JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH

(*Judicial Department*)

Cr.A No.145 -B of 2019

Muhammad Naseer
Vs
The State etc

J U D G M E N T

Date of hearing _____02-12-2019_____

Appellant (s) by: M/S Muhammad Rashid Khan Dirma Khel & Abid Anwar Khattak Advocates

Respondent by: Malik Akhter Nawaz Advocate.

State by: Mr. Shahid Hameed Qureshi Addl: A.G.

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SAHIBZADA ASADULLAH , J.- Muhammad Naseer, the appellant/convict through present criminal appeal preferred under section 410 Cr.P.C has challenged the validity of judgment dated 14.05.2019, passed by the learned Additional Sessions Judge-I, Judge MCTC, Karak, whereby he was convicted and sentenced in case FIR No. 511 dated 06-10-2013,

under section 302/324/34 PPC, registered at Police station Latamber, district Karak, the detail whereof is as under:-

i. ***U/S 302(b) PPC, he was convicted and sentenced to life imprisonment with compensation of Rs.50,000 (rupees fifty thousand) payable to the legal heirs of the deceased as provided U/S 544-A Cr.P.C, or to undergo further six months S.I indefault whereof.***

ii. ***U/S 324 P.P.C he has also been convicted for attempting at the life of complainant namely Mujeeb-ur-Rehman by making firing at him ineffectively and sentenced to suffer imprisonment for two years with fine of Rs.5,000/- or to undergo further one month S.I indefault whereof.***

iii. ***Benefit of Section 382-B Cr.P.C has also been extended to the convict/ appellant.***

2. According to the prosecution version as disclosed in the F.I.R, that it was on 06-10-2013 at 1100 hours, when the complainant Mujeeb-ur-Rehman

reported the matter to the local police on the spot to the effect that on the eventful day, he alongwith deceased brother Sadeeq-ur-Rehman had come to their land, situated in village Tatter Khel and after spending some time, they were coming back to their home, when at about 10.15 hours, accused/ appellant Naseer Khan armed with Kalashnikov while co-accused Shabir-ur-Rehman, duly armed with .30 bore pistol, riding on their motor cycle, reached there at the place of occurrence and asked them that why he (complainant) and his deceased brother had come to the land and thereafter both of them started firing upon Sadeeq-ur-Rehman with the intention to commit his qatl-i-amd, resultantly he was hit and died on the spot; that thereafter the accused also made firing at complainant but he luckily escaped unhurt; that the motive was stated to be the dispute over landed property. The report was taken down into *Murasila (Ex:PA)* by Raham Dad HC (Rtd) (PW-1), who also prepared

injury sheet and inquest report (Ex.PW 1/1 & Ex.PW 1/2). Thereafter he sent the dead body for autopsy to the doctor under the escort of constable Raham Niaz No.1462, while *murasila* was sent to the Police station through constable Zia Ullah, the contents of which were incorporated into F.I.R (Ex:PA/1) by Rasool Muhammad SI (Rtd) (PW-6). And handed over copy of the same to Mumtaz Khan SI CTD Kohat (PW-07), for conducting investigation in the instant case.

3. After completion of investigation by Mutmaz Khan SI CTD Kohat (PW-07), complete challan was submitted before the trial court against both the accused named above. On arrest of appellant/accused, supplementary challan was submitted in the trial court. He was summoned from District Jail, Karak. After fulfillment of codal formalities U/S 265-C Cr.P.C, he was charge sheeted and the trial commenced against the accused.

4. In order to prove its case, prosecution examined as many as (9) witnesses, while the statement of Israr PW-09, recorded in earlier trial of co-accused was transposed. After closure of the prosecution evidence, statement of appellant/ accused Muhammad Naseer was recorded under section 342 Cr.P.C, wherein he professed his innocence. He neither wished to be examined on oath, as required under section 340 (2)Cr.P.C. nor opted to produce defence evidence. After hearing the prosecutor and defence, learned trial court convicted and sentenced appellant/ accused, vide the impugned judgment, hence the instant appeal.

5. We have considered the submissions of learned counsel for the parties, AAG for the state and gone through the record of the case.

6. The complainant reported the matter to the local police at 11.00 a.m on 06-10-2013 regarding the murder of his brother Sadeeq-ur-Rehman which

was taken down vide *murasila* (Ex.PA). The report shows that the complainant in the company of the deceased had come to the fields belonging to his uncle who was settled in Canada. It was 10:15 a.m when they after taking tea in the adjoining *baitak* of one Mir Wali came out to leave for their village when the accused/appellant with his brother Shabir-ur-Rehman came on motor cycle duly armed, they first warned them of their coming to the spot fields and then fired with their respective weapons on targeting both the deceased and complainant. The complainant was examined as PW-9, wherein he stated that they had started for village when the incident occurred but the distance between point No.1 where he was shown present and point No.2 where the deceased shown present is shown 47 paces which confirms that the complainant was not accompanying the deceased at the relevant time. The complainant stated that he was also fired at but escaped unhurt, had he been present being

empty handed he too was at the mercy of the assailants and they would have easily done away with him. In case titled ***"Zahir Shah Vs the State" (2019 MLD 1562)***, wherein it is held that:

> ***"Admittedly, the deceased along with PW-1 to PW-3 were standing closely and after making indiscriminate firing there were no chances of PWs to escape unhurt and also there was every possibility that the deceased had received multiple bullet injuries, but the picture is quite different from the presumptions and expectations as suggests by the situation, when the deceased had only received two bullet injuries on his person, while all the PWs were escaped unhurt."***

7. The spot is lying on the metal road and the scribe confirmed the inter-se link between police post Ahmad Abad and the spot through a metal road. The occurrence occurred at 10:15 a.m but no effort was made to shift the deceased to the Police station

and to report the matter there, rather the body was lying on the spot when a private person namely Ilyas Khan contacted the scribe on his cell phone who reached to the sot at 11.00 a.m, when the villagers and relatives had already arrived and the vehicles were available on the spot, had the complainant been present with the deceased at the time of firing, he would have either shifted the dead body to the police station or to the hospital, but infact the complainant was in the village and was informed there, where from he in the company of his relatives reached to the spot within 30 minutes. We are still struggling to know that who was Ilyas, who informed the police and that why his statement was not recorded? The complainant stated that soon after the occurrence *Cot* was arranged and the dead body was shifted to the baitak of one Mirwali, we are surprised that why the "*Cot*" was shifted to the *baitak,* rather it should have been shifted to the police station for report, but this stance was openly

contradicted by other witnesses, i.e PW-1 Raham Dad, who is the scribe, stated that when he reached to the spot, the dead body was lying in the field and PW.9 Israr, who escorted the dead body to the hospital, stated that when they reached, the dead body was lying on the ground. The complainant further stated that he did not accompany the dead body to the hospital, rather preferred to stay on the spot with PW-1, the conduct of the witness is not natural and badly failed to convince us, as his first priority would be to accompany the dead body to the hospital, rather than to stay in the adjoining *baithak* for hours. We are again surprised that what the scribe was doing on the spot for two/three hours, as by then the I.O had not reached and no further investigation could be conducted by him as being Head constable, was not authorized and it was then, when the Investigating officer arrived at 1.30 p.m to the spot, who then effected the recoveries and prepared the site plan. Infact the attitude of the

witnesses is not only abnormal, rather an attempt was made to cover the delay on one side and to make the presence of the complainant/believable on the other, but they failed to convince and we can safely hold that the witness was interested and procured and that the F.I.R was registered after preliminary investigation. In case titled ***"Muhammad Ashraf alias Acchu Vs the State" (2019 SCMR 652)***, wherein it is held that:

> ***"It is well settled that benefit of slightest doubt must go to an accused and in a case where the Court reaches a conclusion that eye-witnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story is concocted by the PWs, then the case of the accused merits plain acquittal."***

8. The presence of the witness is not free from doubt, as the complainant had no personal property but it was the property of their uncle who was residing in Canada and that the accused were their first

cousins, the complainant could not show the purpose of his presence and coming to the fields. Even the accused had got nothing on the spot, neither the complainant was ploughing or sowing the field or were in possession of the same which annoyed the accused to a degree to kill the deceased. Had the complainant been present and the accused had the intention to kill them, no hurdle was there to stop them from killing the complainant as well. Infact the prosecution is travelling with the weakest motive, though this motive was alleged but nothing was brought forwarded to prove the same. In case titled ***"Noor Muhammad Vs the State another" (2010 SCMR 97)***, wherein it is held that:

> ***"It appears that the prosecution has abandoned the motive. In these circumstances, solitary statement of the complainant without any supporting evidence and particularly' when the incident occurred on 20-9-1995 did not take place in his presence is very unsafe to be relied upon. Thus, the prosecution has***

failed to prove the motive. It has been held in the case of Muhammad Sadiq v. Muhammad Sarwar 1979 SCMR 214 that when motive is alleged but not proved then the ocular evidence required to be scrutinized with great caution. In the case of Hakim Ali v. The State 1971 SCMR 432 it has been held that the prosecution though not called upon to establish motive in every case, yet once it has set up a motive and failed to establish it, the prosecution must suffer consequence and not the defence. In the case of Ameenullah v. State PLD 1976 SC 629 it has been held that where motive is an important constituent and is found by the Court to be untrue, the Court, should be on guard to accept prosecution story."

9. The place of occurrence is surrounded by fields but no farmer from the adjoining lands was made a witness. Mirwali Khan who was an important witness though was examined U/S 161 Cr.P.C but he did not turn up to record his statement during the trial as he was the witness who could say that the complainant had come in the company of the accused

and who could better explain that who shifted the dead body of the deceased to his *baitak* but he avoided to appear mainly for the reason that he was not ready to support false charge of the complainant and his nonproduction leads to a negative inference against the prosecution. In case titled, ***"Riaz Ahmad Vs the State" (2010 SCMR 846)***, wherein it is held that:

> ***"One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain***

been examined in the Court his evidence would have been unfavourable to the prosecution."

10. The ocular account is in conflict with the medical evidence. The deceased was facing the accused the seat of injuries and the place of the deceased do not support the stance of the complainant as one injury was from front to back but the others were from left to right. The doctor has given the time between death and postmortem as 3 to 4 hours which takes the time of death earlier than the one noted. The dead body was identified by the relative and co-villagers, i.e before the police and before the doctor at the time of post mortem examination, had the complainant been present at the spot, he would have at least identified the deceased before the police as the Inquest report was already prepared on the spot. This being so, we cannot hold otherwise but that it was a blind murder. In case titled ***"Nasir Ali and others Vs Sajjad Hussain and others (PLD 2006 Supreme Court 560)***, wherein it is held that:

"The learned High Court had given finding of fact against the petitioner after proper appreciation of evidence with ocular testimony directly in conflict with medical evidence. It is a settled A principle of law that in case of conflict between the ocular and medical evidence, then medical evidence is to be preferred. See Bagh Ali's case (1983 SCMR 1292) and Muhammad Aslam's case (1969 SCMR 462). It is pertinent to mention here that statement of eye-witnesses in respect of nature and seat of injuries could not connect the respondents as their statements are not inconsonance with medical evidence and this finding was duly considered/noted by the High Court after re-appraisal of eye-witnesses and the medical evidence in minutely."

11. The learned counsel for the appellant vehemently argued that the appellant remained absconder for sufficient long time, but mere absconscion of accused is not conclusive guilt of an accused person; it is only a suspicious circumstance

against an accused that he was found guilty of the offence. However, suspicions after all are suspicions, the same cannot take the place of proof, the value of absconcion, therefore, depends on the facts of each case. In case titled ***"Liaqat Hussain and others Vs Falak Sher and others"*** ***(2003 SCMR 611(a),*** wherein it has been held:-

> ***"(a) Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation for being present on the scene of occurrence and were chance witnesses---Prosecution case did not inspire confidence and fell for short of sounding probable to a man of reasonable prudence---Abscondence of accused in such circumstances could not offer any useful corroboration to the case of prosecution"***

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/appellant. Resultantly, this appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the learned trial court is set-aside and he is acquitted of the charge by extending him the benefit of doubt, he shall be released forth with from jail, if not required to be detained in connection with any other case.

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

Announced.
02.12.2019

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