

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

(R)

1) Cr.A No. 310-M/2018

- 2) Bakht Rawan son Pasham Khan
- 3) Rehmat Ali
- 4) Bawar Khan sons of Kamin Gul residents of Kass Kalkot, District Dir Upper.

Qversus

1. The State through Additional Advocate General.
2. Lal Zada son of Zarin Khan resident of Remin Kass Kalkot, District Dir Upper.

Present:

Mr. Sajjad Anwar, Advocate for the appellants/convicts.

Mr. Inayat Ullah Khatir, Advocate for State.

Mr. Raza Ullah, Advocate for the complainant.

2) Cr.R No. 108-M/2018

- 1) Lal Zada (2) Gul Bahadar (husband of the deceased Mst. Shamshad Bgum) sons of Zarin Khan residents of Remin Kass Kalkot, District Dir Upper.

Qversus

- 1) Bakht Rawan son Pasham Khan
- 2) Rehmat Ali
- 3) Bawar Khan sons of Kamin Gul residents of Kass Kalkot, District Dir Upper.
- 4) The State through Additional Advocate General, Peshawar High Court, Mingora Bench, District Swat.

Present:

Mr. Raza Ullah, Advocate for the petitioners.

Mr. Inayat Ullah Khatir, Advocate for State.

Mr. Sajjad Anwar, Advocate for the respondents/convicts.

Date of hearing: **02.12.2020**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Our this judgment is aimed to decide the instant appeal filed by appellants/convicts against their conviction and sentence as well as the connected Cr.R No. 108-M/

2018 filed by complainant side for enhancement of sentence of the appellants, as both these cases are emanating from the same judgment dated 07.11.2018 passed by learned Additional Sessions Judge-II/Izafi Zilla Qazi, Dir Upper, in case F.I.R No. 147 dated 15.06.2016 u/s 302/109/34 P.P.C registered at Police Station Kalkot, District Dir Upper, whereby the appellants were convicted u/s 302 (b) P.P.C and sentenced to life imprisonment with fine of Rs.100,000/- each or to undergo further six months S.I each in case of default in payment of fine. They were also burdened to pay Rs.100,000/- each as compensation to LRs of each of the deceased, or in case of default they were directed to undergo further six months S.I each. Benefit of section 382-B, Cr.P.C was extended to them.

2. Abstract of the prosecution case is that on receiving information regarding murders, Muhammad Siyar Khan (PW-2), SHO of P.S *Kalkot*, rushed to village *Reman Kass*, *Kalkot* and came to know that two women had been shot dead. Complainant Lal Zada (PW-7), who was present there, reported the occurrence to police by narrating that on 15.06.2016 at morning time his mother Mst. Saleh Marjana and sister-in-law Mst. Shamshad

Begum wife of Gul Bahadar were busy in hoeing the maize crop in their fields known as *Shatop*. The sheep and goats of Rehmat Ali etc entered the maize crop; the ladies drove the goats out of the field and cautioned the owners thereof for keeping the goats under control on which the present appellants started altercation and thereafter all the three appellants fired at the ladies at 08:30 hours. Resultantly, Mst. Saleh Marjana sustained injury on her chest whereas Mst. Shamshad Begum was wounded on the elbow of her right hand and left side of her back and both died on the spot. The complainant also charged co-accused Karim and Badshah Gul for instigation of the appellants for committing the murders. Altercation between the deceased and appellants over entry of sheep and goats to the fields was mentioned as motive behind the occurrence and the occurrence was stated to have been witnessed by Imran Khan (PW-8) and Masta Khan (not produced) and Abdur Rehman (PW-9).

3. After recording report of the complainant through *Murasila* Ex.PW-2/1, the S.H.O (PW-2) prepared injury sheets and inquest reports of the deceased ladies and sent the dead bodies to Sharingal hospital for medical

examination. Dr. Fazal Subhan (PW-6), after examining the dead bodies, recorded his findings in his reports the detail of which is as under:

Ex.PW-6/1 regarding deceased Mst. Saleh Marjana

Age about 48/49 years. Sex female. Time of injury 08:30 A.M dated 15.06.2016, time of examination 01:15 P.M.

Dead body was brought to hospital by relative and brother and were recognized by them.

Brother in law. Muhammad Ghulam son of Muhammad Raza CNIC 15703-9584439-5.

Relative Muhammad Ishaq son of Muhammad Didar CNIC 15703-2532714-9

Police constable Gul Shauddin IHC.

Findings:

1.1 cm round shape lesion seen in left side of the chest between 5-6 intercostal space on mid-clavicular line.

Exit wound seen on the other side of the back. Exit wound was irregular in shape and large 1.3 cm irregular shape.

Opinion: FAI (expired)

Ex. PW-6/3 regarding deceased Mst. Shamshad Begum.

Age 39/40 years, sex female, time of injury 08:30 A.M dated 15.06.2016.

Time of examination: 01:00 P.M dated 15.06.2016.

Dead body was brought to hospital by her brother and relative and were recognized by them.

1. Brother Hazrat Nawab son of Hazrat Wali CNIC 15602-9021359-9
2. Brother-in-law Anwar Zada son of Zarın Khan CNIC 15703-0918978-1

Police Constable: Gul Shahuddin IHC

Findings:

Large wound seen on the elbow joint (right hand) posterior of the bone seen.

1.1 cm round shape seen on lateral side of the hand (right hand) 5 cm above elbow joint.

Entry wound 1.3 cm irregular wound seen on right side of the chest cage between 7-8 intercostal space 5 cm below armpit.

Exit wound seen on left side of the chest cage which is irregular in shape 1.3 cm irregular.

Opinion: FAI (expired dead body)

4. Initially all the accused remained absconders. The acquitted co-accused were arrested on 20.07.2016 and supplementary challan against them was submitted before the trial Court. The present appellants were arrested on 21.09.2016 and after submission of supplementary challan, all the accused were formally indicted by trial Court for the offence to which they did not plead guilty and opted to face the trial. Prosecution produced ten PWs in support of its case against the accused and closed its evidence. It is noteworthy that learned DPP had moved an application on 23.07.2016 for discharge of co-accused Karim and Badshah Gul. The learned trial Court, after hearing the arguments, accepted the said application vide order dated 24.10.2017, resultantly, the said co-accused were acquitted of the charge.

After closure of the prosecution evidence, the appellants were examined u/s 342, Cr.P.C during which they denied the allegations of prosecution by professing innocence, however, they neither recorded their own statements on oath nor

produced any witness in their defence. On conclusion of trial, the learned trial Court vide judgment dated 07.11.2018 convicted the appellants u/s 302(b) P.P.C for murders of the ladies and sentenced them in the manner already discussed in the earlier part of this judgment. Hence, this appeal.

5. We have heard the arguments of learned counsel for the parties including the learned counsel representing the State and perused the record with their able assistance.

6. Prosecution has examined complainant Lal Zada (PW-7), Imran Khan (PW-8) and Abdur Rehman (PW-9) as eye witnesses of the occurrence. According to complainant Lal Zada, he was present at the rooftop of his house at the time of occurrence and witnessed the present appellants firing at both the deceased, however, the same was not his version in the initial report because he did not mention his name as eye witness of the occurrence. This fact was also admitted by author of *Murasila* (PW-2) and I.O (PW-10) in their respective cross-examination. Thus, the complainant has tried to improve his initial version by introducing himself as eye witness of the occurrence at a belated stage, as such, he is not a

trustworthy witness. Reliance is placed on Akhtar Ali Vs. The State (2008 SCMR 6). The august Supreme Court of Pakistan observed in this regard that:

It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness.

The complainant has also admitted in his cross-examination that women folk of the area including the ladies of his house observe *parda*. It is astonishing that *parda nasheen* ladies of his house were busy in hoeing the maize crop in the fields and he was sitting on the rooftop of his house and did not participate with the deceased ladies in the said work which is commonly the job of males in this area. It is also strange enough that women of his house were involved in altercation with the appellants whereafter the occurrence took place which culminated in double murders but the complainant remained silent spectator; neither he defended his nears and dears nor took any step in retaliation against the appellants. The complainant did not

exhibit the natural conduct usually displayed by people in such like shocking situation. In view of the mentioned facts and circumstances of the case, presence of the complainant near the place of occurrence is doubtful, therefore, his statement is not worth reliance.

7. The other eye witnesses namely Imran Khan and Abdur Rehman appeared before the trial Court as PW-8 and PW-9 respectively. The former is brother-in-law whereas the latter is cousin of the complainant. No doubt, discarding ocular account of related or interested witnesses in each and every case is not a rule, however, on close perusal of the statements recorded by the mentioned PWs in the present case, their presence on the spot is also not free from doubt. They have been shown at Points No. 7 & 9 in the site plan Ex.PW-10/1 which is the boundary line (known as *pula* in the local dialect) between the two fields. In response to a question by the defence counsel, the Investigating Officer (PW-10) admitted in his cross-examination that:

میں نے مقامات 7,8,9 گواہان پر راستہ کی نشاندہی نہیں کی ہے۔ از خود کہا کہ رستہ نہیں ہے بلکہ پلہ ہے۔ میں نے اس پلہ کی نشاندہی کی ہے جس پر گواہان جا رہے تھے۔

The assertion of PW Imran Khan that he was present on the spot because he was going to the house of complainant, does not appeal to prudent mind in view of the above admission of the I.O. Similar is the position of PW Abdur Rehman who, according to his own statement, is resident of village *Kalkot* situated at a walking distance of 20 minutes from village *Reman Kass* where the occurrence took place. This witness has also not given a plausible reason for his presence on the spot at the time of occurrence except the narration in his cross-examination that he was present in his filed adjacent to the field where the occurrence took place but his this version does not get support from the site plan wherein no land of the said PW adjacent to the spot has been shown. Assemblage of the above said two eye witnesses and PW Masta Khan (shown at Point-8 but not produced) at the same time on the spot at the time of occurrence is otherwise also doubtful because the said place is neither a general pathway for common people nor is a public place visited by them as usual. The eye witnesses, though related to deceased, have also not accompanied the dead bodies to hospital. Thus, in view of the above mentioned aspects of the case, they were mere

chance witnesses, hence, their presence on the spot at the relevant time is doubtful. In almost similar situation in the case of G.M Niaz Vs. The State reported as 2018 SCMR 506, the august Supreme Court of Pakistan disbelieved the ocular account by observing that:

The ocular account of the incident in issue had been furnished before the trial court by Mahboob Ahmed complainant (PW6) and Qasim Ali (PW5) who were a brother and a paternal cousin of the deceased respectively. The said eye-witnesses were not only very closely related to the deceased but they were also chance witnesses who had utterly failed to bring anything on the record establishing their claimed presence with the deceased at the relevant time. Mahboob Ahmed complainant (PW6) had his residence far away from the spot and the same had not even been shown anywhere close to the place of occurrence in the site-plan. Qasim Ali (PW5) had his residence about ten kilometers away from the scene of the crime. He had maintained that he was present at the spot in order to see a movie but the said reason had not been established before the trial court through any independent evidence. The record of the case shows that Zahid Iqbal deceased was taken to the hospital in an injured condition by a police constable and not by the above mentioned closely related eye-witnesses and this fact completely belied the claim of the eyewitnesses regarding their presence with the deceased at the relevant time.

8. The PWs have admitted in their cross-examination that there were several houses near the place of occurrence and the people had attracted to

the spot on hearing firing shots but no independent witness of the houses surrounding the place of occurrence was produced in support of the allegation against the present appellants. Even PW Masta Khan, who was an impartial eye witness of the occurrence per prosecution version and was assigned Point No.8 in the site plan, was abandoned. This situation leads us to draw an adverse inference under Article 129 (g) of the Qanun-e-Shahadat Order, 1984 that had the prosecution produced the said witness at trial stage he would not have supported the prosecution case.

Another aspect of the case is that according to site plan, there are rivulet/water channel and pathway on the northern side of the field where the occurrence took place and further in north side of the said channel there is field of one Wali Khan in which the maize crop was grown. The houses of appellants are situated in the north side of the said field. Movement of the sheep and goats of the appellants from their house and reaching to the field of complainant, avoiding the intervening maize field of Wali Khan for grazing and thereafter crossing the water channel and path, appears to be a concocted story.

It is also noteworthy that the occurrence was reported at 09:30 A.M with apparent delay of one hour though the police station is at a distance of 1 ½ K.M from the spot. On the other side, the deceased were brought to hospital at 01:00 P.M i.e after 3 ½ hours of lodging the report. If the maximum time of one hour consumed on recording the report and other documents is excluded, even then the prosecution has not explained that for what purpose the dead bodies were kept in the house for 2 ½ hours and not shifted to hospital soon after the report. The mentioned difference regarding the time of report and examination of the dead bodies by doctor indicates that the time of report mentioned in *Murasila/F.I.R* is fictitious and the actual time of report was suppressed by police at the time of recording the report.

Similarly, it cannot be expected from an ordinary person to commit two murders only on the ground that he was cautioned not to let his goats to spoil the growing crop. It appears that the occurrence has not taken place in the mode and manner as alleged by prosecution rather something, other than what was narrated in the report, had happened prior to the occurrence between the parties

which was not brought on the record and real facts of the occurrence were suppressed.

PW Imran Khan also admitted in his cross-examination that there was a dispute between father of complainant and father of PW Sher Bahadar regarding title of the field where the occurrence took place and at that time the said land was barren/uncultivated. Though afterwards the witness has corrected this slip of his tongue to justify presence of the deceased on the spot by stating that the subject field was not disputed and maize crop was grown on it, however, the former spontaneous utterance of the PW creates a doubt regarding the fact that maize crop was grown in the said field and the deceased were present there for weeding the crop. Although the I.O has placed on file some photographs showing maize crop and blood but the said photographs by itself cannot establish the fact that the occurrence had taken place in the same field which was shown in the site plan. Thus, the entire prosecution case rests on a very flimsy foundation which does not stand to reason. Reliance is placed on "Mst. Shamim and 2 others Vs. The State and another" (**2003 SCMR 1466**) wherein it was held that:

"The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal position in a criminal case. It should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability. It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an improbable prosecution story can sustain conviction".

9. Coming to circumstantial evidence on the record, according to medical evidence, both the deceased have sustained entry wounds almost of the same dimension whereas only two crime empties have been recovered from point "C" as shown in the site plan but on the other hand three persons have been charged allegedly armed with formidable weapons Kalashnikov. The above stated position of medical evidence and recovery of empties from a single point suggests the involvement of a single accused in the occurrence, thus, the charge appears to be exaggerated by throwing a wide net to implicate three real brothers. Guidance in this regard is sought from the judgment in the case titled "Farman Ali and 03 others Vs. The State" (PLD 1980 Supreme Court 201) wherein it has been observed by the Hon'ble apex Court that:

"In his dying declaration, Rashid Khan has involved the three brothers as well as their friend, Farman Ali. But the medical evidence and the evidence of the Ballistic Expert do seem to cast doubt on his veracity. The evidence of Doctor Muhammad Kamal, who had conducted autopsy on the dead body of Rashid Khan' is that the size of inlet of all the wounds suffered by him was the same meaning thereby that he had been shot from one or more than one weapon of the same calibre. It is in the evidence of the Ballistic Expert, however, that the four empties sent to him for examination were found to have been fired through .32 bore pistol which was also sent to him by the Investigation Officer. It would therefore follow that Rashid Khan had been shot through a pistol and certainly not through a rifle with which Farman Ali is said to have been armed. It is true that according to the prosecution each one of the three appellant brothers was armed with a .32 bore pistol. But the type of injuries suffered by Rashid Khan rather suggest that it was the work of one man. It is common knowledge that .32 bore pistol is an automatic weapon carrying in its charger seven bullets. The fact that the deceased was found to have suffered seven inlet wounds, three of them in his left Knee joint, one on his left elbow, two in his abdomen and one in backward direction to his right superior iliac spine, the inlet -size of all of which is said to be the same, would go a long way to show that this could as well be the work of a single person and not of the three appellants. There is no evidence on the record to show, however, as to which one of the three had caused him the said injuries, therefore, no option is left but to hold that the prosecution has failed to bring home its case against any one of the appellants".

No doubt, it is the allegation against the appellants that they had acted in prosecution of their

common intention, however, it is the case of prosecution that the occurrence had taken place over trespassing of the appellants' goats into the maize crop of the complainant. Apparently, the occurrence has taken place at spur of the moment and there is no past blood feud between the parties to suggest that the appellants had attacked the ladies after pre-planning, therefore, the provision under section 34 P.P.C is not attracted to the case in the mentioned circumstances.

10. To review the entire evidence brought on the record, the prosecution case is full of various inconsistencies of glaring nature which are sufficient to create several reasonable doubts in prudent mind qua the guilt of the appellants. It is well settled that benefit of even a single but reasonable doubt should be extended to an accused not as a matter of grace but as matter of right. Reliance is placed on *Tariq Pervaiz Vs. The State (1995 SCMR 1345)*. The rule laid down by the august Supreme Court in the said judgment is as follows.

The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt

in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

11. For what has been discussed above, by allowing this appeal, we set aside conviction and sentence awarded to the appellants by learned trial Court through judgment dated 07.11.2018 and acquit them in case F.I.R No. 147 dated 15.06.2016 registered against them u/s 302, 109, 34 P.P.C at Police Station Kalkot, District Dir Upper. They be released forthwith from jail if not required in any other case. The connected Cr.R No. 108-M/ 2018, for having become infructuous in view of acquittal of the appellants, is accordingly dismissed.

12. Above are the reasons of our short order of the even date.

Announced.
Dt: 02.12.2020

Office 15/12 WR

JUDGE

JUDGE