THE PESHAWAR HIGH COURT, BANNU BENCH.

[Judicial Department].

Cr.A No.124-B of 2018

Abdul Khaliq & another

Vs.

The State

JUDGMENT

Date of hearing: ***12.11.2019.***

For Appellants: ***M/S Qaidullah Khan and Haji Malik Rehman advocates.***

For State: ***Mr.Shahid Hameed Qurashi Addl:A.G.***

For Respondents: ***Mr.Fazal Qadir Khan advocate. Muhammad Alamgir Wazir advocate.***

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SAHIBZADA ASADULLAH, J.--- This single judgment is aimed to dispose of the instant Criminal Appeal as well as the connected ***Criminal Revision No. 40-B/2018*** (***Muhammad Arshad Vs the State etc)***, as both these have arisen out of one and the same judgment.

2- Appellants Abdul Khaliq and Zar Bakht Ali, being aggrieved by judgment dated 17.07.2018 of the learned Additional Sessions Judge, Banda Daud Shah, District Karak in

Sessions Case No. 83/7 of 2016, by which the appellants were convicted U/S.302 (b) /34 PPC, and sentenced to imprisonment for life alongwith fine of Rs.100,000/-(one Lac), each in default six months SI, however, the accused was given benefit U/S. 382-B Cr.P.C. Hence, have preferred this appeal against his conviction and sentence, while the connected ***Criminal Revision No.40-B/2018*** was preferred by the complainant Muhammad Rashid, for enhancement of sentence.

3- Brief facts given in the FIR are that on 19.04.2016 at 11.30 hours, Muhammad Arshad /complainant **(PW-7)** brought the dead body of his deceased father Noor Sayed to the Civil Hospital Banda Daud Shah, and reported the matter to the effect that on the eventful day at 07.30 hours, his father Noor Sayed was sitting on cot in front of shop of Rooz Wali and the complainant was present in his own shop situated at the place of occurrence, when the accused/ appellants came on motorcycle duly armed with their respective weapons, the accused/ appellant Zar Bakht Ali opened firing upon the deceased, as a result of which he was hit and started running, who was chased and again

fired by the accused / appellant Zar Bakht Ali as a result he fell down on the ground and that the accused decamped from the spot. Motive behind he occurrence, alleged by the complainant was that some eight (8) years back, father of accused/ appellants was killed, for which the deceased Noor Syed was charged. Report of the complainant was reduced in shape of *murasila* Ex:PA.

4. Initially accused/ appellant Zar Bakht Ali was arrested, while accused/ appellant Abdul Kahliq was absconding. After completion of investigation, complete challan was submitted against him before the learned trial Court. During the course of trial accused/ appellant Abdul Khaliq was arrested, whose supplementary challan was submitted. After complying with the provision of section 265-C Cr.P.C, they were formally charged, to which they pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as ten (10) PWs. On conclusion of trial, statements of accused / appellants were recorded under section 342 Cr.P.C, wherein they professed innocence. They neither wished to produce defence evidence nor opted to be examined on oath as

provided under section 340(2) Cr.P.C. Learned trial Court after hearing arguments of learned counsel for the parties, vide impugned judgment dated 17.08.2018 convicted and sentenced the accused/ appellants.

5. Arguments of learned counsel for the parties heard and record gone through with their valuable assistance.

6. This was on 19.04.2016, at 07.30 a.m. that the deceased was sitting in a cot in front of the shop of one Rooz Wali whereas the complainant shown himself in his shop situated at the place of occurrence when the accused/ appellant with the co-accused came to the place of occurrence riding on motorcycle and started firing over the deceased, the deceased when received the initial firing started running, who was chased by the accused/ appellant and just behind the shops at point No.B1, he received fatal injuries and fell down on the ground and according to the complainant, the accused/ appellants decamped from the spot. The complainant while reporting the matter to the local police presented Noor Shazada as the eye-witness who was examined as PW-8, and this Noor Shahzada is the real brother of the deceased

and uncle of the complainant. These two witnesses were examined before the trial Court as PW-07 and PW-08 respectively, but both of them were in stark contrast with each other, as one of the witness stated that soon after the occurrence the women folk including the children from the house of the deceased attracted to the spot, whereas the other stated that no one else attracted to the spot and kept complete silence regarding the attraction of the women and children from the house. Both the witnesses made conscious attempts to make their availability appealable and both of them pointed their houses to be situated in the close proximity but one of the witness stated that the houses were at a distance of 500 / 600 yards, whereas the other stated that it was some 250/200 feet from the place of the occurrence. The witnesses did not remain consistent on material aspects of the case, and even they went pole apart in respect of the mode, manner and the time of occurrence. PW-07, stated that the accused / appellant Zar Bakht Ali on reaching near the deceased resorted to indiscriminate firing upon the deceased, but he kept mum regarding the activities of the co-accused whereas when

PW-08 was examined he gave a strange reply by stating that the co-accused i.e. Abdul Khaliq aimed his gun with a warning to us for maintaining silence.

7. The intriguing aspect of the case is that the incident occurred at 07.30 a.m. whereas the report was made to the local police in civil hospital Banda Daud Shah, at 11.30 a.m i.e. with an abnormal delay of four hours and the prosecution miserably failed to explain the delay. We are surprised that the distance between the spot and Civil Hospital B.D.Shah is not more then 8/9 K.Ms and a metal road is available then why the eye-witnesses could not reach with the dead body to the hospital in time and why PW-08 statedly deboarded the Datsun pickup which was proceeding to the hospital with the dead body therein. The prosecution with time went on with constant improvements and both the witnesses never ever remained consistent and stuck to the previous stance. The malafide is evident from record that the scribe who was examined as PW-03, when appeared as a witness before the trial Court, he stated that it was 08.00 a.m that he received information regarding the incident from *Moharrir* of

the Police Station and he reached to the hospital at 09.30 a.m where the dead body of the deceased was brought by the co-villagers and he prepared the injury sheet, inquest report and other formalities, but kept waiting for report when at 11.30 a.m the complainant reached to the hospital and reported the matter to him, his this statement leaves no room to hold that in fact the incident was unwitnessed and later on people of the locality brought the dead body to the hospital and thereafter an attempt was made to contact the legal heirs of the deceased and were procured and after consultation and deliberation the accused / appellants were charged keeping in mind the blood feud as earlier father of the appellant was murdered for which the deceased was charged. The presence of the witnesses at the place of occurrence went unestablished as the shops they claimed at the place of occurrence were neither pointed out nor shown in the site-plan, when it was prepared on pointation of the prosecution witnesses. The shop in front of which the deceased was sitting in the *charpai* was statedly belonging to one Rooz Wali, but even he was not examined by the investigating officer, to confirm the

factum of the incident. There are dents and dents in the prosecution case and a conscious attempt was made by the prosecution witnesses to make believe their presence on the spot but we are mindful that neither they were present on the spot nor the dead body was collected and brought to the hospital by them, when such is the state of affairs we cannot hold otherwise, but that the witnesses are chance and interested witnesses with the sole purpose to implicate the appellants for a blind murder. In case titled ***"Gulfam and another Vs the State" (2017 SCMR 1189)***, wherein it is held that:

> ***"The prosecution had relied upon two eye-witnesses, i.e. Muhammad Rafiq complainant (PW-17) and Muhammad Ishaq (PW13) out of whom the complainant was a brother of Muhammad Hanif deceased and Faheem Abbas deceased was an uncle of the complainant. The said eye-witnesses lived at some distance from the place of occurrence and they had claimed that at the relevant time they were available near a Dahi Bhalay cart on a roadside. Availability of the said eye-witnesses on a roadside near a cart at about midnight and doing nothing and for***

no purpose was a circumstance which was sufficient to raise many an eyebrow. The said eye-witnesses were, thus, nothing but chance witnesses who had failed to establish any reason for their availability near the place of occurrence at the relevant time."

8. The investigating officer allegedly recovered empties from the spot alongwith blood stained pebbles and prepared the site-plan on the pointation of the witnesses. The distance between the assailant Zar Bakht Ali has been shown as 10 paces from the cot where the deceased was initially sitting and 10 to 12 paces when the deceased after running received second round of firing, when these injuries are looked into two of the injuries were having blackening and this factor further negates the stance of the witnesses in respect of the distances mentioned therein. The investigating officer sent the collected empties alongwith blood stained pebbles to the office of the chemical examiner with request to determine as to whether the empties were fired from one or different weapons. The Forensic Sciences Laboratory report was received and placed on file where the expert had opined that the empties were fired from different

weapons, if the stance of the complainant is read together with the opinion so tendered by the expert then the testimony of complainant is losing ground as the witnesses attributed the effective role of firing on the deceased to the accused Zar Bakht Ali. The prosecution has miserably failed to prove its case to the hilt and when the witnesses are termed as interested and chance then the courts are having a heavy responsibility on its shoulders to walk with care and caution lest an innocent person should be convicted.

9. The Doctor conducted post mortem examination of the deceased and he was cross-examined on different aspects of the injuries. But one thing is astonishing that if the complainant was correct in giving the inter-se distances between the assailant and the deceased at two different points then the blackening on or around the injuries was not possible because in case of Kalashnikov the maximum range where blackening can be caused is not more than three (3) feet, so the veracity of the witnesses goes down and we do not find ourselves in agreement with what the prosecution has brought forward. In case titled,

"Barkat Ali Vs the State" (2007 SCMR 1812), wherein it is held that:-

> ***"It is an admitted fact that eye-witnesses had stated that the deceased was hit by the respondents at about 30/35 feet whereas according to the medical report, there was burning and blackening as is evident from the statement of P.W.2, therefore, ocular account furnished by the two eye-witnesses is not in consonance with the medical evidence which clearly contradicts the statement of the eye-witnesses. It is a settled law that blackening appears on the dead body in case the deceased has received injuries at a distance of 4 feet according to medical jurisprudence by Modi."***

10. Though the learned counsel representing the complainant stressed that the accused/ appellants soon after the occurrence absconded and to him the abscondence alone is a sufficient pointer towards guilt of the accused, we are unable to understand that how in absence of positive and convincing evidence the abscondence alone can lead to conviction and if we accede to the submissions so forwarded, we are afraid the results would be drastic. There is no cavil to the preposition that

abscondence alone cannot be a substitute, for the direct evidence and this aspect has been beautifully dealt with by the apex Court in case titled, ***"Muhammad Sadiq Vs the State" (2017 SCMR 144),*** wherein it is held that:

> ***". The fact that the appellant absconded and was not traceable for considerably long period of time could also not be made sole basis for his conviction when the other evidence of the prosecution is doubtful as it is riddled with contradictions."***

11. The prosecution has forwarded a motive that the father of the accused / appellant was murdered for which the deceased was charged and to them it was the revenge which brought the appellant / accused to commit the murder of the deceased but the motive is a double edged weapon which cuts both ways and this view was consistently held by Hon'ble Supreme Court, in case titled ***"Muhammad Ashraf alias acchu Vs the State" (2019 SCMR 652),*** wherein it is held that:

> ***"The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given***

> ***details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."***

12. Be that as it may, the prosecution failed to convince this court that it was non-else but accused who killed the deceased.

13. After thoroughly evaluating the evidence available on file this court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against accused/appellants. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellants recorded by the learned trial court is set-aside and they are acquitted of the charge by extending them the benefit of doubt, they shall be released forth with from jail, if not required to be detained in connection with any other case. So far as the connected ***Criminal Revision No.40-B/2018*** is concerned, the same stands dismissed.

14. These are the detailed reasons for our short order of the even date.

Announced:

12.11.2019

JUDGE

JUDGE