

THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

Cr.A No.151-B of 2021

**Umer Gul and another
Vs.**

The State and another.

JUDGEMENT

Date of hearing: 21.6.2022

For Appellant: **Mr. Ahmad Farooq Khattak Advocate**

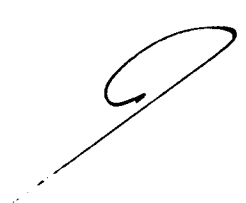
For Respondent: **Mr. Abid Anwar Khattak, Advocate.**

For State: **Sardar Muhammad Asif, Asstt: AG.**

SAHIBZADA ASADULLAH, J.— The appellants Umer Gul and Said Awal Badshah alias Bhutto have called in question the judgment dated 09.9.2021, rendered by learned Additional Sessions Judge, Karak at Takht-e-Nasrati, whereby they have been convicted under section 302(b) of the Pakistan Penal Code and sentenced to life imprisonment as Ta'zir with Rs.5,00,000/- (five lac), as compensation under section 544-A Cr.P.C. to be paid to the legal heirs of the deceased or in default thereof, to undergo six months simple imprisonment. The appellants were also convicted under sections 324/34 P.P.C and sentenced to undergo five years rigorous imprisonment, each convict shall also pay fine to the tune of Rs. 50,000/- and in default thereof shall further undergo S.I

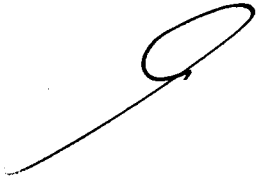
for three months. Benefit of section 382-B Cr.P.C was extended to the convict/appellants.

2. The complainant Hidayat Ullah moved criminal revision petition No.40-B/2021 for enhancement of sentence of the appellants. Since both the matters have arisen out of one and the same judgment, therefore, we intend to decide the same through this common judgment.




3. Brief facts of the case according to narration of the F.I.R, are that on 28.02.2018 at 10:00 hours complainant Hidayat Ullah along with the dead body of his uncle Hazrat Bilal lodged report to the local police in emergency room of Civil Hospital Takht-e-Nasrati to the effect that on the day of incident he and his deceased uncle went out from their house and proceeded to NADRA office Taikht-e-Nasrati for renewal of CNIC of the deceased Hazrat Bilal. After submission of form in NADRA office, they went out from NADRA office and started towards their house. After covering some distance both the convict/appellants came to the place of incident on motorcycle. On seeing the complainant party, accused Bhutto commanded his co-accused Umer Gul to kill, upon which accused Umer Gul drew his pistol and started firing at them, as a result of which Hazrat Bilal got hit, sustained injuries and died on the spot

while the complainant escaped unhurt luckily. The accused decamped from the spot on their motorcycle, driven by accused Bhutto, after the occurrence. Motive for the offence was stated to be based on the honour of women folk. Hence, the F.I.R (ibid).

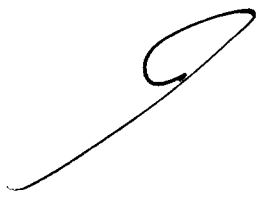


4. On completion of investigation, the prosecution submitted challan against the accused before the trial Court where at the commencement of trial, the prosecution produced and examined as many as thirteen (13) witnesses, whereafter, statements of the accused were recorded under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they wished to be examined on oath as provided under section 340(2) Cr.P.C, nor opted to produce defence evidence. After hearing arguments from both the sides, the learned trial Court vide impugned judgment dated 09.9.2021, convicted the accused/ appellants and sentenced them, as mentioned above. Hence, the instant criminal appeal and the connected criminal revision.

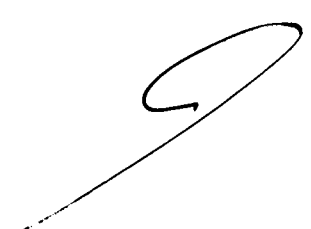
5. We have heard learned counsel for the parties alongwith learned A.A.G for the State at length and with their valuable assistance, the record was gone through.



6. The unfortunate incident claimed life of the deceased when after accomplishing his task in the local NADRA office was leaving the premises in the company of the complainant. The deceased after receiving firearm injuries was rushed to Civil Hospital Takht-e-Nasrati, where the complainant reported the matter to the local police, charging the appellants for death of the deceased. The police after receiving information reached to the hospital and after drafting the Murasila, injury-sheet and inquest report of the deceased were prepared. The dead body was sent to the doctor under the escort of a constable for post mortem examination. The dead body was received by the doctor a little before 10:30 a.m. who started his post mortem examination at 10:30 a.m. The investigating officer after receiving copy of the F.I.R, visited the spot and on pointation of the complainant prepared the site plan. During spot inspection the investigating officer collected blood stained earth from place of the deceased and two empties of .30 bore from the place of the accused. The convict/ appellants were arrested and after framing of the charge the trial commenced which on conclusion led to the conviction of the appellants as stated above. The appellants feeling aggrieved approached this Court through the instant criminal appeal.



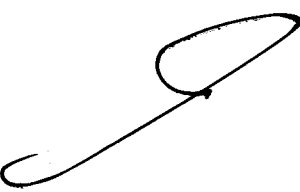
7. The record was scanned through with the valuable assistance of learned counsel for the parties with the only quest to know as to whether the learned trial court was justified to convict the appellants. Though the learned trial judge after application of his judicial mind to the collected material and recorded statements held the appellants responsible for death of the deceased, but we are to see as to whether the approach of the learned trial Court was correct and as to whether the available evidence was properly appreciated. As life and liberty of the appellants are involved, so this Court is under the obligation to re-assess the available evidence, so that to ascertain as to whether the reasons given by the learned trial judge get support from the available record. If on one hand we have the deceased with a bereaved family waiting for justice, on the other we have the appellants and their family looking for fair trial as Court is the custodian of the rights of the people involved, so the life and liberty of the people is a sacred trust which the Court must protect. True that in the incident two accused were charged, one for facilitation and the other for effective fire-shots and that the effective role of firing has been attributed to the convict/appellant Umer Gul, so in essence it is the case of a single accused. True that in case of a single accused substitution is a rare phenomenon, but equally true that the same is not the



rule of thumb, under all circumstances the courts are to search for independent corroboration. The charge against a single accused will never absolve the courts of its liability to search for corroboration and also to apply its judicial mind to the collected material and in no circumstances where a single accused is charged, he is to be held responsible for commission of the offence, under all circumstances, this is and this should be the responsibility of both the trial as well as the Court of appeal to take extra care in case of single accused to avoid miscarriage of justice. In the instant case we have before us the complainant as a single eye witness, but even here the prosecution should not suffer as it is the quality and not the quantity of evidence which is to be produced. In the attending circumstances of the present case when on one side there is a single accused charged for effective firing upon the deceased, waiting for his fate, we have the single eye witness as well to depose against the appellant and in such circumstances we must walk with extra care to punish the guilty and to rescue the innocent.

8. The incident occurred in a local market where office of National Database & Registration Authority (NADRA) is situated. It is the case of the prosecution that the deceased along with the complainant left his house to get his Computerized National Identity Card (CNIC) renewed; that

after doing the needful when the deceased left the office in the company of the complainant, the assailants i.e. the convict/appellants attracted to the spot and started firing at the deceased. The record tells that out of the two the appellant Said Awal Badshah was riding the motorcycle whereas appellant Umer Gul was occupying the pillion; that on reaching to the place of incident, the appellant Umer Gul started firing at the deceased who after receiving firearm injuries fell to the ground and the convict/ appellant Umer Gul was driven away by his co-accused on his motorcycle from the place of incident. It is pertinent to mention that adjoining to the place of incident the local police station is situated, but the deceased soon after receiving firearm injuries was shifted to Tehsil Head Quarters Hospital Takht-e-Nasrati with the only hope to save his life, but it could not be saved. The local police after hearing about the occurrence rushed to the hospital where the complainant reported the matter and the Murasila was drafted. It was argued by learned counsel for the appellants that the complainant was not present at the time of incident and that his attendance was procured from his village. In order to appreciate this particular aspect of the case we deem it essential to scan through the record of the case. There is no denial to the fact that the village of both the deceased and the complainant is

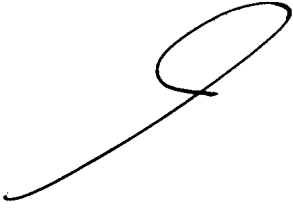


situated at about 20/25 kilometers away from the place of incident and that in such a quick succession the procurement of the complainant from his village is beyond imagination. In order to ascertain as to whether the submissions of the learned counsel for the appellants has substance in it, we feel it appropriate to go through the report made by the complainant. The record tells that the incident occurred at 09:40 a.m. whereas the matter was reported at 10:00 a.m. in hospital to the local police. The record further transpires that the dead body was received by the doctor at 10:15 a.m. and he started his post mortem examination at 10:30 a.m. The quick succession of events rebut the submissions of the learned counsel for the appellants and we see no possibility or interest on part of the police officials to procure the person of their choice to report the matter and as such he was termed as an interested witness, but we are not in agreement with the learned counsel for the appellant and even the apex court took an otherwise view in case titled “Talib Hussan and another Vs the State and another (2009 SCMR 825).

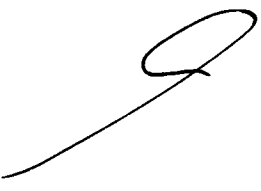
“As regards the contention raised by the learned counsel for appellant Shahid Mahmood that since ocular evidence consists of interested witnesses, therefore, it could not have been believed, it may be pointed out here that no doubt eye-witnesses in the

instant case are related to the deceased but they by no stretch of imagination could be termed or regarded as interested witnesses. It is well-settled that an interested witness is one who is partisan or inimical towards the accused or has a motive previously or cause of his own to falsely implicate the accused in the crime. Mere relationship of a witness with the deceased or the very fact that he is interested in prosecution of the accused on account of the occurrence, would not dub him as an interested witness."

9. The site plan depicts that the prosecution succeeded in establishing the place of incident as the investigating officer collected two empties of .30 bore from the place of the accused and blood stained earth from the place of the deceased. The collected empties were sent to the Fire Arms Expert wherefrom an opinion was received that the empties were fired from one weapon. We are to see as to whether the complainant was accompanying the deceased from his village to the place of incident, the record tells, yes he was accompanying the deceased at the relevant time as it was he who with the help of the people, available at the place of incident, shifted the deceased to the hospital and reported the matter within 20 minutes. The complainant was examined

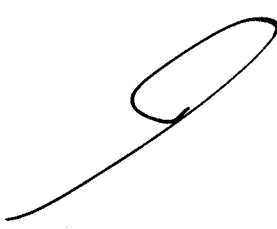


as PW-7 who stated that on the day of incident he along with the deceased left his village, as the deceased was intending to renew his CNIC; that they left their village and reach the NADRA office where the deceased stood in a queue and thereafter succeeded in submitting his documents regarding the renewal of his CNIC. It was questioned time and again that neither the complainant produced the relevant documents to the investigating officer to establish their presence and purpose nor the investigating officer collected anything from the office in that regard. True that none of the sides could produce and could collect the same, but equally true that the deceased lost his life near the NADRA office which was his destination. The defence could not succeed to tell otherwise as the complainant and the deceased had no other purpose in the vicinity. The learned counsel for the appellants invited the attention of this Court to the lack of interest on the part of the investigating officer to record statements of independent witnesses. True that the investigating officer did not record statements of officials from the NADRA office, but that alone will not discredit the eye witness account, rather the defence is to travel an extra mile to convince us otherwise. It is interesting to note that during trial the complainant submitted an application along with the renewed CNIC of the deceased, to the trial Court with a request for requisitioning



the relevant record from the concerned NADRA office and to place on record copy of the renewed CNIC of the deceased. Though the application could not pave its way to achieve the desired target, but copy of the renewed identity card is still available on file. For the ends of justice we put a glance over the attested copy of the identity card submitted before the Court, we found the date of issuance as 31.3.2018. There is a common practice in the NADRA office that when applicant approaches for renewal of the CNIC after submitting the relevant documents a token is issued and it takes nearly two months in getting the renewed copy, while applying the ordinary mode. The date of occurrence and date of renewal of CNIC of the deceased leaves no ambiguity that the deceased visited the NADRA office on the day of incident. We could not subscribe to the submissions made by the learned counsel for the appellants regarding non-examination of witnesses from the nearby shops and of the officials witnesses from NADRA office, regarding its adverse impact on the prosecution case, as the complainant succeeded in establishing on record that on the day of incident he in the company of the deceased visited the office. The defence could not succeed in discrediting the veracity of the complainant and it could not convince us to hold another view. The record is silent regarding the interest of the

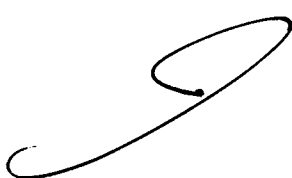
complainant to charge the appellants for ulterior motive. True that the relation between the convict/appellant Umer Gul with the deceased was strained as mother of the appellant was killed many years back which put both the families at daggers drawn. The attending circumstances of the present case leave no ambiguity in mind that the incident occurred in the mode and manner and at the stated time.



10. The post mortem was conducted on the dead body of the deceased at 10:30 a.m. where the doctor gave the detail of the injuries caused. It was highlighted that the injuries were from up to downwards and that the same were possible only and only when the assailants occupies a place in height, but we are not persuaded as it is for the bullet to choose a passage for itself. Even otherwise when the bullet touches the hard surface then it always changes its direction and the present case is no exception. The presence of the complainant was questioned on the plea that neither the complainant was cited as a witness of identification in the column of the inquest report nor in the relevant column of the post mortem report and that the witnesses so cited belong to the village of the complainant and that the same tells nothing, but that the matter was reported after preliminary investigation. We are not persuaded with what the learned counsel for the appellants submitted as we could not gather

any interest of the police officials from the record to procure the attendance of the complainant from his village, as the complainant was the sole eye witness, so it was not necessary for him to be the complainant as well as identifier of the dead body, but as the prosecution succeeded in proving its case to the hilt, so this plea of the appellants is hardly of any service to them. It is not obligatory that the complainant must be the witness of identification in every criminal case, rather the importance of his identification varies from case to case and the present case is no exception. The time given by the doctor between injury and death and between the death and post mortem leaves no ambiguity that the deceased lost his life at the stated time. We are conscious of the fact and so is held by the superior courts that the medical evidence is confirmatory in nature, but we cannot forget that in presence of strong eye witness account the medical evidence is to play a little role, as this evidence is confirmatory in nature, so its weakness otherwise has no impact on the prosecution's case provided it otherwise succeeds, as in the present case right from the beginning till the end the complainant succeeded in establishing his presence on the spot and he succeeded in convincing us in respect of the mode and manner of the occurrence, so we are not persuaded to form another view. As there is no conflict between the eye witness account and

the medical evidence, so we are not in a happy mood to dilate anymore on this particular aspect of the case.

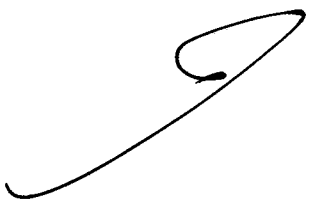


11. True that both the investigating officer and the complainant could not bring on record independent evidence in respect of the alleged motive, but that alone will not help the appellants. There is no cavil to the proposition that weakness or absence of a motive in itself is not sufficient to discredit the veracity of the witnesses and overshadow the clarity of the prosecution case. Weakness or absence of motive plays a little role, that too, in different cases. It is not the yardstick that in all cases where the alleged motive could not be established the prosecution will suffer, rather the same can be pressed into service for limited purpose, more particularly in determining quantum of sentence.

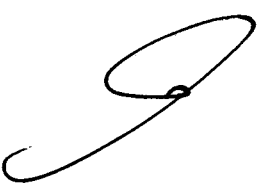
12. The moot question for determination before this Court is to see as to whether the learned trial court was justified to convict the appellants under section 302(b) P.P.C and as to whether both the appellants played the same role. There is no denial to the fact that the appellant Said Awal Badshah has been attributed the role of facilitation and according to the prosecution it was he who brought the actual culprit to the place of incident and we are to see as to whether the prosecution succeeded in establishing this particular aspect of the case. We are confronted with a situation where

two accused are charged for the death of the deceased one with effective fire shots whereas the other with the role of *Lalkara* and facilitation. In order to appreciate this aspect of the case we deem it essential to travel through the collected evidence once again. The complainant while making report attributed the role of effective fire shots to the appellant Umer Gul whereas to the co-accused the role of command and facilitation was attributed. In order to see as to whether the co-accused had an interest in the episode and as to whether the prosecution succeeded in creating a nexus between the co-accused and the motive, we deem it appropriate to revisit the attending circumstances of the present case. In order to gauge the role played by the co-accused it is a must that the background which led to the death of the deceased, be taken into consideration. Right from the beginning till the end the prosecution could not succeed in establishing the relationship between the appellant Said Awal Badshah and the deceased and even the investigating officer could not collect anything in positive, that both the accused shared common intention. This is interesting to note that the role of command has been attributed to convict/appellant Said Awal Badshah, but the record is silent that what prompted him to command the appellant Umer Gul, to kill the deceased. When the appellant

Said Awal Badshah had nothing against the deceased then in such eventuality it does not appeal to a prudent mind that he would ask the co-accused to kill the deceased as the motive was stated to be between Umer Gul and the deceased. It was disclosed that many years back mother of the convict/appellant Umer Gul was done to death where the deceased was held responsible for killing of his mother. When the motive was between the two i.e. the deceased and the appellant Umer Gul then it was Umer Gul who was to take the revenge and in that eventuality there was hardly an occasion for the co-accused to command. If we take what the complainant stated to be correct then the command is always issued by a person whose interest is greater than the killer, but in the present case it was the appellant Umer Gul who had a greater interest in the deceased than the co-accused. The prosecution could not collect any positive evidence which could help us in forming an opinion that the convict/appellant Said Awal Badshah had shared common intention with the principal accused. It was argued that the principal accused was brought to the spot on motorcycle by the co-convict and that his facilitation in killing the deceased speaks nothing, but that he too was equally responsible for the death of the deceased. We cannot ignore the importance attached to section 34 of the Pakistan Penal Code, the intent and purpose

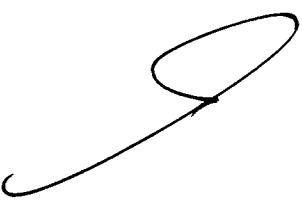


of the legislature behind, but while convicting an accused, that too, for sharing common intention, extra ordinary circumstances and confidence inspiring evidence is needed. It is simple to charge for sharing common intention, but it is not so simple to convict as much is needed from the prosecution to establish a charge against an accused charged under this particular section of law. The record tells that the co-convict Said Awal Badshah is not the resident of either of the village of the complainant or the principal accused and even the record is silent regarding his previous ill-will both the complainant and the deceased. Despite efforts we could not lay hands on any substantial evidence which could convince us that he shared common intention with the principal accused and that it was he who facilitated him in coming to the place of incident. Though while reporting the matter it was mentioned by the complainant that the accused/ appellant arrived to the place of incident on a motorcycle, but neither the registration number nor the model of the motorcycle was disclosed. The investigating officer could not collect any documentary evidence which could tell that it was the ownership of the co-convict Said Awal Badshah and in such eventuality we lurk no doubt in mind that the prosecution could not succeed in connecting the appellant Said Awal Badshah with commission of the offence, that too,



under section 34 P.P.C. We are conscious of the fact that the complainant is the sole witness of the incident and that bifurcation of both the appellants in respect of commission of the offence is a bit tricky, but while bifurcating the role of the co-convict the prosecution story will not suffer to an extent to dislodge its credibility against the principal accused as the role of the co-convict is that of facilitator and of command, so the complainant could not bring material against him to convince this Court regarding his involvement with the purpose and that alone is sufficient to tell that the co-convict Said Awal Badshah needs benefits of the same. As is held in case titled “Ali Hussain and another Vs Mukhtar and two others” (1983 SCMR 806).

“As regards the appeals of the other two accused/respondents Sabi and Mukhtar, we do not find any evidence to saddle them with the responsibility of sharing common intention with Mumtaz accused/appellant. They might have been present at the time of occurrence and played the role attributed to them but without knowing that Mumtaz accused/appellant would whip out a knife and cause a fatal injury to the deceased. Thus, appeal against the acquittal of Sabir and Mukhtar, respondents, stands dismissed.”



13. While appreciating the evidence available on file this Court reaches to an inescapable conclusion that the prosecution could not succeed in connecting the accused/convict Said Awal Badshah with commission of the offence. For what has been discussed above, the instant criminal appeal is partially accepted, the impugned judgment of conviction dated 09.9.2021, rendered by learned Additional Sessions Judge, Karak at Takht-e-Nasrati, is set-aside to the extent of appellant Said Awal Badshah alias Bhutto and consequently appellant Said Awal Badshah alias Bhutto is acquitted of the charges leveled against him. He be set at liberty forthwith if not required in any other case while the impugned judgment of conviction to the extent of appellant Umer Gul is maintained.

14. The connected criminal revision No.40-B/2021 has been filed by the complainant, requesting the enhancement of the already awarded sentence. Keeping in view the peculiar circumstances of the present case and the background of bitterness between the parties, that too, when mother of the principal accused was killed where the deceased and others were held responsible, so in that eventuality it was a sense of revenge that was haunting the mind of the principal accused who could not resist the same and killed the deceased. It is the motive between the parties

which turned to be the cause of killing and when the circumstances are such then we are not hesitant to hold that the learned trial Court was fully justified to award the awarded sentence. We do not see any reason to interference and as such the instant criminal revision being bereft of merit is hereby dismissed. As is held in case titled "Amjad Shah Vs the State (PLD 2017 SC 152).

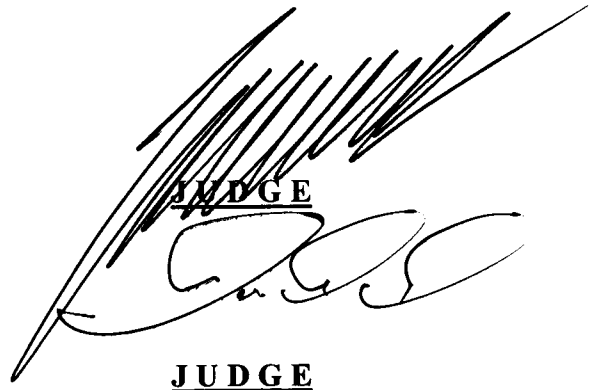
"Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict."

These are the detailed reasons of the short order of even date.

Announced

21.6.2022

*Ihsan


JUDGE


SCANNER

06 JUL 2022


Khair Khan

(D.B)

Hon'ble Mr. Justice Ishtiaq Ibrahim &
Hon'ble Mr. Justice Sahibzada Asadullah