

**PESHAWAR HIGH COURT,
PESHAWAR**
(Judicial Department)

Cr.A No. 606-P of 2015.
With Cr.M No. 608-P of 2019

JUDGMENT

Date of hearing. 05.09.2019

Appellant by: Mr. Altaf Khan, advocate.

State by: Mr. Mujahid Ali Khan,, AAG.

Complainant by. Mr. Muhammad Naeem Khan,
advocate

QAISER RASHID KHAN, J.- Through the present appeal, Qadeem Shah, appellant has called in question the judgment dated 05.10.2015 of the learned Additional Sessions Judge-I, Takht Bhai whereby he was convicted under section 302 PPC and sentenced to life imprisonment and also to pay a compensation of Rs.2,00,000/- within the meaning of section 544-A Cr.P.C to the legal heirs of the deceased and in default to suffer S.I for six months in case FIR No. 240 dated 27.03.2010 under section 302 PPC registered at PS Lund Khwar, District Mardan.

2. As per FIR ibid, on 27.3.2010, the complainant namely Naseem Shah (PW-9) took the dead body of his father Saleem Shah to police station Lund Khwar and reported about the matter as to how they had gathered at the house of his uncle Nooran Shah to

resolve a dispute over a joint house, when some harsh words were exchanged and thereafter his uncle Qadeem Shah pulled out his pistol and started firing at his father Saleem Shah with which he was hit and died on the spot. The occurrence was witnessed by his other uncle Itibar Shah and grandmother Mst. Fazal Roshan.

3. Initially, the convict-appellant went into hiding , therefore, on completion of investigation, challan under section 512 Cr.P.C was submitted against him and after recording some evidence he was declared as a proclaimed offender by the learned Additional Sessions Judge-I, Takht Bashir vide order dated 22.10.2010. On the arrest of the convict-appellant, supplementary challan was submitted against him. Formal charge was framed against the convict-appellant on 04.11.2013 to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined 10 witnesses. The gist of their evidence is as under:

Syed-ul-Ibrar Khan SHO (PW-1) has submitted supplementary challan on 01.07.2013 against the convict-appellant .

Taj-ud-Din, FC, (PW-2) has executed warrant of arrest and proclamation notices against the convict-appellant.

Muhammad Bashir ASI (PW-3) is marginal witness to the pointation memo Ex:PW-3 vide which the

convict-appellant led the police to the spot and pointed out different places.

Dr. Zahir Ullah (PW-4) has conducted autopsy on the dead body of the deceased and found the following.

Symptoms observed before death: Shock.

F.A injured (head injury) killed with firearm.

External appearance: Condition of subject stout emaciated, decomposed etc average body inclothing, blood stain no rigor martis.

Injuries:

1. Fire arm inlet wound on upper check (left) face size about $\frac{1}{4}$ " x $\frac{1}{4}$ ".
2. Corresponding firearm exit wound on left side base of skull size about $\frac{1}{2}$ " x $\frac{1}{2}$ ".

INTERNAL APPEARANCE. Intact. Stomach was found healthy and contained semi undigested food.

Remarks: in his opinion the case of death was due to F.A injury to brain causing severe injury intracranial bleedings, shock and death.

Probable time that elapsed between injury and death within two hours while between death and P.M within one hour. He verified his report Ex:PM along with pectoral.

Alamzeb Khan SI (PW-5) has recorded the report of the complainant in the shape of FIR Ex:PA, prepared the injury sheet Ex:PW-5/1 and inquest report

Ex:PW-5/2 of the deceased and dispatched the dead body to the hospital for post mortem examination.

Jehanzeb Khan ASI (PW-6) has partially investigated the case. Vide application Ex:PW-6/1, he obtained one day custody of the convict-appellant and also prepared pointation memo Ex:PW-3/1. Similarly, vide application Ex:PW-6/2 he produced the accused before the Magistrate for recording his confessional statement but he refused and was accordingly sent to the judicial lock up.

Imad son of Gul Rahman (PW-7) is marginal witness to the recovery memo Ex:PW-7/1 vide which the I.O took into possession the blood stained earth from the spot and also recovered 5 empty shells of 30 bore lying in scattered position and sealed the same into parcel. He is also marginal witness to the recovery memo Ex:PW-7/2 vide which the I.O took into possession the blood stained clothes of deceased Saleem Shah and sealed the same into a parcel.

Naseeb Gul (PW-8) being co-villager of the deceased has identified his dead body before the police as well as the doctor.

Naseem Shah son of the deceased and complainant appeared as PW-9 and supported the contents of the FIR Ex:PA. At his instance, the site plan Ex:PB was prepared by the I.O.

Amir-ud-Din Khan, SI (PW-10) has investigated the case. He visited the spot and prepared the site plan Ex:PB at the pointation of the complainant and the eyewitnesses. He recovered blood stained earth alongwith five empties of 30 bore from the spot and sealed the same into a parcel vide recovery memo Ex:PW-7/1. Likewise, vide recovery memo Ex:PW-7/2, he took into possession the blood stained clothes of the deceased comprising a Qamees (P.1), Shalwar (P.2) and white jacket (P.3). Similarly, vide his applications Ex:PW-10/4 and Ex:PW-10/5 he obtained warrant of arrest and proclamation notices respectively against the convict-appellant. He recorded the statement of the PWs and on completion of investigation handed over the case file to the SHO for the submission of challan under section 512 Cr.P.C against the convict-appellant.

4. After the closure of the prosecution evidence, the convict-appellant was examined under section 342 Cr.P.C. who pleaded innocence and denied the allegations of the prosecution brought against him. However, he neither wished to produce any evidence in his defence nor himself appeared as his own witness in disproof of the allegations of prosecution as provided under section 340 (2) Cr.P.C. On conclusion of the trial, after hearing of the learned counsel for the parties and appraising the evidence, the learned trial Judge

convicted and sentenced the appellant as mentioned in para-1 of the judgment.

5. The learned counsel for the convict-appellant vehemently attacked the impugned judgment of conviction and sentence of the convict-appellant and contends that he has been falsely charged in the instant case by the complainant as his presence at the spot is not established and in this respect he states that the occurrence has taken place in the house of Nooran Shah (elder brother of both the deceased and the convict-appellant) but neither his statement was recorded by the I.O nor he turned up before the learned trial court to record his statement in support of the stance of the complainant and that the motive set up by the prosecution has not been proved. Further contends that from the spot, 5 empties of 30 bore have allegedly been retrieved but the same were not sent to the FSL to ascertain as to whether they were fired from one or different weapons. He further contends that the site plan does not support the version advanced by the complainant and his presence at the spot as well. He further contends that Imad who is marginal witness to the recovery of memo, in his court statement as PW-7 states that the recovery memo was prepared by the I.O and he was just made to sign the same and lastly that when the other circumstances do not support the version advanced by the prosecution then the mere abscondance

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of the convict-appellant is not sufficient to award him the conviction and thus he deserves acquittal. In this respect, he placed reliance on 1999 SCMR 1220 (*MUHAMMAD KHAN and another versus THE STATE*), 1998 P.Cr.LJ 990 (Peshawar), {*SALIM KHAN and another versus THE STATE*}, 2001 P Cr.L J 1740 (Peshawar) {*SAEEDULLAH versus SHAH NAZAR and another*} 2003 P Cr.L J 2003 (Quetta) (*NOOR ALAM versus THE STATE*) , 2002 P Cr.L J 377 (Peshawar) { *The State through Advocate-General, N.W.F.P, Peshawar versus Tawab and another*} 2008 SCMR 158 {*Muhammad Khalid Khan versus Abdullah and others*} , 2017 SCMR 144 (*MUHAMMAD SADIQ versus THE STATE*) and 2006 SCMR 1846 (*Lal Khan versus the State*) .

6. Such arguments of the learned counsel for the convict-appellant are resisted by the learned AAG assisted by the learned counsel for the complainant who contend that the convict-appellant has been directly charged by the son of the deceased namely Saleem Shah and he has narrated the entire details in the FIR in respect of the mode and manner of the occurrence, the motive set up has been duly proved and the recovery of 5 empties of 30 bore from the spot lend further credence to the story advanced by the complainant. They further contend that the site plan prepared at the instance of the complainant and Itibar Khan, brother of the deceased

also supports the ocular testimony furnished by the complainant and that the non-sending of the empties from the spot to the FSL would not dent the prosecution version as this exercise was not necessary in view of the single accused being charged by the complainant.

7. Arguments heard and the available record.

8. It was the complainant namely Saleem Shah who reported about the incident to the police on 27.03.2010 at 15:00 hours as to how he along with his father (deceased Saleem Shah) had gone to the house of his uncle Nooran Shah to settle some dispute in respect of a joint house where his grandmother Mst. Fazal Roshan and uncle Itibar Shah were also present and during the course of negotiations, some harsh words were exchanged whereafter the convict-appellant pulled out his pistol and fired at his father Saleem Shah with which he received firearm injury and died on the spot. Since the occurrence has taken place in the house of Noor Shah, uncle of the complainant, therefore, his presence at the spot was quite natural.

9. The complainant who recorded his statement as PW-10 has furnished a straightforward account of the occurrence and also put forth the motive as a dispute over a joint house. He was indeed subjected to a lengthy and taxing cross examination but barring some minor and negligible discrepancies and contradictions, he stuck to his stance regarding the

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version so advanced by him. The convict-appellant is his real uncle so in such circumstances there was no occasion for the complainant to falsely nominate him for the murder of his father.

The deceased and the convict-appellant are brothers inter se and the motive has been given as a dispute over a joint property. The defence has badly failed to shatter the motive set up by the prosecution.

10. So far as the arguments of the learned counsel for the convict-appellant regarding non-examination of Mst. Fazal Roshan and Itibar Shah are concerned, suffice it to say that the same phenomenon was but natural. Mst. Fazal Roshan being an old lady in her advanced age having lost her one son in the incident would of course have not turned up to depose against her other son and that too, when much of the dust had settled after the arrest of the convict-appellant after over three years of the occurrence. The same is the case with Itibar Shah, who is not only the brother of the deceased but also of the convict-appellant and as such, for obvious reasons could have not deposed against his brother as in the process, the same would entail capital punishment for the convict-appellant.

11. Imad son of Gul Rehman who is marginal witness to the recovery memos Ex:PW-7/1 and 7/2 has recorded his statement as PW-7 and in his examination-in-chief has in clear terms stated as to how the I.O

arrived at the spot and recovered the 5 empties as well as blood and accordingly he put his signatures over the same. He is an independent witness as no relationship whatsoever of the said witness has been shown with the complainant party and has given a clean breast statement and despite being subjected to cross examination, he stood his ground.

12. As per the report of the doctor who was examined as PW-4, the deceased has received a single firearm injury on his left cheek with its corresponding firearm exit wound on the left side base of his skull which proved fatal. The arguments of the learned counsel for the convict-appellant in respect of the statement of the doctor that the time between the injury and death was within 2 hours can at best be termed to be a probable time and would not as such cause a dent in the ocular testimony of the complainant.

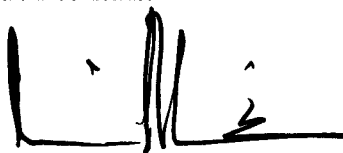
13. From the spot, 5 empties of 30 bore have been retrieved. Since this is a case of a single accused, therefore, there was no necessity for the prosecution to have sent the same to the FSL for getting its report. More so, after the commission of the offence, the convict-appellant rather than surrendering before the law opted to abscond and remained fugitive from law for over three long years and he has failed to give any plausible explanation for such long abscondance.

14. In view of the above discussion, the prosecution has been able to prove its case against the convict-appellant through a promptly lodged FIR, confidence inspiring ocular testimony, single accused motive, recovery of crime empties from the spot, supportive medical evidence coupled with his over three years long abscondance to the hilt and that is how the learned trial court has rightly convicted and sentenced him vide the impugned judgment. Reliance in this respect is placed on *2003 SCMR 736 (Muhammad Sadiq Versus the State)*, *2003 SCMR 1479 (Mukhtiar versus the State)*, *2006 SCMR 1857 (Muhammad Ehsan versus the State)*, *2008 SCMR 161 (Maqbool Khan versus the State)*, *2008 SCMR 917 (Farooq Khan versus the State)*, *2010 SCMR 1025 (Faisal Mehmood and another versus the State and another)*, *2010 SCMR 1791 (Anwar Shamim versus the State)* and *2012 SCMR 1869 (Takdir Samsuddin Sheikh versus State of Gujrat and another)*.

As a sequel to the above discussion, we dismiss the instant appeal and maintain the conviction and sentence of the appellant. However, the benefit of section 382-B Cr.P.C is extended to him.

Announced

Dated: 5.9.2019.



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