and 2 others vs the State"

(2008 SCMR 1221), wherein it was observed:-

"Benefit of doubt. Principle of applicability. For the purpose of benefit of doubt to an accused, more than one infirmity is not required. Single infirmity creates reasonable doubt in the mind of a reasonable and prudent person regarding the truth of charge, makes the whole case doubtful. "

In support of the same ratio, reliance is further placed on the case of the august Supreme Court of Pakistan cited as "Muhammad Zaman vs. the State 2014 SCMR 749", wherein it has been held:-

Even a single doubt if found reasonable, was enough to warrant acquittal of the accused.

16. In view of the above discussion, we are of the absolute view that the prosecution has failed to prove its case

against the accused/appellant beyond any shadow of doubt; therefore, his conviction cannot be maintained, resultantly, while extending him the benefit of doubt, we accept this appeal by setting aside his conviction and sentence recorded by the learned trial Court through the impugned judgment and acquit him of the charge levelled against him. He be set free forthwith, if not required in any other case.

17. These are the reasons of our short order of even date.

Announced
Dt. 13.11.2018


JUDGE


JUDGE

Office
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