

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr. A. No.569-P/2017

Adil Bacha son of Gulzar Bahadur,
r/o Panjpir District Swabi.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant :-	<u>Mr. Jalal ud Din Akbar-e-Azam Khan Gara,</u> <u>Advocate.</u>
For State :-	<u>Mr. Mujahid Ali Khan, AAG.</u>
For complainant:-	<u>Muhammad Farooq Jan, Advocate.</u>
Date of hearing:	<u>02.09.2020.</u>

ORDER

ROOH-UL-AMIN KHAN, J:- At a trial held by learned Additional Sessions Judge-III, Swabi, accused Adil Bacha and Sahid, having been found guilty of committing murder of Amjad Ali Shah deceased, have been convicted under section 302 (b) PPC and sentenced to undergo imprisonment for life each and to pay Rs.1,00,000/- each, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. and in default thereof to undergo 06 months simple imprisonment vide judgment dated 23.09.2017, in case FIR No.552 dated 05.08.2014, registered under sections 302/34 PPC at Police Station Swabi. Benefit of section 382-B Cr.P.C. has been extended to them.

2. Against their conviction, convict Adil Bacha has filed the instant appeal and convict Sahid, has filed connected Cr.A. No.578-P/2017, whereas, complainant Babar Ali Shahh has filed Cr.R. No.131-P/2017, seeking enhancement of sentence of the convicts from life imprisonment to normal penalty of death as provided for the offence.

3. Since, the appeals and the revision are arising out from one and the same judgment dated 23.09.2017 of the learned trial Court, therefore, are being decided through this common judgment.

4. The prosecution case, as unfolded in First Information Report/FIR (Exh.PA) is that on 05.08.2014 at 2225 hours, complainant Babar Ali Shah (PW.12) with the help of his co-villagers brought the dead body of his father Amjad Ali Shah deceased to Bacha Khan Medical Complex (BMC), Shah Mansoor, and reported to Fazal Miraj SI (PW.4) to the effect that on the night of occurrence he along with his mother, namely, Mst. Shaheen Akhtar and the deceased, was present in their house, situated in village Panj Pir when at 2110 hours, someone knock at the door of their house. The deceased went outside to see the knocker and he followed him. The moment the deceased came out from the house, Adil Bacha and Sahid (appellants) as well as their co-accused Jabir Ali Shah, emerged. Out of them, appellant Sahid opened fire at

the deceased with his pistol, as a result, he got hit and died at the spot. After commission of the offence, the accused decamped from the spot. Motive behind the occurrence is that the deceased was annoyed on the friendly relationship of his son/accused Jabir Ali Shah with co-accused Sahid and Adil Bacha. Report of the complainant was reduced into writing in the shape of Murasila Exh.PA/1 by Fazal Miraj SI (PW.4), who also prepared injury sheet and inquest report of the deceased Exh.PW.4/1 and Exh.PW.4/2, respectively, and shifted his dead body to the mortuary for postmortem examination.

5. Dr. Syed Muhammad Kashif (PW.9) conducted autopsy on the dead body of the deceased on 05.08.2014 at 09.50 p.m. and found the following injuries on his person:-

1. Firearm entry wound below neck (midline of back).
2. Firearm exit wound on left axilla (bullet extracted and handed over to police).
3. Firearm entry wound on right cheek (mid).
4. Firearm exit wound behind the right ear.
5. Two firearm entry wound on right cheek.
6. Firearm exit wound near the second bullet.
7. Firearm entry wound on top of skull.
8. Firearm exit wound on back of skull (occipital region).
9. Firearm entry wound on left eyebrow.
10. Firearm exit wound near right mandible below cheek.

According to his opinion, firearm injuries sustained by the deceased on his head, led to his unnatural death. Probable time between injury and death has been opined by him as 2 to 5 minutes whereas between death and postmortem as ½ hours.

6. Ghani Said Khan Inspector (PW.13), conducted investigation in the case, who proceeded to the spot and prepared site plan Exh.PB at the pointation of the complainant. During spot inspection, he took into possession bloodstained pebbles from the place of the deceased vide recovery memo Exh.PW.6/1 and two empties of .30 bore lying in scattered position vide recovery memo Exh.PW.6/2. Vide recovery memo Exh.PW.6/3, he took into possession the last worn bloodstained garments of the deceased and a spent bullet extracted from the body of the deceased by the medical officer vide recovery memo Exh.Pw.3/1. He sent the bloodstained articles to the FSL, report whereof is Exh.PK. Similarly, he sent the empties to the FSL for safe custody vide application Exh.PW.13/2. Accused Jabir Ali and Adil Bacha, arrested by SHO Sher Afsar, were handed over to him, who obtained their two days police custody, recorded their statements under section 161 Cr.P.C. and produced them before the learned Illaqa Judicial Magistrate vide application Exh.PW.10/1, where, both of them recorded their confessional statements. He initiated proceedings

under section 204 and 87 Cr.P.C. against accused Sahid. On 01.01.2015, accused Sahid was arrested. He interrogated him and recorded his statement under section 161 Cr.P.C. On completion of investigation he handed over case file to the SHO for submission of challan against the accused.

7. Since, accused Jabir Ali Shah was a juvenile, therefore, separate challan under the Juvenile Justice System Ordinance was submitted against him, whereas, complete challan was submitted against accused/appellants Adil Bacha and Sahid before the learned trial Court, where both were charge sheeted to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined as many as thirteen witnesses. After closure of the prosecution evidence, statements of the appellants were recorded under section 342 Cr.P.C. wherein they denied the prosecution allegations and professed their innocence. They, however, declined to be examined on oath under section 340(2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the parties, convicted and sentenced the appellants as mentioned vide judgment impugned herein.

8. We have heard the exhaustive arguments of learned counsel for the parties and perused the record with their valuable assistance.

9. To prove the guilt of appellants, the prosecution has relied upon the ocular account of the alleged eyewitness/complainant Babar Ali Shah (PW.12), the confessional statements of accused Adil Bacha and Jabir Ali Shah as well as medical evidence and recoveries from the spot. The learned trial Court while believing the aforesaid evidence has recorded conviction of the appellants. To concur or disagree with the view of the learned trial Court, we will reappraise the evidence relied upon by the prosecution.

10. According to FIR, the occurrence has taken place in the month of August at 2110 hours i.e. (09.10 p.m) and by such time the dark completely prevails. Complainant Babar Ali Shah (PW.12), neither in his report/FIR nor in court statement has uttered a single word about the source of light in which he identified the accused and this fact has also been admitted by the Ghani Said Khan Inspector (PW.13)/Investigating Officer. In the site plan Exh.PB, the deceased is shown at point No.1 and complainant at point No.2 and distance between these two points is given as 6 feet. Similarly, appellant Sahid, to whom the specific role of firing has been attributed, is shown at point No.3, which is at a distance of 16 feet from point No.2 i.e. the place of complainant. Accused Jabir and Adil Bacha, have been shown at points No.4 and 5, respectively, which are at a distance of 21 and 26 feet, respectively, from the place of

complainant at point No.2. AS discussed above, about darkness of night, the site plan Exh.PB is also silent about availability of any source of light at the spot as no light or lamp was taken into possession by Ghani Said Khan Inspector (PW.13), rather, he in his statement has admitted that no source of light was disclosed to him by the complainant. In the foot notes of the site plan Exh.PB it has been categorically mentioned by the I.O. that the spot was inspected and site plan was prepared with the help of headlights of vehicle and torch. In absence of any tangible and concrete evidence to prove the availability of light on the spot at the time of occurrence, we are firm in our view to hold that identification of the assailants from the distances of 16, 21 and 26 feet, was next to impossible, what to speak of identifying firing of a particular person hitting the deceased. This sole ground is sufficient for discarding the testimony of complainant that he is not a truthful witness. However, for safe administration of justice we would like to scrutinize his testimony.

Complainant poses himself to be the eyewitness of the occurrence. It is in the prosecution evidence that appellant Jabir Ali Shah is the step brother of complainant. In cross-examination, complainant disclosed that he has five paternal Aunts, namely, Mst. Bas Nama, Mst. Gul Hamida, Mst. Irshada, Mst. Asia and Mst. Bakht Safa, who all have grown up sons and that his above named aunts

have never demanded their shares in the property of the deceased. By taking summersault in the next breath he admitted that his above named paternal aunts has instituted a civil suit in respect of their share in the property of the deceased wherein he had submitted cognovit in their favour. He further disclosed that the said suit is still pending in the civil Court Swabi wherein accused Jabir Ali Shah along with his brothers Hasan, Jehangir and their mother Mst. Shaheen are also defendants and they have denied the claim of his paternal Aunts. He further disclosed that, after second marriage of his deceased father with Mst. Shaheen Akhtar, his mother Mst. Raveda (first wife of the deceased) was expelled by the deceased along with her daughter Mst. Marwa, therefore, they were residing in the house of his maternal grandfather, however, he was residing with his deceased father. Blowing hot and cold in the next breath he deposed that **“I lived in the house of my maternal grandfather for three years till the death of my deceased father”**. He further deposed that after the occurrence they were shifted to a nearby house situated near the house of the deceased on account of Jirga decision. He admitted that during the days of occurrence Mst. Shaheen Akhtar (second wife of the deceased) along with her sons Jehangir and Hassan was residing with the deceased. He deposed that the distance between the house of his maternal grandfather and the deceased can be

covered within 2/3 minutes. Both the houses are situated in different streets. He admitted it correct that a mosque is situated near the house of his maternal grandfather wherein he used to teach Islamic education to children after Maghrib prayers. The circumstances disclosed by the complainant clearly prove that after second marriage by the deceased with Mst. Shaheen Akhtar, the complainant along with his mother and sister was expelled from the house by the deceased, therefore, they were residing in the house of his maternal grandfather. Besides, the complainant used to teach Islamic education to the children in a Mosque situated near the house of his grandfather. In this view of the matter, presence of the complainant in the house of the deceased is beyond the understanding of a prudent mind because if the relation of the deceased were so strained with mother of the complainant that she along with children was expelled from the house then living of the complainant in the house of his father does not appeal to a prudent mind. In this view of the matter, the complainant falls within the category of chance witness. The hon'ble Supreme Court in case titled, "**Mst. Rukhsana Begum and others vs Sajjad and others**" (2017 SCMR 596), has explained the meaning of a "chance witness", in the following words:-

"Chance witness" was one who, in the normal course was not supposed to be present on the

crime spot unless he offered cogent, convincing and believable explanation justifying his presence there”.

No explanation, much less plausible has been furnished by the complainant so as to justify his presence in the house of the deceased. Rather sufficient circumstances have been disclosed by the complainant in his statement on the basis of which his presence in the house of the deceased cannot be admitted by any stretch of imagination.

11. Adverting to the confessional statements of appellant Adil Bacha, the same is exculpatory. He has shown complete ignorance about his involvement in the murder of the deceased. He disclosed that on the night of occurrence he was informed by appellant Sahid through a text message to reach the house of appellant Adil Bacha for chit chat. After sometime, he reached his house and they both left for the house of accused Jabir Ali Shah on a motorbike, where the motorbike was parked at some distance from the house of accused Jabir Ali Shah and he was told by appellant Sahid to guard the motorcycle and wait for him. Appellant Sahid went towards the house of the deceased and after sometime he (Adil Bacha) heard the report of fire shots and noticed appellant Sahid along with accused Jabir Ali Shah running towards him. He inquired from them as to whether someone has fired at them or they have fired at someone. In response he was told by them not

to talk and they all proceeded to Darra Petrol Pump on the same motorbike, where accused Jabir Ali Shah was informed by someone about murder of his father on mobile call. In the confessional statement he has shown his ignorance about the occurrence and similarly he has also not disclosed about the role of co-accused.

As regards confessional statement of accused Jabir Ali Shah, he has stated therein that he had friendly/love relationship with appellant Sahid on which his deceased father was annoyed and used to beat him. Having embarrassed from the attitude of his father, he along with appellant Sahid made a plan for committing the murder of the deceased and on the night of occurrence he told appellant Sahid on phone call to visit his house along with pistol, who accordingly reached there along with appellant Adil Bacha. According to the scheme, appellant Adil Bacha was directed to stand near the motorcycle and wait for them, whereas, he and appellant Sahid went towards the door of the house of deceased. He knocked at the door on which the deceased came out and appellant Sahid opened fire at him, as a result, he got hit. They both rushed towards the motorcycle and decamped from the spot.

12. Thorough perusal of the confessional statements of both the accused reveals that both are contradictory with each other on material fact. According to the statement of accused Adil Bacha when he along with accused Sahid

reached the spot and he was directed to stand near the motorbike and wait for him. He has not uttered a single word about arrival of accused Jabir Ali Shah there i.e. the place of parking of motorcycle, whereas, according to accused Jabir Ali Shah when appellants Sahid and Adil Bacha reached the spot, he meet them, prepared plan and directed appellant Adil Bacha to wait for them near the motorcycle and he along with Sahid went towards the house of the deceased. Again according to statement of accused Jabir Ali Shah he told accused Sahid on phone to bring pistol, whereas, accused Adil Bacha who accompanied accused Sahid to the spot has not uttered a single word about availability of any pistol with appellant Sahid. Besides, confessional statement of accused Jabir Ali Shah is not corroborated by any other strong evidence. The I.O. has not brought on file, record of text message allegedly sent by appellant Sahid to appellant Adil Bacha. Similarly, he has also not procured record of the alleged call of appellant Sahid made to appellant Adil Bacha on the night of occurrence in respect of their visit to the house of Jabir Ali Shah for chit chat. Similar is the case of the call of accused Jabir Ali Shah allegedly made to appellant Sahid regarding reaching the spot along with pistol. The motorcycle used in the commission of offence has also not been recovered. Appellant Sahid who had been given specific role of firing at the deceased has not recorded any

confessional statement. For the sake of arguments if the confessional statement of accused Jabir Ali Shah is taken into consideration, the same can only be used as a circumstance against appellant Sahid but subject to strong corroboration from other independent pieces of evidence and its proof during trial, which is missing in the instant case. No crime weapon has been shown recovered from appellant Sahid. The two crime empties of .30 bore recovered from the spot, though have been sent to the FSL, but only for the purpose of safe custody. There is no FSL report as to whether these have been fired from one or more than one weapon.

13. Yet there is another aspect of the case which further damages the prosecution case. The confessional statements of the accused have been recorded by Ijaz ur Rehman Judicial Magistrate (PW.10), who in cross-examination disclosed that accused Jabir Ali and Adil Bacha were produced before him on 11.08.2012 and on that very day they did not volunteer to record their confessional statements. Two days physical custody of the accused was granted and on 13.08.2014 i.e. expiry of custody both the accused were produced before him at 12.30 pm through a single application. He admitted it correct that he has not mentioned that at the time of recording statement of accused Jabir Ali Shah, appellant Adil Bacha was made to sit outside the court and similar is

the position when the statement of Adil Bacha was being recorded by him. He admitted it correct that in the respective certificates attached with the confessional statements of the accused Adil Bacha and Jabir Ali Shah, **he has not specifically mentioned that he read over to them their confessional statement in Pashto or so explained.** Ghani Said Khan Inspector (PW.13), who produced the accused before the learned Judicial Magistrate for recording their confessional statements admitted it correct that on the first day of their production the accused were not ready to confess their guilt, therefore, their two days physical remand was obtained. According to the I.O. he produced both accused for recording their confessional statements at 11.00 am and both remained inside the court room till 3.00 p.m. Statement of the I.O is contradictory with the statement of Ijaz ur Rehman Judicial Magistrate (PW.10). According to him the accused were produced before him by the I.O. at 12.30 p.m. and he recorded the statements at 1.45 p.m. Confessional statements of the accused recorded by the Magistrate, in light of the peculiar facts and circumstances discussed above being involuntary and result of torture as well as suffering from mandatory procedural irregularities is the most suspicious piece of evidence in the whole case, besides having been retracted. It might be right that retracted confession, if corroborated by independent

evidence of reliable nature, can be made basis for conviction on a capital charge, but it must be subject to thorough judicial scrutiny. It is trite law that for accepting a confession, two essential requirements must be fulfilled i.e. the confession was made voluntarily, it was based on true account of facts, leading to the crime and the same was proved at the trial. The Hon'ble Supreme Court in case titled, "**Azeem Khan and another Vs Mujahid Khan and others**" (2016 SCMR 274) has given strict guidelines for the Magistrate, recording confession, to be followed without any exception, which for the sake of convenience and ready reference are reproduced below:-

"Before recording confession and that too in crime entailing capital punishment, the recording Magistrate had to essentially observe all the mandatory precautions (laid down in the High Court Rules and Orders). Fundamental logic behind the same was that, all signs of fear inculcated by the investigating agency in the mind of the accused were to be shed out and he was to be provided full assurance that in case he was not guilty or was not making a confession voluntarily then in that case he would not be handed over back to the police. Thereafter, sufficient time for reflection was to be given after the first warning was administered. At the expiry of such time, recording Magistrate had to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the court and beyond the view of the accused. After observing all these legal requirements if the accused person was willing to

confess then, all required questions as formulated by the High court Rules and Orders should be put to him and the answers given, be recorded in the words spoken by him. Statement of accused should be recorded by the Magistrate with his own hand and in case there was a genuine compelling reason then, a special note was to be given that the same was dictated to a responsible official of the Court like stenographer or reader and oath shall also be administered to such official that he would correctly type or writ the true and correct version. In case, the accused was illiterate, and made a confession, which was recorded in another language i.e. Urdu or English, then the same should be read-over and explained to him in the language he fully understood, and thereafter a certificate, as required under section 364 Cr.P.C. with regard to these proceedings should be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he was Naib Court wearing police uniform or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.”

14. The above mentioned strict guidelines of the Hon’ble Supreme Court have not been followed by the learned Judicial Magistrate at the time of recording the confessional statements of the accused. In this view of the matter, the confessional statements which on one hand are exculpatory and on the other hand, not corroborated and proved during trial, are of no legal worth, therefore, is excluded from consideration in light of the ratio of judgment (supra) of the Honble Supreme Court.

15. Recovery of blood from the spot, the last worn bloodstained argument of the deceased, positive Serologist in respect thereof coupled with postmortem of the deceased, though confirm the unnatural death of the deceased with firearm at the spot as alleged by the prosecution, but never tell the names of the culprit (s). Such pieces of supporting and corroborative evidence are always taken into consideration along with direct evidence and not in isolation. In support, reliance can be placed in on the judgments rendered by the Hon'ble apex court in **Ijaz Ahmed's case (1997 SCMR 1279 and Asadullah's case (PLD 1971 SC 541) and case titled, "Saifullah vs the State" (1985 SCMR 410)**

16. For what has been discussed above, we have no hesitation to hold that the prosecution has miserably failed to prove the guilt of the appellants through cogent and confidence inspiring direct or circumstantial evidence. The prosecution case is pregnant with doubts benefit of which should have been extended to the appellants but the learned trial Court by not appreciating the evidence in its true perspective arrived at a wrong conclusion by holding the appellants guilty of the offence. As per golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. Under principle enunciated by the august apex court of the country through different pronouncements, by now it is settled law that conviction

must be based on unimpeachable evidence and certainty of guilt and any doubt arising in prosecution case must be resolved in favour of the accused.

17. Resultantly, this and the connected Cr.A. No.578-P/2017, titled, "Sahid Vs State etc" are allowed, conviction and sentences of the appellants recorded by the learned trial court vide impugned judgment are hereby set aside and they are acquitted from the charges leveled against them. They be set at liberty forthwith, if not confined in any other case.

18. On acquittal of the appellants, connected Cr.R. No.131-P/2017, titled, "Babar Ali Shah vs the State and others" has become infructuous which is hereby dismissed.

19. These are the reasons of our short order of even date, which is reproduced below:-

For reasons to be recorded later through a common judgment, this and the connected Cr.A. No.578-P/2017, filed by appellants Adil Bacha and Sahid, respectively, are allowed, resultantly, their conviction and sentences recorded by the learned Additional Sessions Judge-III, Swabi under section 302(b) PPC vide judgment dated 23.09.2017, in case FIR No.552 dated 05.08.2014, under sections 302/34 PPC, Police Station Swabi, are hereby set-aside. The appellants are acquitted from

the charge in the cited case. They be set at liberty forthwith, if not confined in any other case.

Announced:

02.09.2020

M.Siraj Afridi PS

JUDGE

JUDGE

**DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice S.M. Attique Shah.**