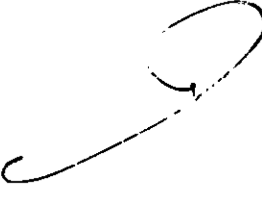
Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr. A No.180-B of 2021
With
Murder Reference No. 04-B/2021

Nazar Khan, alias, Nan
Vs.
The State etc:

JUDGMENT



For **appellant**:	Messrs. Shahid Nazir Jarra and Muhammad Rashid Khan Dirma Khel, Advocate
For **State**:	Mr. Sardar Muhammad Asif, Asstt: A.G
For **Respondents**:	Mr. Iftikhar Durrani, Advocate
Date of hearing:	**05.04.2022**

SAHIBZADA ASADULLAH, J.- Nazar Khan alias Nan, the appellant, has called in question the judgment dated 30.10.2021, rendered by the learned Additional Sessions Judge-I, Bannu, whereby the appellant has been convicted under section 302 (b) PPC, and sentenced to death with fine of Rs.500,000/- (five lac) to be paid to the legal heirs of deceased. The amount of fine on realization shall be paid to the legal heirs of deceased, as compensation U/S 544-A Cr.P.C, in default the convict shall undergo six months SI. Benefit of Section 382-B Cr.P.C was extended to the convict/appellant. **Murder Reference No. 04-B/2021** has also been sent by the learned trial Court under section 374 Cr.P.C, for its confirmation or otherwise, hence, we intend

to decide both the matters through the instant common judgment.

2. Brief facts of the case as per contents of F.I.R are that, on 21.01.2011 the complainant Adnan Khan while accompanying the dead-body of the deceased Khalid Khan reported the matter, in the D.H.Q, Hospital Bannu, to the local police to the effect that, he along with Khalid Khan (deceased) had visited *Murghi Mandai*, Bannu to purchase household articles, that in the meanwhile the accused Nazar Khan alias Nan and Umar Fayaz armed with .30 bore pistols attracted to the spot. Nazar Khan alias Nan fired at the deceased Khalid Khan with the intention to kill, who after receiving firearm injuries died on the spot. The accused decamped from the spot after commission of the offence, thus, the F.I.R ibid.

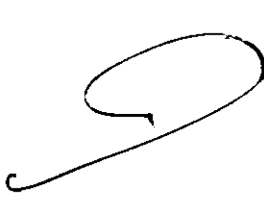
3. After concluding investigation, the prosecution submitted challan against the accused. Learned trial Court after compliance of section 265-C Cr.P.C, formally charge sheeted the accused/appellant, to which he pleaded not guilty and claimed trial. The prosecution produced and examined as many as 09 witnesses, whereafter, the accused was examined under section 342 Cr.P.C. The appellant neither opted to be examined on Oath under section 340 (2) Cr.P.C, nor wished to produce evidence in defence. After hearing arguments,

the learned trial court vide the impugned judgment, dated 30.10.2021, convicted the appellant and sentenced him, as mentioned above. Hence, the instant criminal appeal.

4. It was on 21.01.2011 at 08:45 AM when the deceased and others visited Murghi Mandi Parady Gate Bannu, when in the meanwhile the accused/appellant along with another duly armed with .30 bore pistols attracted to the spot, where out of the two, the convict/appellant started firing at the deceased, who after receiving fire-arm injuries got injured and died on the spot. The deceased was shifted to civil hospital Bannu, where the matter was reported in the shape of murasila and thereafter the injury sheet and inquest report were prepared and dead-body was sent to the doctor for PM examination. The investigating officer after receiving copy of F.I.R visited the spot and on the pointation of the eye-witness prepared the site-plan. During spot inspection the investigating officer collected blood-stained earth from the place of the deceased and two empties of .30 bore from the place of the appellant. The collected empties were sent to the fire-arms expert to ascertain as to whether the same were fired from one or different weapons.

The report was received in positive with an opinion that the same were fired from one weapon.

6. The appellant was arrested on 15.05.2019, and on conclusion of the trial the learned trial Court was pleased to convict him vide the impugned judgment. The learned trial Court dealt with the matter comprehensively and after applying its judicial mind to the evidence on record convicted the appellant. This being the Court of appeal is under the obligation to go through the collected evidence and to ascertain as to whether the learned trial Court fully appreciated the available evidence on file and that the reasons provided for conviction of the appellant find support from the evidence available on file. There is no denial to the fact that out of the accused charged, the role of effective firing has been attributed to the appellant, so in essence single accused is charged for the murder of the deceased. 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. As in case of single accused the Courts are under obligation to apply extra care while assessing the evidence on file, so that miscarriage of justice could be avoided.



7. The learned counsel for the appellant submits that the prosecution did not succeed in bringing home guilt

against the appellant; and that the incident did not occur in the mode, manner and at the stated time. It was extensively argued that the medical evidence does not support the case of the prosecution and the seat of injuries on person of the deceased belies the stance of the complainant. It was lastly submitted that the prosecution case suffers from inherent defects which can only and only be read in favour of the appellant. Contrarily, the learned counsel representing the complainant along with Asstt: Advocate General, submitted that the matter was promptly reported which excludes the possibility of consultation and deliberation. They further submitted that the ocular account could not be shattered despite lengthy cross-examination and that the medical evidence fully supports the stance of the complainant. It was argued that the motive alleged has been proved on record and that the learned trial court was fully justified to convict the appellant. They concluded their side on submitting that the impugned judgment is well reasoned, which calls for no interference.

8. Heard and record perused.

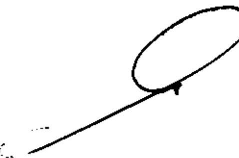
9. This Court is to see as to whether the incident occurred in the mode, manner and at the stated time; and as to whether the complainant was present at the time of incident and as to whether the prosecution succeeded in bringing home guilt against the appellant. The unfortunate

incident occurred in the local bazaar, known as, Murghi Mandi Bazar, where the complainant along with the deceased had come to purchase household articles to prepare "*Sobat*", in the night. The record tells that yet the deceased and the complainant were to purchase, when in the meanwhile the accused attracted to the spot and fired at the deceased. The deceased was shifted to the hospital where the matter was reported. We are to ascertain from the record that as to whether the incident occurred in the mode, manner and at the stated time. We are to collect from the available evidence the role played by the appellant and the charge brought against him. There is no denial to the fact that the complainant and others reached to the place of incident at 08:45 AM and after receiving fire-arm injuries the deceased was shifted to the hospital where the matter was reported at 09:15 AM. The time spent between the injuries caused and report made excludes the possibility of consultation and deliberation, and it further confirms that the complainant was present at the time of incident. The site-plan prepared at the instance of the complainant confirms the respective places assigned to the complainant, the deceased and the accused as well. The recoveries of empties from the spot along with blood-stained earth lend support to the case of the prosecution.

10. Soon after reaching to the hospital, the matter was reported and it was the complainant along with another who identified the dead body of the deceased to the local police at the time of preparation of the inquest report. Not only at the time of report, but also at the time of postmortem examination, it was the complainant along with another, who identified the dead body of the deceased. The presence of the complainant at the time of incident and soon thereafter is established from the record and the defense could not succeed in convincing us other-wise. It was argued that had the complainant been present on the spot instead of the deceased he would have been the prime target, as it was he who was involved in the blood feud. An attempt was made to convince that the respective places assigned to the parties and the injuries received by the deceased do not find support from the site-plan. The record was gone through where we did not come across any substantial material which could disclose the involvement of the complainant in blood feud with the appellant and even the record is silent in that respect. In order to appreciate this particular aspect of the case, the prosecution has placed on file copy of F.I.R No.119 dated 07.07.2009 under section 324/34 P.P.C, Police Station, Basia Khel, Bannu. The motive F.I.R was registered by one Nazar Khan son of Gul Sarwar, where four accused namely, Raziq s/o

Rahmani, Gul Khan, Gham Nawaz Khan s/o Aziz Khan and Am Nawaz Khan s/o Gul Khan, are charged. Though the name of the deceased did not figure in the said F.I.R, but one of the accused namely Raziq is the real brother of the deceased and the possibility cannot be excluded that it was the previous episode which claimed the life of the deceased.

11. The collected empties were sent to the fire-arms expert wherefrom a report was received in positive, with an opinion that the same were fired from one weapon. As in the incident the effective role was assigned to the appellant, so the laboratory report confirms the stance of the complainant to a greater extent. The site-plan prepared on pointation of the complainant fully supports the case of the prosecution and the recoveries of empties with it's positively report strengthens the prosecution case to a greater extent. True that positive laboratory report is a supportive piece of evidence and the same can be pressed into service only and only when strong evidence is available on file. In the present case the prompt report and direct ocular account leaves no ambiguity that the prosecution is well equipped with the required evidence and in the like circumstances the positive report received from the Laboratory fully supports the prosecution case and the same can be taken into consideration.



12. It was agitated time and again that the medical evidence does not support the case of the prosecution and that the conflict between the two will benefit none, but only the appellant. In order to ascertain this particular aspect of the case, we with the help of learned counsel for the parties went through the site-plan. The site-plan depicts the respective places of the deceased, the eye-witness and the accused, including the appellant. The inter-se distance between the deceased and the appellant leaves no ambiguity that the deceased was fired by the accused/appellant while present at Point-3. In order to appreciate this particular aspect of the case, we deem it essential to go through the statement of the doctor, who was examined as PW-6. The doctor explained the nature of injuries in the following manner:-

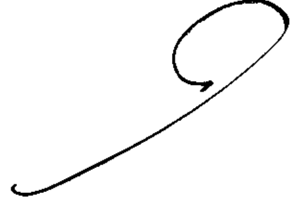
Wounds:

1. One FAI entry wound on posterior part of right lower skull size ¼ x 1/4 .
2. One FAI exit wound on right parietal region of skull size ¾ x ½ .
3. FAI entry wound on posterior aspect of skull mid at lower part size ¼ x ¼ .

13. It was argued with vehemence that the medical evidence does not support the ocular account and that both are in conflict. Our attention was brought to the injury

received on skull, where we observed that the bullet travelled from down to upward. An attempt was made to convince this Court that the firing was not made in the mode and manner. We are not ready to accept to what the learned counsel for the appellant submitted, as head is not the static part of the body and human being reacts differently in different circumstances. The possibility cannot be excluded that on noticing the presence of accused duly armed, the deceased would have reacted by changing his position and while doing so received the injury on his skull. We are not only to see the conflict between the medical evidence and ocular account, rather we are to go through the attending circumstances of the case, coupled with statements of the witnesses recorded before the trial court as in that eventuality this court will be in a better position to appreciate this particular aspect of the case. We cannot forget, and so is settled that medical evidence is confirmatory in nature and in presence of direct, confidence inspiring and trust worthy ocular account the same has little role to play. In the present case as the complainant succeeded in establishing his presence on the spot and his testimony could not be shattered, so it is the ocular account which would prevail instead of the medical evidence. True that, when the ocular account fails then it is the medical evidence which steers the wheel. The complainant remained

consistent on material aspects of the case and the defence failed to discredit his veracity. Our attention was invited to the fact that the postmortem was conducted at 10:35 PM, after a considerable delay, and that the same alone is sufficient to discard the prosecution story. The learned counsel representing the appellant fell in error, as in fact the time of examination of the dead body was 10:35 AM and not 10:35 PM. In order to resolve the controversy, the opinion of the doctor is of prime importance, where the time between injury and death is given as 1 to 3 hours. It is pertinent to mention that soon after preparation of the inquest report the dead body was handed over to one Imran Shah (constable), who escorted the same to the doctor for postmortem examination, and no prudent mind would accept that the same was produced to the doctor after 24 long hours. This plea of the appellant cannot be accepted and as such the same is discarded. As the complainant succeeded in establishing his presence on the spot at the time of incident and thereafter, so his evidence is not only trustworthy but confidence inspiring as well, the same cannot be discarded, even if, there were minor discrepancies in the prosecution case. In case titled ***"Sharfuddin alias Sharfu and another Vs. The State"(2022 YLR 324)***, it is held that:



> ***The minor discrepancies pointed out by the learned counsel are not helpful to the defense because with the passage of time such discrepancies are bound to occur. The occurrence took place in broad day light and both parties knew each other so there was no mistaken identity and in absence of any previous enmity there could be no substitution by letting off the real culprit specially when the appellant alone was responsible for the murder of the deceased. The evidence of two eye-witnesses was consistent, truthful and confidence-inspiring. The medical evidence fully supports the ocular account so far the injuries received by the deceased, time which lapse between the injury and death and between death and postmortem.***

14. The motive was stated to be the blood feud between the parties and that several persons lost their lives from both the sides. In order to substantiate its stance the prosecution placed on file the motive F.I.R where brother of the deceased namely Raziq was charged along with others. This was agitated time and again that when complainant was the prime target and that when he was present at the time of incident then instead of the deceased he would have been the actual target but his escaping unhurt strengthens

the belief that the incident did not occur in the manner and at the stated time. It was further submitted that once the motive is alleged and the same is not proved then it is the prosecution to suffer. As the alleged motive has been proved on record and the investigating officer collected documentary evidence in that respect, so we lurk no doubt in mind that the prosecution has been succeeded in proving the motive. If we admit for a while that the prosecution failed to prove the motive then the same can be pressed into service for limited purposes i.e. for determining the quantum of sentence and nothing more keeping in view the peculiar circumstances of this case.

15. The appellant soon after the incident went into hiding till his arrest on 15.05.2019. The appellant could not explain his long abscondance. True that abscondance alone is not sufficient to burden an accused with the liability, but equally true that the same can be taken into consideration in favour of the prosecution provided, the prosecution succeeds in bringing home guilt against the accused charged. As the prosecution succeeded in proving its case against the appellant through confidence inspiring witnesses, so the long unexplained abscondance can be taken an additional ground to favour the prosecution.

16. As the prosecution succeeded in bringing home guilt against the appellant, so this Court is to determine as

to whether the awarded sentence is justified and is in accordance with law. As the appellant has been convicted to death sentence, so this Court is under the obligation to reassess the already assessed evidence to ascertain as to whether the awarded sentence is legally correct and as to whether the learned trial court had no alternative to go for a lesser sentence. The record tells that both the deceased and the appellant during the days of incident were aged about 22/23 years, an age where it is hard to resist the emotions, temptations and the surrounding influences. We lurk no doubt in mind that the prosecution could not succeed in bringing on record the exact cause of the incident, rather previous blood feud was projected to be the cause of death of the deceased. True that on record brother of the deceased was charged in the motive F.I.R, but equally true that the prosecution could not bring on record concrete evidence in that respect to exclude any other hypothesis. As the complainant, the deceased and the appellant were nearly of the same ages, the possibility cannot be excluded that it was a chance encounter which led to the death of the deceased. The record is silent that what happened a little earlier to the incident which claimed the life of the deceased. As the complainant stated that at the time of incident, both the accused i.e. the appellant and his co-accused were duly armed with .30 bore pistols and that it was from the fire

shots of the appellant that the deceased lost his life. Had the cause of death been the blood feud, then in that eventuality the complainant would have also received fire arm injuries and the co-accused would have also resorted to firing, but the situation tells another story and the created mystery could not be resolved till the end. This court is to take into consideration the attending circumstances of the case for awarding sentence. There is no denial to the fact that on one hand there are minor discrepancies in case of the prosecution, whereas on the other the prosecution could not convince that it was the previous blood feud between the parties which claimed the life of deceased. When the prosecution is uncertain regarding the exact cause of death, then the same can be pressed into service to assess as to whether the appellant was rightly convicted. We are conscious of the fact that when the prosecution succeeds in bringing home guilt against an accused charged, then the normal penalty is death, but in case in hand the discrepancies in the prosecution case and the uncertain cause of death leads this court to hold that the awarded sentence is a bit harsh and the same needs interference, as is held in case titled ***"Mst. BEVI Vs. Ghulam Shabbir and another" (1980 SCMR 859)*** where it is held:

> ***"The question of sentence undoubtedly present a complex problem. On the one***

hand the prosecution asserted a definite motive for Ghulam Shabbir respondent to murder the deceased--either as a hired assassin or without payment a mere obligation on the asking of Ghulam Abbas acquitted accused. The failure of this part of the prosecution cast even (if the acquittal of Ghulam Abbas is considered to be on benefit of doubt) can be pressed in service by Ghulam Shabbir when considering the question of sentence. On the other hand, if the assumed motive- ii kept in view ht is guilty of an unprovoked cruel act of murder. It has been held in some cases that the principle underlying the concept of benefit of doubt can in addition to the consideration of question of guilt or otherwise, be pressed also in matter of sentence. As a definite motive was asserted against the respondent and the same has failed, keeping in view all the circumstances of this case, it would not be necessary to impose the capita' punishment. Therefore while finding him guilty; under section 302, P. P. C. he is sentenced to transportation for life should be awarded as compensation."

17. We, in order to avoid miscarriage of justice deem it appropriate to reduce the awarded sentence from death to imprisonment for life under section 302 (b) P.P.C.

The instant Criminal Appeal is partially allowed, the impugned judgment is modified by maintaining the conviction and reducing the sentence from death to life imprisonment, while rest of the sentence shall remain intact.

As the criminal appeal has partially been allowed and the appellant is convicted and sentenced under section 302 (b) P.P.C, is reduced, to life imprisonment, the Murder Reference No. **04-B/2021** is answered in negative.

Announced
05.04.2022
Imranullah PS

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Ishtiaq Ibrahim &
Hon'ble Mr. Justice Sahibzada Asadullah

11 APR 2022