

Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr. A No.156-B of 2021

Umar Hayat
Vs.
The State etc

JUDGMENT

For appellant: **Mr. Sawal Nazir Khan Advocate**

For State: **Mr. Sardar Muhammad Asif, Asstt: A.G**

For Respondents: **Mr. Irfan Pirzada Advocate**

Date of hearing: **04.04.2022**

SAHIBZADA ASADULLAH, J.- The appellant; Umar Hayat has called in question the judgment dated 28.09.2021, rendered by learned Additional Sessions Judge-III, Bannu, whereby the appellant was convicted under section 302(c) P.P.C. and sentenced to imprisonment for 25 years as Ta'zir with fine of Rs.2,00,000/- (two lac) as compensation to the legal heirs of the deceased in terms of section 544-A Cr.P.C, or in default thereof to further undergo six months simple imprisonment. Benefit of section 382-B Cr.P.C was extended in favour of convict/appellant.

2. The complainant, Muhammad Niaz Khan moved criminal revision petition **No.03-B/2022** for enhancement of sentence of convict/appellant. 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 as per contents of F.I.R are that, on 18.01.2018 at 23:40 hours at civil hospital, Bannu, the complainant Muhammad Niaz Khan alongwith dead-body of his deceased brother Zia Ullah, reported the matter to the local police to the effect that his deceased brother Zia Ullah had given loan of Rs.700,000/- (seven lac) to one Aman Ullah of village Fazal Shah Mita Khel as the said Aman Ullah was laboring in Saudi Arabia, who used to send the loan amount through co-accused Haroon Khan; that on the eventful day, the brother of complainant was informed by the co-accused Haroon Khan to receive the loan amount sent by Aman Ullah from abroad, when the complainant alongwith his brother Fahim Ullah on one bike, whereas, Zia Ullah (deceased) on another bike proceeded to the village Fazal Shah Mita Khel, where on reaching near the tube well situated near the house of Abdur Rahim, there co-accused Haroon Khan, Ayaz & Zaheer Khan duly armed with Kalashnikovs were already present there where the co-accused Haroon Khan was bent upon paying Rs.2,00,000/- less than the actual loan amount to Zia Ullah, upon this an oral brawl took place between the parties. On their way back, the complainant alongwith his brother Faheem Ullah on his bike, while Zia Ullah on his own motorcycle, the accused

persons started firing at them with intention to kill, as a result of which brother of the complainant Zia Ullah got hit and succumbed to the injuries on the spot while the complainant and his brother Faheem Ullah remained unhurt luckily. Accused decamped from the spot after commission of the offence. Motive for the occurrence was stated to be a money dispute. Hence, the instant F.I.R.

4. After completion of investigation and their arrest, prosecution submitted challan against all the accused. Learned trial Court after complying codal formalities of section 265-C Cr.P.C, formally charge sheeted the accused to which they pleaded not guilty and claimed trial. It is pertinent to mention that co-accused Ayaz Khan was juvenile, however, prosecution submitted challan against him under the relevant law and during trial, co-accused Zaheer & Haroon and juvenile co-accused Ayaz Khan submitted their applications for their acquittal u/s 265-K Cr.PC, which were accepted and they were acquitted of the charges vide Order dated 12.11.2019. Thereafter, at the commencement of trial of accused/appellant, the prosecution produced and examined as many as 11 witnesses. On close of prosecution evidence statement of accused was recorded under section 342 Cr.P.C, wherein he professed innocence and false implication, however, neither he opted to be examined on oath as provided under section 340(2) Cr.P.C, nor wished to produce

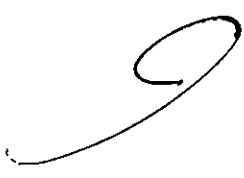
defence evidence. After hearing arguments, the learned trial Court vide impugned judgment dated 28.09.2021, and sentenced the accused/appellant as mentioned above, hence, the instant appeal against the judgment of conviction as well as connected Cr.R No.03-B of 2022.

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 occurred on 18.01.2018, when the deceased was done to death and three accused namely, (1) Haroon Khan son of Abdur Rahim (2) Ayaz son of unknown and (3) Zaheer Khan were charged for the offence. The dead body was shifted to the local police station, where the matter was reported, the injury sheet and inquest report were prepared and after doing the needful the dead body was sent to the doctor for postmortem examination.

7. The investigating officer after getting copy of the F.I.R, visited the spot and prepared the site-plan on pointation of the witnesses. The investigating officer collected 12 empties of 7.62 bore from the place of the deceased and the same were sent to the Forensic Science Laboratory to ascertain as to whether those were fired from

one or different weapons. It is essential to note that the same were received to laboratory on 22.01.2018, where those were found to have been fired from different weapons. It is pertinent to mention that all the three accused who were charged by the complainant in his first information report faced the trial, where the complainant and others expressed their satisfaction regarding their innocence and as such they were acquitted of the charges.



8. It is interesting to note that right from beginning till 29.01.2018, there was nothing on record regarding the involvement the appellant in the episode, but it was on 29.01.2018 when one Malik Naeem informed the local police regarding the involvement of the appellant in the incident. The local police attracted to the spot and the convict/appellant was handed over by the said Malik Naeem along with a Kalashnikov. After the physical remand was sought, the appellant was interrogated and ultimately was produced before the judicial magistrate to record his confessional statement. It was on 30.01.2018, when the appellant confessed his guilt. It is pertinent to mention that at the time of his arrest, a Kalashnikov was allegedly recovered which was sent to the fire-arm expert along with the collected empties and a report was received in positive stating therein that out of 12 empties collected from the spot

05 matched with the recovered weapon. A separate F.I.R was registered U/S. 15 AA.

9. The appellant was charge sheeted and on conclusion of the trial was convicted vide the impugned judgment.

10. The learned trial court applied judicial mind to the collected evidence on file and through a comprehensive judgment convicted the appellant which has been questioned before this Court. Though the learned trial court dealt with the material aspects of the case and assessed the collective evidence, but this being the court of appeal is under obligation to reassess the already assessed evidence so that miscarriage of justice could be avoided.

11. The moot questions for determination are, as to whether the incident occurred in the mode, manner and at the stated time; and as to whether the accused volunteered his arrest and that he happily accepted his guilt and as to whether the prosecution succeeded in bringing home guilt against the appellant.

12. We are to assess as to whether the incident occurred in the manner given by the complainant in his first information report or in the manner narrated by the appellant in his confessional statement. We are to see as to whether in case of disbelieving the first information report, the confessional statement will still hold ground, or as to whether

when the witnesses were disbelieved on one particular aspect of the case then the building erected on the sole statement of the appellant will collapse. There is no denial to the fact that soon after the arrest of accused charged in F.I.R, they were put to trial and when the complainant appeared before the trial court, he expressed his satisfaction regarding their innocence and as such they were acquitted of the charges. Soon after their acquittal, it was the appellant who fell into the hands of one Malik Naeem, who happens to be the real uncle of the acquitted accused Haroon Khan. The record tells that it was on his information that the local police attracted to his *Hujra* and the appellant along with the Kalashnikov was handed over to him.

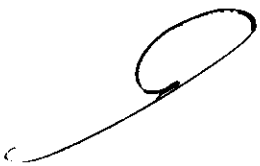
13. True, that soon after his arrest, the appellant was produced before the court of judicial magistrate, where he confessed his guilt, but equally true that the prosecution is still to explain that how he was implicated and arrested in the instant case. It is important to read Naqal Mad No.18 dated 29.01.2018, where the local police categorically explained the way Malik Naeem provided information, the way the appellant was arrested and the manner in which the Kalashnikov in question was taken into possession. This Court is to see, as to whether the prosecution succeeded through independent witnesses in establishing the arrest of the appellant and his subsequent confession before the court

of Judicial Magistrate. This is interesting to note that neither the investigating officer examined Malik Naeem on this particular aspect of the case, nor he was produced before the trial court in support of his claim. The foremost duty of the prosecution was to establish on record the manner in which the appellant was arrested and the recovery was effected, but admittedly, the most important witness, i.e, Malik Naeem was not produced and his non-production cannot be read in benefit of the prosecution, rather it benefits the appellant. Article 129(g) of the Qanun-e-Shahadat Order, 1984, caters for the situation.

14. This is admitted on record that Malik Naeem happens to be the real uncle of acquitted accused Haroon Khan and the possibility cannot be excluded that to save his real nephew the appellant was made escape goat. We are to access as to whether the confessional statement was voluntary made; and as to whether the accused was under the influence of the said Malik Naeem and as to whether the learned judicial magistrate provided comfort to the appellant to think. The record tells that there is no other evidence regarding the involvement of the appellant, but only the so-called DD No.18 dated 29.01.2018, and the same could not be proved on record as the very witness who was instrumental in production of the appellant to the local police, was not produced. This is unfortunate on part of the

Investigating Officer, more particularly in this case that the fate of the appellant was determined on the influence of his employer, without realizing the fact that in case of conviction the appellant would be awarded capital punishment. The Investigating Officer did not realize the interest of Malik Naeem as he happens to be the real uncle of the acquitted co-accused Haroon Khan. This practice on part of the police officials if encouraged would yield into drastic results and in such eventuality the influence of the influential people would increase, which in turn would spoil the atmosphere and there would be every likelihood of miscarriage of justice. It is high time that such interference must be discouraged, so that the accused charged would get an opportunity to be treated in accordance with law and the law enforcement agency would be at liberty to collect evidence against the accused charged, in a transparent manner. As in case in hand the urging factor behind the charge and confession of the appellant was only and only his employer, so this court is under the obligation to adjudge as to whether his influence was not sufficient enough to declare his confessional statement as involuntarily made. The attending circumstances of the present case lead this Court to hold that right from his arrest till the end, the appellant travelled under the influence of his employer i.e. Malik Naeem and the possibility cannot be excluded that it was his influence and inducement which compelled the

appellant to confess his guilt. We are not in a happy mood to accept the only confessional statement of the appellant for his conviction, that too, uncorroborated. When such is the state of affairs no sanctity can be awarded to the recorded statement and the learned trial Judge fell in error to consider the same.



15. There is no denial to the fact, that the appellant was produced before the court of judicial magistrate. But the prosecution is yet to answer as to whether the incident occurred in the mode manner and at the stated time. This court is to resolve that once the first information report was disbelieved and the witnesses did not support the charge in the manner it was laid, whether in that eventuality the only confessional statement of the appellant would be sufficient for awarding conviction. It transpires from the record, that soon the case was put in court against the acquitted charged accused, a compromise was reached between the parties where special Oath was administered to all the three accused and the complainant after getting satisfied did not proceed with the matter. The learned counsel representing the complainant submitted that it was the choice of the complainant to withdraw from the charge against some of accused and to proceed against some, but we are not persuaded with what was submitted at the bar, as in the instant case, while reporting the matter, the complainant and

another posed themselves to be the eye-witnesses of the incident against the acquitted accused, but when they accepted the explanation regarding innocence of accused then no ambiguity is left that the incident did not occur in the manner as was given in the first information report. When the witnesses lost their credibility and the accused were acquitted of the charges then we are afraid that the same cannot be taken into account against the appellant.

16. The prosecution is left with the only confessional statement of the appellant and we are to see as to whether the learned judicial magistrate followed the law on the subject and that the provided guide lines were strictly observed. We are to see as to whether the confession was made voluntary and as to whether the appellant was free from the outside influence while confessing his guilt. The manner in which the appellant was arrested and the recovery was effected is sufficient to hold that he was under the influence of one Malik Naeem, being his servant. The confessional statement was read thoroughly, which does not find support from record of the case. If we admit that the deceased was done to death in the manner as given by the appellant then in that eventuality the F.S.L report in respect of the empties would have been in positive, but in fact only 5 empties were shown to have been fired from the weapon recovered from his possession. Though, the Daily Diary No. 18 was drafted by

the police officials to whom the accused was handed over, with a compressive detail regarding the involvement of the appellant in the episode, but as the information was provided by Malik Naeem and he was not produced before the trial court, so the prosecution could not succeed to establish that particular aspect of the case. The confessional statement was not recorded in an atmosphere which could persuade us that the appellant by the time was composed and in comfort. The judicial magistrate was produced as PW-7, who stated that on 30.01.2018, the appellant was produced by the local police who was given ample opportunity to think and after getting satisfaction he recorded his confessional statement, though no major contradictions could be extracted from the mouth of this witness, but the attending circumstances of the case right from arrest of the appellant and his production before the court of judicial magistrate leaves no ambiguity that he was under an influence of the person who handed him over to the local police and with whom he was employed as a private servant. Even otherwise when the complainant of the instant case could not inspire confidence in respect of acquitted co-accused, then the manner in which the deceased lost his life cannot be taken into account and even the sole confessional statement of the appellant cannot be taken a determining factor to determine his fate. The appellant did not travel in an atmosphere of peace and serenity, so the disturbance of his

mind and influence of his master is a factor which goes against the prosecution and as such this piece of evidence cannot be taken into consideration. In case titled, **"Mst. Tasleem and another Vs. State (2013 MLD 1331)"**, it is held that:

"We are in agreement with learned counsel for the State that any lapse on the part of Magistrate in recording confession cannot always be treated as fatal to the evidentiary value of confession but it is to be evident that the said lapse has not in any way adversely affected the voluntariness or truthfulness of the confession. Thus it is quite safe to say that emphasis is upon voluntariness and truthfulness of the confession which has to be gathered/collected from the responses/answers given by the confessor to mandatory questions. Once it is found that confessor was subjected to maltreatment before production for confession or where confessor states that he/she is making confession due to compulsion of some body else, the confession cannot be taken as voluntary or truthful."

17. It was stressed time and again that not only the confessional statement of the appellant brought him conviction; rather the same was corroborated by the recovery of weapon from possession of the appellant and its positive report. As it is evident from record that the appellant was arrested and handed-over to the local police by real uncle of

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the acquitted accused Haroon Khan, so the recovery effected is not free from doubt and the same cannot be taken into consideration. True that the collected empties were sent to the fire arms expert along with the recovered Kalashnikov, but as the recovery was not effected from exclusive possession of the appellant and that the same was handed over by Malik Naeem, so the same cannot be relied upon and there is every possibility that the same was planted. As the said witness was not produced as a witness before the trial court, so this piece of evidence cannot be taken into consideration, what to say, to convict the appellant with its aid, as such the benefit of doubt, if accrues would be extended to the accused. In case titled, “Attaullah Vs the State” (PLD 2019 Balochistan 75), it is held that:

“The prosecution has also failed to establish the recovery of crime weapon, and proved that the disclosure as well as the confessional statement of the appellant was volunteer and true, all these facts and legal defects have badly damaged the case of prosecution. The prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same must go to the accused and it would be sufficient to disbelieve the prosecution story and acquit the accused. Reliance in this regard is placed on the case of Tariq

Pervaiz v. The State 1995 SCMR 1345, wherein the Hon'ble Supreme Court has held that, "The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt it is not necessary that there should be many circumstances creating doubt if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

18. The prosecution could not succeed in proving the alleged motive and even no independent witness was produced in that respect, so the same cannot be taken into consideration. Even the complainant while reporting the matter did not charge the appellant for the murder of the deceased and even no motive against the appellant was brought on record. True that weakness or absence of motive is not sufficient to dislodge the prosecution case, but equally true that once motive is alleged the prosecution is under the bounden duty to prove the same, failing which, non-else but the prosecution would suffer.

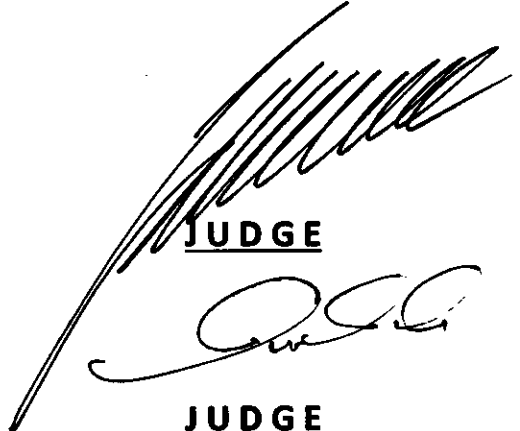
19. The cumulative effect of what has been stated above leads this court to an irresistible conclusion that the prosecution failed in bringing home guilt against the appellant and that the impugned judgment is suffering from inherent defects which calls for interference. The learned trial

Judge, misdirected himself both in law as well as on facts of the case. The instant criminal appeal is, therefore, allowed, the impugned judgment is set-aside. The appellant is acquitted of the charges, he shall be released forthwith, if not required to be detained in connection with any other criminal case.

20. As the Criminal Appeal against conviction has succeeded, so the connected Criminal Revision bearing No. 03-B/2022 has lost its utility to proceed, the same being bereft of merit is hereby dismissed.

Announced
04.04.2022

Imranullah PS



JUDGE
JUDGE

(D.B)

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

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