

**2018 M L D 854**

**[Peshawar (Bannu Bench)]**

**Before Syed Afsar Shah and Ishtiaq Ibrahim, JJ**

**TARIQ ZAMAN---Appellant**

**Versus**

**MUHAMMAD SHAFI KHAN and 2 others---Respondents**

Cr.A. No.181-B with Murder Reference No.3-B of 2016, decided on 8th February, 2017.

**(a) Penal Code (XLV of 1860)---**

---Ss. 302, 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Prosecution case was that accused and co-accused were brawling with the son of complainant, and on arrival of complainant and his brother at the place of occurrence, accused persons started firing with intention to kill them, resultantly brother of complainant was hit and died on the spot---Motive for the crime was dispute of land---Accused (appellant) had not been shown to have harmed anybody in the FIR---Testimony of complainant showed that accused did not have any firearm at the relevant time rather was empty handed---Prosecution witness/son of complainant with whom grappling was alleged had also attributed the firing to the co-accused---Complainant had not specified the weapons with which the accused persons were equipped at the relevant time, which cast doubt on his presence at the relevant time because he was not a lay man---Complainant being police official was supposed to be well aware of the calibre and type of weapons possessed by the accused persons at the time of occurrence---FIR showed time of occurrence as 8.00 p.m.--Complainant had charged seven accused for indiscriminate firing at him and his deceased brother---Complainant had failed to explain as to how could he identify the bullets coming out from the barrel of the gun of each accused and hitting the deceased in the darkness---Investigating Officer had not collected any evidence with regard to source of light at the relevant time, which created doubt about the identification of accused persons---Circumstances established that complainant was not present at the spot---Mode and manner of occurrence had not been clearly brought on record and ocular account suffered with infirmities---Prosecution, in circumstances, had not been able to prove the charge against the accused---Accused was acquitted in circumstances by setting aside the conviction and sentence recorded by the Trial Court.

**(b) Criminal trial---**

---Absconsion---Corroborative evidence---Scope---High Court observed that people abscond not because they were guilty, but because of fear and torture of the police---Absconsion was not a substantive piece of evidence, but was a corroborative evidence---Abscondence could neither cure the inherent defect of the ocular account nor by itself was sufficient to sustain conviction.

Taj Muhammad v. Pesham Khan and others 1986 SCMR 823 and Farman Ali and 3 others v. The State PLD 1980 SC 201 rel.

**(c) Criminal trial---**

---Evidence---Corroboration---Effect---Scope---Where direct evidence failed, corroborative piece of evidence was of no avail.

**(d) Criminal trial---**

---Benefit of doubt---Scope---If any reasonable doubt had arisen, benefit of the same would be extended to accused not as a grace or concession, but as a matter of right.

**(e) Criminal trial---**

---Benefit of doubt---Scope---Any reasonable doubt arising out of the prosecution evidence, pricking the judicious mind was sufficient for acquittal of the accused.

Sultan Mehmood and Mehbob Khan for Appellants.

Shahid Hameed Qureshi, Addl: A.G. and Malik Nawaz and Shah Hussain for Respondents.

Date of hearing: 8th February, 2017.

**JUDGMENT**

**ISHTIAQ IBRAHIM, J.**---This criminal appeal calls in question the judgment dated 31.3.2016, rendered by learned Sessions Judge, Karak, in case registered vide FIR No.139 dated 03.7.2001, under Sections 302/324/148/149, P.P.C. at Police Station Karak, District Karak, whereby the appellant Tariq Zaman was convicted and sentenced as under:--

- (i) Under Section 302(b), P.P.C. death with compensation Rs.5,00,000/- (Rupees five lac) under section 544-A(1), Cr.P.C. payable to the legal heirs of deceased or in default thereof it shall recover as arrears of land revenue at proper time failing which he will suffer six months S.I subject to separate order.
- (ii) Under Section 324, P.P.C. to suffer six years imprisonment, out of which half will be R.I and the remaining will be S.I. with fine Rs.1,00,000/- (Rupees one lac) or in default thereof he will suffer further six months S.I.

However, benefit of Section 382-B, Cr.P.C. was extended to the appellant/convict.

2. The learned Trial Court has sent Murder Reference No.03-B/ 2016 for confirmation of death sentence.

3. Since the appeal and murder reference are the outcome of one and the same judgment, therefore, these are being disposed of by way of this single judgment.

4. The prosecution case as narrated in the FIR (Ex.PW-5/1) is that on 03.07.2001 at 2040 hours, complainant Muhammad Shafi (PW-5) brought the dead body of his brother Lal Sahib Khan to the police station and reported the occurrence that on the eventful day he along with his brother Lal Sahib Khan were present in the 'baithak' for offering 'maghrib' prayer. On hue and cry, they came out and saw the appellant Tariq Zaman along with Raziq Zaman and Haider Zaman (co-accused since acquitted), brawling with his son Muhammad Rafi whereas Khurshid Alam, Jan Alam, Gul Alam and Shahid Rehman (co-accused since acquitted) while duly armed with firearms were also present there. The complainant and his brother went to the spot and in the meanwhile the above named accused started firing with intention to kill them, due to the firing of accused Khurshid Alam and Tariq (appellant), his brother Lal Sahib Khan was hit and expired on the spot while the complainant escaped unhurt. Beside complainant, his son Muhammad Rafi (PW-6) is stated to have witnessed the occurrence. Motive for the crime was a land dispute. The complainant charged the above named accused for the commission of offence hence, the above referred FIR got registered.

5. After completion of investigation, complete challan was submitted in the learned Trial Court against co-accused whereas challan under Section 512, Cr.P.C. was submitted against the appellant. On conclusion of trial, co-accused Raziq Zaman, Haider Zaman, Gul Alam, Jan Alam and Shahid Rahman were acquitted by learned trial Court while accused Khurshid Alam was convicted and sentenced vide judgment dated 21.8.2013, who was later on acquitted by this Court on the ground of compromise and perpetual warrant of arrest was issued against the appellant. On the arrest and completion of investigation against the appellant, supplementary challan was submitted against him. He was charge sheeted wherein he claimed trial. The prosecution produced nine (09) witnesses in toto.

6. Statement of Doctor Shaji Muhammad SMO (Rtd) resident of Biland Killa Tehsil and District Karak was recorded as PW-4 who deposed as under:--

"On 03.7.2001 at 08.45 p.m. I conducted the postmortem examination on the dead body of the deceased Lal Sahib son of Shahbaz aged about 48/50 years resident of Kashmiri Banda brought by police and found the following:-

**Internal.**

- I. One entry wound on left nipple 1 c.m.
2. One exit wound on right chest hack infra-scaptda region 1/2 inch in size.
3. Entry wound 02 on right perineal, region 1 c.m.
4. Exit wound left side base of the penis, size 2 c.m.
5. Entry wound on the right lower half of the thigh front, size 1 cm.

6. Evil wound on lateral surface of the right thigh, 1/2 inch mid-way of the thigh.
7. Entry wound below the left knee, 1 c.m. medial aspect.
8. Exit wound lateral aspect of the left leg, 1/2 inch below knee joint.

**External.**

**Thorax.**

5th rib fractured, pleurae perforated, right and left lungs, pericardium, heart and blood vessels perforated. Stomach was normal.

**Opinion.**

The dead body received fire arm wounds. The entries were both from right and left. All the exit wounds were present, showing no bullet inside. The victim died immediately because of fatal trauma to the lungs and heart. Blood was bubbling from the mouth and nose.

Time between injury and death .approximately 1/2 hour.

Time between death and P.M ..Approximately one hour.

My report in this respect is Ex.PM (consists of 6 sheets) along with pictorial is correct and bears my signature correctly".

7. Statement of Investigating Officer Jehangir Khan (Rtd S.I) resident of Takht-e-Nasrati District Karak was recorded as PW-8. He reduced the report of the complainant in the shape of FIR Ex.PW-S/I and prepared injury sheet Ex.PW8/1 and inquest report Ex.PW-8/2 of the deceased and sent his dead body to the hospital for his examination. He proceeded to the spot and during spot inspection secured blood stained earth from the place of deceased vide recovery memo. Ex.PR and sealed the same into parcel. He took into possession 03 empty shells of .30 bore Ex.P-I from the places of accused Tariq Zaman and Khurshid Alam and prepared recovery memo. Ex.PW-3/1. Through same memo. he also secured 05 empty shells of 7.62 bore Ex.P-2 from the place of accused Raziq Zaman and 03 empty shells of 7.62 bore Ex.P-3 giving the fresh smell of discharge from the place of accused Shahid Rehman which were lying in scattered condition. He prepared site plan Ex.PC on the pointation of complainant and recorded the statements of PWs under Section 161, Cr.P.C. He received the last worn clothes of the deceased from the hospital consisting of one shirt Ex.P-4, trouser P-5 and bunyan P-6 and to this effect prepared recovery memo. which is Ex.PW3/2. He conducted house search of the accused but they were not available in their houses. He sent the blood stained articles to the FSL and in this regard the report is Ex.PK.

8. After the closure of prosecution evidence, the appellant was examined under Section 342, Cr.P.C., wherein he professed innocence and false implication in the case. However, he neither wished to be examined on Oath as required under Section 340(2), Cr.P.C. nor wanted to produce

evidence in his defence. After hearing arguments, the learned Sessions Judge, Karak convicted and sentenced the appellant as mentioned above vide judgment dated 31.3.2016 hence, the appellant filed the present appeal while the learned trial Court sent the murder reference for confirmation.

9. The learned counsel for the appellant argued that the complainant is a chance witness. He is employed in Police Department at Hangu and nothing has been brought in black and white that at the relevant time he was present at the spot of occurrence. The description of weapons was not given by the complainant in the FIR as well as in his Court statement. Scuffle and dragging of PW Muhammad Rafi is alleged, but there are no signs of injury on his body. The time of occurrence is 8.00 p.m., and due to darkness identification of the accused is doubtful. How the complainant can distinguish the fatal shots coming out from the weapons possessed by the seven accused when it is a case of simultaneous firing and that too, at 08.00 p.m. The co-accused of similar role have already been acquitted. He argued that the learned trial Court has wrongly awarded the sentence to the appellant and he deserves acquittal.

10. On the contrary, it was argued that the appellant has been charged in a promptly lodged FIR with specific role of effective firing due to which brother of the complainant got hit and died on the spot. The complainant party and the accused are co-villagers, therefore, question of mis-identification does not arise. The appellant remained absconder for a long period of 13 years. The prosecution has fully proved its case against the appellant and he was rightly convicted and sentenced by the learned Trial Court.

11. We have heard the arguments of learned counsel for the parties as well as learned Addl: A.G. for State and have gone through the record with their able assistance.

12. In the First Information Report the complainant has charged two sets of accused, one is that of Tariq Zaman (appellant), Raziq Zaman and Haider Zaman (co-accused since acquitted) sons of Marwat Khel who were allegedly grappling with the son of complainant PW Muhammad Rafi, and the other is of Khurshid Alam, Jan Alam, Gul Alam sons of Alam Khel and Shahid-ur-Rahman son of Afzal Mir (co-accused since acquitted) who were shown to be armed with firearms. It is pertinent to mention here that in FIR the appellant has not been shown having any arm and the same is the deposition of the complainant before the that Court when he was examined as PW-5. For convenience his examination-in-chief is reproduced as under:--

"Deceased Lal Sahib Khan was my brother. On the day of occurrence, I along with my deceased brother Lal Sahib Khan were offering evening prayer in our drawing room. We heard some noise from outside. We rushed outside the drawing room and saw that Tariq Zaman (accused facing trial), Raziq Zaman and Haider Zaman were grappling with my son Muhammad Rafi while Khurshid Alam, Jan Alam, Gul Alam sons of Alam Khel and Shahid Rehman son of Fazal Mir were already present there duly armed with deadly weapons. When we reached the spot, these accused entrenched themselves and started firing at us. By the fire shot of the accused Khurshid Alam and Tariq Zaman, my brother Lal Sahib Khan got hit and died on the spot while I and my son Muhammad Rafi escaped un-hurt. Motive for the occurrence was a dispute over the landed property. After the occurrence the accused decamped from the spot. I then shifted the dead body of my deceased brother to the P.S. in a Datsun pickup with the help of co-villagers where I

lodged the report against the accused. After reporting the matter, the contents of report were read over to me and I after admitting the same to be correct signed it as a token of its correctness. My report is Ex.PW5/1. I have accompanied the I.O. to the spot where on my pointation site plan was prepared. I charge the accused for the commission of offences".

13. From the testimony of this witness it is clear that the appellant was not possessing any firearm at the relevant time rather he was empty handed.

14. Muhammad Rafi (PW-6) stated in his cross-examination that "I was dragged by the accused namely Tariq Zaman (facing trial), Haider Zaman and Raziq Zeman. The call for prayer had already offered and thereafter I had offered prayer on the Indus Highway before the occurrence". He further stated that "It is correctly recorded in my statement that the three accused referred to above had dragged me from the house of Luqman Hakim near to the house of the accused. It is correctly recorded in my police statement that on my commotion my father and my deceased uncle Lal Sahib Khan came to the spot and by then the accused Khurshid Alam, Jan Alam, Gul Alam and Shahid-ur-Rahman duly armed were present there and the above mentioned accused started firing at us". If this is the standard of evidence of prosecution where the witness with whom grappling was alleged has attributed the firing to the other co-accused and he affirms that the same has correctly been recorded in his statement by the police. In our view conviction of the appellant on such ocular account becomes unjustified and unwarranted in law.

15. The complainant has not specified the weapons with which the accused were equipped at the relevant time. He despite being police official has used the term firearm ( ). In his cross-examination he stated that "I can distinguish in various types of weapons. I have not specifically mentioned the type of weapons possessed by each accused at that time and have used a general term "fire arms". Non-mentioning of type of weapons by the complainant also casts doubt on his presence at the relevant time because he was not a lay man. Being police employee he was supposed to be well aware of the caliber and type of weapons possessed by the accused at the time of occurrence.

16. FIR depicts time of occurrence as 08.00 p.m. and at that time darkness certainly prevails. In his report, complainant has charged seven accused for simultaneously indiscriminate firing at him and his deceased brother. He has failed to explain that how can he identify the bullets coming out from the barrel of the gun of each accused and hitting the deceased in the circumstances when the darkness was almost there and the I.O. has not collected any evidence to show that in fact there was source of light at the relevant time, therefore, identification of accused becomes doubtful.

17. Abscondence of the convict-appellant is concerned, in this part of the country people do abscond not because they are guilty, but because of fear and torture of the police. Even otherwise, absconsion is not substantive piece of evidence, it is a corroborative piece of evidence and in cases where direct evidence fails, corroborative piece of evidence is of no avail, as in the instant case, where the evidence of eye-witnesses have been disbelieved. Needless to say that abscondence can neither cure the inherent defect of the ocular account nor by itself is sufficient to sustain conviction. In this respect, reference can be made to cases, "Taj Muhammad v. Pesham

Khan and others" (1986 SCMR 823) and "Farman Ali and 3 others v. The State" (PLD 1980 Supreme Court 201).

18. It is golden principle of administration of criminal justice that prosecution is bound to prove its case beyond any shadow of doubt. If any reasonable doubt arises, the benefit of the same must be extended to accused not as a grace or concession, but as a matter of right. Similarly, it is also well established principle of criminal justice that there is no need of so many doubts in the prosecution case; rather, any reasonable doubt arising out of the prosecution evidence, pricking the judicious mind is sufficient for acquittal of the accused. Whereas, the case in hand is pregnant with jumble of doubts and infirmities.

19. In light of above, the presence of the complainant at the spot has not been established, the mode and manner of occurrence has not been clearly brought on record in the circumstances and the ocular account suffers with such infirmities, we are of the firm view that the prosecution has not been able to prove the charge against the appellant beyond shadow of any reasonable doubt. Therefore, this Cr.A.No.181-B/2016 filed by appellant Tariq Zaman is allowed, the conviction and sentence awarded to the appellant vide impugned judgment dated 31.3.2016, is set aside and consequently he is acquitted of the charges leveled against him. He be let free forthwith if not required in any other case.

20. The Murder Reference No.03-B/2016 (The State v. Tariq Zaman) is answered in negative.

21. Above are detailed reasons of our short order of the even date.

JK/159/P

Appeal accepted.