

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

Criminal Appeal No. 166-P/2020

Shabbir Hussain

Vs

The State & another

Date of hearing: **23.04.2024**

Appellant by: Mr. Jalal ud Din Akbar-e-Azam
Khan Gara, Advocate.

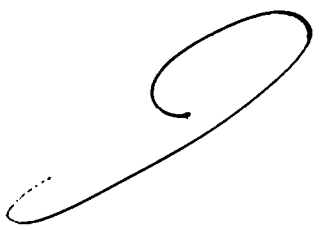
The State by: Mr. Nauman ul Haq Kakakhel,
AAG

Complainant by: M/s. Hussain Ali &
Asfandiyar Khan Advocates.

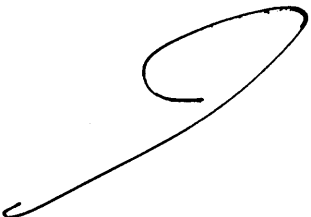
JUDGMENT

SAHIBZADA ASADULLAH, J.- Through this single judgment, we shall decide the instant Cr.A No. 166-P/2020 titled "*Shabbir Hussain vs the State*" and the connected Cr.R No.21-P/2020 titled "*Dr. Wazim Khan Vs. Shabbir Hussain & another*" as both the matters are arising out of one and the same judgment dated 18.02.2020 passed by the court of learned Additional Sessions Judge-II/MCTC, Peshawar delivered in case FIR No. 860 dated 11.08.2013 under section 302 PPC of police station Hayatabad, Peshawar, whereby the appellant Shabbir Hussain was convicted under

section 302 (b) PPC as Tazir and sentenced to undergo imprisonment for life and to pay Rs.4,00,000/- (rupees four lac) as compensation to legal heirs of the deceased within the meaning of section 544-A CrPC or in default whereof to further suffer simple imprisonment for six months. Benefit of section 382-B CrPC was extended to the convict/ appellant.



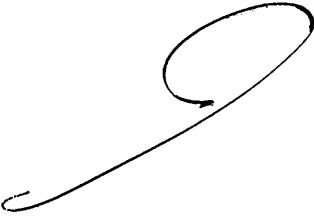
2. Precisely stated facts of the case, as spelt out from the contents of *murasila* are that on 11.08.2013 complainant Dr. Wazim Khan reported the matter in Hayatabad Medical Complex, Peshawar to the effect that he alongwith his paternal nephew Murtaza Khan was preset in front of the main gate of his house whereas, the deceased Azam Khan came out of the house and was proceeding in the street and when reached opposite to the house of appellant Shabbir Hussain, the appellant, who was standing in the gate of his house armed with pistol, started firing at his brother with an intention to kill him as a result of which his brother received firearm injuries while the appellant decamped from the spot. Complainant alongwith his nephew shifted the deceased then injured to the hospital but on the way, he breathed his last. The accused/ appellant was charged for the commission of offence hence, the present FIR.



3. On conclusion of the investigation, challan was submitted before the learned trial Court, where the appellant was summoned and on appearance, was provided copies of the relevant documents u/s 265-C CrPC and thereafter, he was formally charge sheeted to which he pleaded not guilty and claimed trial. After commencement of the trial, the prosecution produced as many as (15) witnesses. Thereafter, the statement of accused-appellant was recorded under section 342 CrPC wherein, he posed innocence, however, neither he opted to produce defense evidence nor wished to be examined on Oath u/s 340(2) Cr.PC. On conclusion of the trial, the learned trial Court convicted and sentenced the appellant in the manner quoted to above, hence, the instant appeal.

4. The learned counsel for the parties heard at length alongwith learned AAG and with their valuable assistance, the record was scanned through.

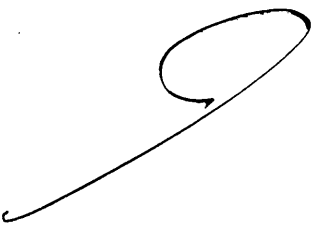
5. The heart wrenching incident led to the death of deceased Azam Khan. The dead body was shifted to the Hayatabad Medical Complex, Peshawar where the complainant reported the matter. The injury sheet and inquest report were prepared and the dead body was sent for the postmortem examination. The Investigating Officer, after receiving copy of the FIR,



visited the spot and on the pointation of the witnesses, prepared the site plan. During spot inspection, blood through cotton was collected from the place of deceased. The Investigating Officer on the same very day visited the hospital where, he collected the OPD chit, which contains the details of arrival of the dead body to the hospital. After the commission of offence, the accused/appellant went into hiding and it was after considerable long time that he was arrested and faced the trial. On conclusion of the trial, the learned trial court was pleased to convict and sentence him vide the impugned judgment.

6. The learned court after concluding the trial, held the appellant responsible for the murder of deceased Azam Khan and as such, he was convicted and sentenced. As in the instant case, single accused is charged, so this court is to see as to whether the approach of the learned trial court was in accordance with law and, as to whether the learned trial court succeeded in appreciating the evidence on file. True that single accused by itself is not a circumstance to determine the fate of the said accused, rather under all circumstances, the prosecution is to bring on record independent, disinterested and reliable evidence, coupled with the fact that the learned trial court must take extra care while determining the involvement of

accused in the incident. True that in case of single accused substitution is a rare phenomenon, but that is not the rule of thumb, rather under all circumstances, both, the prosecution and the court is burdened with liability to proceed with the matter in accordance with law.

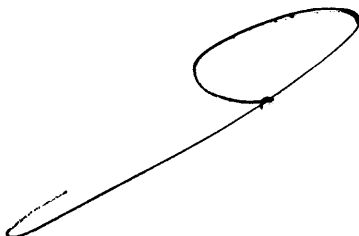


7. The points for determination before this court are as to whether the incident occurred in the mode & manner and at the stated time; as to whether the witnesses were present on the spot at the time of incident and in the hospital at the time of report; as to whether the medical evidence supports the case of the prosecution and, that the prosecution succeeded in proving the alleged motive and, as to whether the prosecution succeeded in bringing home guilt against the appellant?

8. There is no denial to this fact that the unfortunate incident claimed the life of the deceased and the matter was promptly reported, but to ascertain as to whether the incident occurred in the stated manner, we deem it essential to go through the report of the complainant and his court statement and the statements of the eye witness as well. It is evident from the record that the incident occurred at 17:40 hours whereas, the matter was reported in Hayatabad

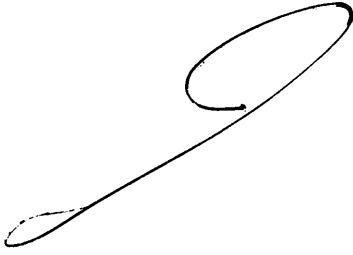
Medical Complex (HMC) at 18:05 hours within the shortest possible time. The record further tells that the deceased was brought to the hospital and, in that respect, an OPD chit was collected where the name of the deceased is mentioned alongwith the time of his arrival as 17:57 hours. The said chit was collected by the Investigating Officer and is duly exhibited. In order to appreciate the presence of the witnesses at the time of incident, we deem it essential to go through their statements. The complainant was examined as PW-8 and the eye witness as PW-9. The complainant stated that on the day of incident, he alongwith the eye witness was present in the street, in front of his house, that the deceased was proceeding towards the house of the appellant and on reaching near the house of the appellant, the appellant fired at him with a pistol in his possession; that the accused decamped from the spot, they rushed to the deceased, the dead body was shifted to the hospital and the matter was reported. The eye witness confirmed the report of the complainant and he also explained the circumstances in which the unfortunate incident occurred. There is no denial to this fact that both the parties, during the days of incident, were residing in the same street and, that it was the complainant and the eye witness, who shifted the dead body of the deceased from the spot to the

hospital. As both the parties were not related to each other and as nothing was brought on record showing their ill-will, so the presence of the witnesses near the place of incident or at the place of incident at the stated time is natural. The learned counsel for the appellant submitted that as the occurrence took place on the 3rd day of Eid, so under all circumstances, the witnesses were present in their village and after receiving information regarding the tragic incident, they rushed to the hospital where the complainant reported the matter. The submissions of the learned counsel for the appellant do not appeal to a prudent mind, as it is not necessary that all people living in cities must go to their villages to celebrate Eid, rather it depends upon every individual. As it is not the rule of universal application, as the behavior of people vary from person to person. True that the complainant belonged to village Bakhshoo Pull but that by itself would not determine the availability of the complainant and the eye witnesses in Hayatabad on the day of incident. As the witnesses confirmed that they were present near their house and nothing was brought on record which could persuade the presence of witnesses in their village. The learned counsel sought the indulgence of this court on the ground that as Mst. Zubaida was present in the house, so it was essential for the

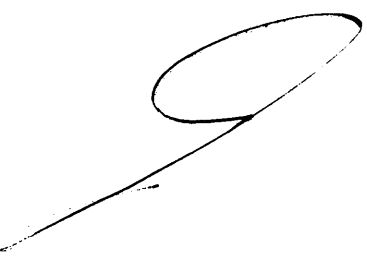


Investigating Officer to record her statement regarding the presence of the witnesses in Hayatabad, on the day of incident. We are not convinced that the non-recording of the statement of Mst. Zubaida by the Investigating Officer would be fatal for the prosecution. As admittedly, Mst. Zubaida was present inside the house, so her examination or on-examination would hardly be a circumstance to determine the truthfulness and veracity of the witnesses. As admittedly, Mst. Zubaida is the closest relative of the deceased and the witnesses, so she cannot be given such preference, rather she enjoys equal relationship with the deceased. We are to see the presence of the eye witnesses on the spot and we are to see as to whether they succeeded in establishing their presence.

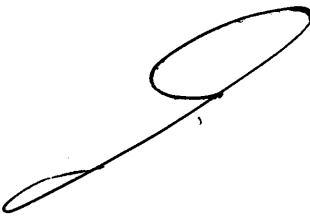
9. The dead body was hurriedly shifted to the hospital and it was the complainant, who reported the matter and interestingly, an OPD chit was collected where the arrival of the dead body to the hospital is entered and the same confirms that the deceased was brought to the hospital at 17:57 hours i.e. within 17 minutes of the incident. This aspect of the case is further confirmed by the doctor, who mentioned the time between the injury and death as immediate and, time between death and postmortem as 1 to 4 hours. The scribe was examined as PW-2 (Fazal Rabbani SI),



who explained that on the day of incident, he was patrolling in the area and, that on receiving information regarding the arrival of the dead body to the hospital, he rushed to the hospital where, the complainant reported the matter. He also confirmed that he prepared the injury sheet and inquest report and thereafter, the dead body was sent for postmortem examination. True that the eye witness did not verify the report of the complainant, but that by itself would not be sufficient for holding that the eye witness was not present with the complainant when he reported the matter. It was agitated that had the complainant and eye witness been present with the dead body, then they would have identified the dead body of the deceased before the police at the time of report and before the doctor at the time of postmortem examination. The learned counsel for the appellant wanted to convince that the witnesses were procured from their village and, that the matter was reported after consultation and deliberation. We are not in a happy mood to accept the submissions of the learned counsel, as admittedly, the dead body identifiers belonged to Hayatabad, and were living in another street. If the identifiers had come from the village of the complainant, then the submissions of the learned counsel would prevail and then this court might take



another view but as the identifiers were from the same locality where the incident occurred, so we are convinced that the complainant, the eye witness and the identifiers collectively shifted the dead body of the deceased to the hospital soon after the incident. There is no denial to this fact that the parties were having no previous ill-will, rather it was an altercation between the appellant and the deceased few days earlier to the incident that took the life of the deceased. As the parties were not related to each other and as the witnesses had no grudge with the appellant, so the bonafide of the witnesses cannot be doubted and, that no malafide can be attributed to the witnesses. As admittedly, the house of the appellant and that of the deceased as well as the witnesses were situated in the same street, therefore, the stated time cannot be disputed. As admittedly, the incident occurred on the 3rd day of Eid, so under ordinary circumstances, people are always present in their houses or in the area, where they live. The witnesses remained consistent regarding the manner in which the incident occurred and, regarding the manner in which the matter was reported, the defence failed to shatter their credibility and, this court is inclined to hold that the incident occurred in the stated manner and at the stated time. The attention of this court was brought to

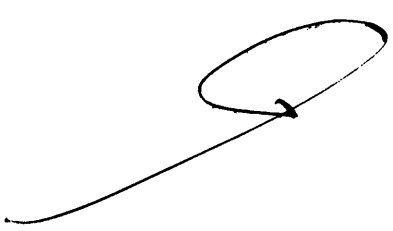


the inquest report where instead of using the word "pistol" the word firearm (*Asliha-e-Atasheen*) is used and the learned counsel wanted to convince that while reporting the matter, the complainant disclosed that the appellant was armed with a pistol, if the inquest report was made on the information of the complainant, then instead of firearm the word pistol would have been used. We are not convinced with what was agitated, as on one hand, there is no ill-will between the parties, so question of false implication does not arise whereas, on the other, the dead body was shifted to the hospital soon after the incident and the report was made within the shortest possible time, so the circumstances by itself are sufficient to hold that the witnesses were present and that the incident occurred in their immediate presence.

10. The Investigating Officer of the case namely; Sabir Khan DSP (retired) was examined as PW-12, who confirmed that after receiving copy of the FIR, he visited the spot and on the pointation of the witnesses, prepared the site plan. The site plan shows the houses of the appellant and that of the complainant in the same street. The site plan further discloses the inter-se distances between the accused, the deceased and the eye witnesses. It was argued that when the eye witness and the deceased were present at a

distance of 70 feet then how the witness identified the appellant and, how they saw a pistol in the hands of the appellant. An attempt was made to convince that from such a long distance the witnesses could hardly identify the weapon in possession of the appellant. True that the motive was not known to the eye witness and, that he did not caution the deceased regarding the intention of the appellant, but as the motive is given as an altercation between the appellant and the deceased few days before the incident, so the witness was not of the view that the appellant would kill the deceased, as intention of the appellant could not be gathered by the eye witness may be for the reason that the altercation was not so harsh. If the complainant had any malafide to charge the appellant, then on the very day of the incident, he would have introduced the motive, but as he was not in the knowledge of the altercation between the appellant and the deceased, so he kept silent and soon thereafter, he submitted an application, that too, on the same day regarding the motive between the parties. It is pertinent to mention that the eye witness was examined on the very day of the incident by Investigating Officer and he explained the motive and he confirmed that few days earlier to the incident an altercation took place between the appellant and the

deceased. As single accused is charged for the tragic incident, so in case of single accused substitution is a rare phenomenon. Reliance can be placed on **"Imran Mehmood Vs the State and another"** (2023 SCMR 795), which reads as follows: -



"However, it is by now a well-established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses outrightly. If the presence of the related witnesses at the time of occurrence is natural and their evidence is straight forward and confidence inspiring, then the same can be safely relied upon to award capital punishment. Learned counsel for the appellant could not point out any reason as to why the complainant has falsely involved the appellant in the present case and let off the real culprit, who has brutally murdered her father and uncle. Substitution in such like cases is a rare phenomenon."

11. The time of incident, the time of report and the time of examination of the dead body of the deceased by the doctor, are the circumstances, which confirmed that all the events happened in quick succession and, there was hardly an occasion for the witnesses to consult and deliberate as admittedly, the parties were not related to each other and, as admittedly, no previous ill-will was brought on record

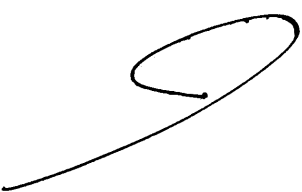
either by the complainant or by the Investigating Officer, so the defence could not convince that either the witnesses were interested or they had a motive for false implication. True that the witnesses are closely related to the deceased, but under no circumstances, they can be held as interested and inimical towards the appellant. There is no cavil with the proposition that the statement of a close relative can be taken into consideration provided it rings true and provided it inspires confidence. As both the witnesses were cross-examined on material aspects of the case and as nothing detrimental to the prosecution case could be extracted from their mouths, so mere relationship of the witnesses with the deceased can hardly be a ground to label them as interested witnesses. An interested witness is one who has an interest to falsely implicate and, who has an interest to substitute the real culprit for the innocent. As on one hand, the defence could not convince that the complainant had a malafide to charge and on the other the prosecution could not collect any evidence regarding malafide on the part of the complainant, so this court is confident in holding that it was the accused/appellant, who killed the deceased and that the witnesses were present at the time of incident and at the time of report in the hospital.

12. The medical evidence is in harmony with the ocular account and, that the witnesses remained consistent on this particular aspect of the case. True that the deceased received an entry on right of his neck with its exit to the left but equally true that it alone cannot determine the presence of the appellant and the presence of the deceased at the stated time. An attempt was made to convince that in case the deceased was proceeding towards the appellant, then he would have received an injury from his left with its exit on his right, but the defence ignored that the deceased received three firearm injuries and apart from the injury on the neck, he received another injury on his shoulder which travelled from left to right. As the defence could not convince that what injury was received by the deceased at the earliest and which of the injury thereafter, so this court can presume that after receiving the injury on his shoulder, the deceased changed his direction and it was in that eventuality that he received an injury on the right of his neck with its exit on the left. We cannot ignore that man is not a statue, rather every individual reacts differently in particular circumstance of each particular case. The possibility cannot be excluded that after receiving firearm injury on his shoulder, the deceased wanted to rescue himself and, that while struggling so, he

received an injury on his neck. The medical evidence fully supports the ocular account. True that medical evidence is confirmative in nature and in absence of trustworthy eye witnesses account, the same can hardly be a circumstance for holding the accused responsible, but as in this particular case, the witnesses remained consistent, so the medical evidence can be taken into consideration. As is held in case titled **"Ansar and others Versus The State and others"**, (2023 SCMR 929), which is reproduced herein below: -

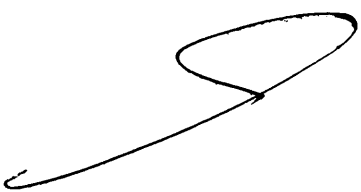
"All these witnesses of the ocular account remained consistent on each and every material point qua the date, time, mode, manner of the occurrence and the locale of the injuries on the person of the deceased and the injured PW. Sarfraz (PW-3) had sustained injuries during the occurrence, which have fully been supported by the medical evidence given by Dr. Muhammad Tariq, who appeared as PW-8. The testimony of this injured PW as well as the stamp of injuries on his person clearly proves his presence at the place of occurrence. These PWs remained consistent on each and every material point inasmuch as they made deposition according to the circumstances surfaced in this case, therefore, it can safely be concluded that the ocular account furnished by the prosecution is reliable, straightforward and confidence inspiring. These PWs were subjected to lengthy cross-examination but their testimonies could not be shattered."

13. The motive is given as an altercation between the deceased and the appellant few days



earlier to the incident. True that while reporting the matter, the complainant did not disclose the motive, rather it was the eye witness, who disclosed the same and the complainant submitted an application on that very day for that very purpose. The learned counsel wanted to convince that the silence of complainant regarding the motive is a circumstance, which confirms his absence from the spot, but we are not persuaded, as the complainant had no malafide so, he did not mention the same. Had the complainant an intention to falsely implicate, then he was at liberty to introduce a motive of his choice. Even otherwise, the statement of the eye witness was recorded under section 161 CrPC on that very day and he explained the motive to the Investigating Officer. There is no cavil with the proposition that absence or weakness of motive is not a ground for the acquittal of an accused, rather the same can be taken into consideration to determine as to what sentence should be awarded. To be more specific, the absence or weakness of motive can be pressed into service for determining the quantum of sentence and, that was what the learned trial court did while awarding the sentence. . Reliance could be safely placed on judgment of the Apex Court in case title **“Mazhar Abbas alias Baddi Vs the State” (2017 SCMR 1884)**, which is reproduced as under;

"It is well settled by now that once the prosecution alleges a motive and fails to prove the same during the trial, the same can be taken as a mitigating circumstance while deciding the quantum of sentence of a convict. Therefore, this appeal is partly allowed and the sentence of death awarded to the appellant is altered to imprisonment for life".



14. The appellant remained absconder for considerable long time till his arrest on 26.10.2015, and he failed to explain the same. True that abscondance alone is not sufficient for holding an accused guilty, but once the prosecution succeeds in bringing home guilt against the accused, then abscondance can be taken into consideration. As in this particular case on one hand, the witnesses established their presence on the spot, whereas, on the other, his long unexplained abscondance is a circumstance which can be taken into consideration.

15. The cumulative effect of what has been stated above, leads this Court to an irresistible conclusion that the prosecution succeeded in bringing home guilt against the appellant and that the learned trial court has rightly appreciated the evidence on file. The impugned judgment is well reasoned, which calls for no interference. The instant criminal appeal being bereft of merit is hereby dismissed.

16. Now diverting to Cr. R No.21-P/2020, the complainant has asked for enhancement of the sentence, so we deem it appropriate to re-assess the evidence and to see as to whether the awarded sentence needs the ends of justice or that the same calls for interference. As the parties were not related to each other and as there was no blood feud between the parties, so it is for the prosecution to tell that what permitted the appellant to kill the deceased and that what was the cause of killing. As admittedly, the parties had no blood feud and as disclosed by the witnesses the incident occurred because of an altercation took place between the two few days earlier. As the witnesses failed to explain that what was the cause of altercation and that at which time the deceased and appellant exchanged harsh words, so in our understanding the prosecution failed to convince the real cause of kill. As the motive right from the beginning till the end is uncertain and as the witnesses could not explain the same, nor the investigating officer could collect any independent evidence in that respect, so we are conscious that the cause of killing was even not known to the witnesses. When such is the state of affairs, then this Court is confident in holding that the approach of the learned trial Court was correct and is strictly in accordance with law. When the

like circumstances arise, then the failure of motive or its absence can be taken into consideration for determining as to what sentence should be awarded, as the appellant is convicted and sentenced to life imprisonment, so in our understanding the uncertainty of motive was the cause which persuaded the learned trial Court to award the sentence. As in this particular case the prosecution succeeded in bringing home guilt against the appellant and as the real cause of killing is shrouded in mystery, so the weakness or motive is a circumstance which is to determine the quantum of sentence and the learned trial Court has competently exercised the discretion. The instant criminal revision being bereft of any merit is hereby dismissed.

Announced
23.04.2024


J U D G E
J U D G E

***Muhammad Fiaz* (DB)** Hon'ble Mr. Justice Shakeel Ahmad, J
Hon'ble Mr. Justice Sahibzada Asadullah, J