Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr.A.No.188-P/2021 with M.R.No.04-P/2021.

Nasir Khan Vs. The State.

J U D G M E N T

Date of hearing ------ 07.09.2023.

Appellant by --- Syed Abdul Fayaz & Mr.Shabbir Hussain Gigyani, Advocates.

State by --- Mr.Muhammad Nisar Khan, A.A.G.

Complainant by --- Mian Sher Akbar, Advocate.

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SAHIBZADA ASADULLAH, J:- This criminal appeal is directed against the judgment dated 22.02.2021, of the learned Additional Sessions Judge-I, Swabi at Lahor, delivered in case FIR No.342 dated 27.06.2009 registered under section 302 PPC. at police station Yar Hussain, District Swabi, whereby the appellant has been convicted under section 302 (b) PPC and sentenced to death as *"Tazir"* and to pay Rs.1,000,000/- as compensation to legal heirs of the deceased within the meaning of Section 544-A Cr.P.C recoverable as arrears of land revenue or in default whereof to suffer six months SI. He shall be hanged by the neck till declared

dead. However, benefit of section 382-B Cr.P.C was extended to the appellant.

2. Precisely stated facts of the case, as spelt out from the record, are that on 27.06.2019, complainant Mst.Parveen (P.W.7), with the help of co-villagers, brought the dead body of her deceased husband, namely Sher Afsar Khan to police station Yar Hussain, in a private Suzuki and reported the matter to the effect that on the eventful day, she was present in her house and her husband was present in the thoroughfare in front of his Hujra, near their house, meanwhile, she heard commotion and firing. When she came out of her house, she saw her husband lying dead in a pool of blood, in front of the main gate, of the Hujra. She also saw the convict/appellant, armed with pistol running from the spot making aerial firing. On the report of complainant, present case was registered against the appellant. Motive behind the occurrence was stated to be dispute over women folk between the parties.

3. On arrest of the appellant and completion of investigation, complete challan was submitted before the court of competent

jurisdiction. The accused was charge sheeted to which he did not plead guilty and claimed trial. As such the learned trial court was pleased to direct the prosecution to produce its evidence. In order to prove its case, prosecution produced and examined as many as 12 witnesses, whereafter statement of the accused was recorded wherein he professed his innocence, but did not opt to record his statement under section 340 (2) Cr.P.C. On conclusion of trial, the learned trial court held him guilty and as such he was convicted and sentenced vide impugned judgment, hence, the instant criminal appeal has been preferred by appellant/convict, while Murder Reference No.04-P/2021, was also sent by the learned trial Court under Section 374 Cr.P.C, for confirmation of death sentence awarded to the appellant/convict, which shall also be disposed of along with instant criminal appeal through single judgment.

4. The learned counsel for parties as well as the worthy Additional Advocate General, were heard at length and with their valuable assistance the record was scanned through.

5. It was the unfortunate day of June, in the year 2009, that the deceased received firearm injuries and the matter was reported by the complainant, in the local police station, where she charged the appellant for the murder of the deceased. The FIR was chalked out and, thereafter the injury sheet and inquest reports were prepared and the dead body was sent for post mortem examination. The investigating officer, after receiving copy of the FIR, visited the spot and on the pointation of the complainant and the eyewitness prepared the site plan. During spot inspection, though no blood was collected from the spot, but an empty of .30 bore pistol was taken into possession and the investigating officer also observed bullet marks on the main gate of the Hujra of the deceased. The accused, after the occurrence, went into hiding till his arrest on 27.01.2019. It is pertinent to mention that on the day of incident, the minor son of the deceased also recorded his statement under section 161 Cr.P.C with the investigating officer and on 02.07.2009 he was produced before the court of competent jurisdiction,

where his statement under section 164 Cr.P.C was recorded. As the motive was disclosed as, the strained relation of Mst.Sumbal with her in-laws and that she, during the days of incident, was residing in the house of the deceased, so she also recorded her statement with the investigating officer under section 161 Cr.P.C and also her statement was recorded before the court of competent jurisdiction under section 164 Cr.P.C. On arrest of the appellant, a .30 bore pistol was recovered from his personal possession, containing five live rounds, and in that respect, a separate FIR bearing No.54 dated 27.01.2019, under section 15 AA/13 AO KPK, was registered. The accused faced trial and on conclusion of the trial, was convicted and sentenced vide the impugned judgment.

6. The learned trial court convicted the appellant by taking into consideration the evidence on file and the statements of the witnesses. True that while reporting the matter the complainant did not disclose herself to be the eyewitness of the incident, but she disclosed that on hearing commotion she

came out of the house, she saw the convict/appellant leaving the spot, by making aerial firing and the dead body of her deceased husband was lying in a pool of blood.

7. This court is to see as to whether the learned trial court properly appreciated the evidence on file and as to whether the impugned judgment is based on solid reasons, that too, collected from the record of the case. True that in the instant case single accused is charged and substitution in the like cases is a rare phenomenon, but it is not the rule of thumb that under all circumstances, an accused charged singularly, be held responsible for the murder, rather the courts of law are under the obligation to apply its' judicial mind to the evidence on file and to look for independent corroboration. The case of a single accused under no circumstances will absolve the courts of law from searching independent corroboration, in the collected evidence, rather it increases the liability of both i.e. the investigating agency and the courts of law, to be more vigilant and to apply

extra care, so that miscarriage of justice could be avoided.

8. 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 complainant saw the accused while leaving the scene and that the eyewitness was accompanying the deceased; that the medical evidence supports the case of the prosecution; that the prosecution succeeded in establishing the disclosed motive and as to whether the witnesses remained consistent on the material aspects of the case. This is for the prosecution to prove that the witnesses were present at the time of incident, more particularly, the eyewitness Saifullah and to show that the prosecution succeeded in bringing home guilt against the appellant. This court is to see as to whether the appellant deserved to be awarded the normal penalty of death and that the learned trial court was justified to award the same. In order to answer the formulated questions/ points, we deem it appropriate to scan through the record and to re-visit the statements of the

witnesses, as in that eventuality this court would be in a position to reach to a just and proper conclusion. As in the instant case, the most important witnesses are the complainant and the eyewitness, so we would like to go through their statements. The complainant was examined as P.W.07, who stated that on the day of incident while present in her house, she heard commotion followed by firing; that she rushed to the street and saw the appellant duly armed leaving the spot; that she found the deceased lying in a pool of blood struggling between life and death; that the dead body was picked up from the spot, put on a cot and was shifted to the Police Station in a Suzuki Pick Up; that she reported the matter, which was duly verified by one Sarbali Khan. The eyewitness was examined as P.W-08, who supported the version of the complainant and disclosed that on the day and at the time of incident, he was present with the deceased and that it was in his presence that the convict/appellant attracted to the spot, altercated with deceased and, thereafter fired at the deceased. The witnesses were cross-

examined on the material aspects of the case, more particularly, the manner in which the incident occurred and the manner in which the complainant rushed out from her house, saw the appellant and reported the matter. The complainant was put to searching cross-examination, but nothing detrimental from her mouth could be extracted to favour the appellant. As the complainant and the eyewitness are the most relevant and important witnesses, so their conduct plays a vital role in the determination of the instant matter and for that matter, we deem it essential to go through the record of the case and also the material collected by the investigating officer. The site plan shows the house of the complainant near to the place of incident and also Hujra of the deceased. As the incident occurred in front of the Hujra of the deceased and the house of the complainant was situated in the street intervening by few houses, so we are to see as to whether from such a distance the commotion could be heard and that from such a distance the complainant was capable to

witness the aerial firing made by the appellant. True that while in house, the place of incident was not visible to the complainant, but the same is visible if one comes out from the house. The complainant disclosed that after hearing commotion and firing she rushed to the street and saw the appellant making aerial firing, while leaving the spot. The site plan depicts that after firing at the deceased the appellant left the spot and it was at point 2-A, of the site plan, that the complainant noted his subsequent presence while making aerial firing and the place was visible to the complainant. The presence of the complainant in the vicinity cannot be doubted, as the house of the complainant was in the same street, where the incident occurred and the availability of the complainant in her house, at the time of incident was nothing, but natural. The complainant was asked regarding the manner in which the dead body was shifted to the police station and regarding the persons who witnessed the incident, the complainant explained the circumstances and disclosed that as it was the time of panic, so she could

not remember the names of all those, who were present on the spot, at the time of incident. Even otherwise, it was nothing, but natural that on hearing fire shots many more people would have attracted to the spot and that it was with the help of the co-villagers that the dead body of the deceased was shifted from the spot to the police station. Much was submitted regarding the presence of the eyewitness i.e. Saif Ullah, that the complainant did not mention his name while reporting the matter, so his presence on the spot is neither established, nor inspires confidence. This is surprising that when the complainant appeared before the learned trial court it was the defence who examined her regarding the presence of the eyewitness, and that it was in an answer to a question that she disclosed, that on the day of incident the deceased left the house in the company of the eyewitness, and that the eyewitness was present with the deceased at the time of incident. We cannot ignore that the reply was made by the complainant when a specific question was asked by the defence, regarding the presence

of the deceased and the eyewitness. An attempt was made to convince this court that the eyewitness was introduced at a belated stage, that too, with ulterior motives, but we are not satisfied with what was submitted. As the complainant knew the fact that on the very day of the incident the eyewitness got recorded his statement and after few days of the incident, his statement under section 164 Cr.P.C was recorded before the court of competent jurisdiction, so the silence of the complainant regarding his presence, while recording her examination-in-chief, is not detrimental to the prosecution case, as admittedly both the statements of the complainant were and are available on the file. The record tells that during the days of incident, the eyewitness was hardly 8/9 years of age, if not present, then the complainant would avoid the risk of naming him, as she knew that being of tender age, he would not resist the searching cross-examination, and even would fail to convince the investigating officer in that respect, but when she named him as the eyewitness and when the

statement of the eyewitness was recorded, no inference other than the one, can be drawn that the witness was present on the spot when the unfortunate deceased was done to death. The presence of the eyewitness has further been established from his statement recorded under section 161 Cr.P.C, on the day of incident and from his statement recorded under section 164 Cr.P.C few days after the incident. There were ample opportunities for the complainant to substitute the eyewitness, but she did not and her conduct speaks, that what she told was correct and natural. The eyewitness was examined as P.W-08, several questions were put to this witness, to see his reliability, but his testimony could not be shattered and he remained consistent on the material aspects of the case. He remained consistent to what he saw and he explained the manner in which the two altercated and the appellant fired. The witnesses remained consistent throughout and no contradiction could be pointed out and no inconsistency could be noted. It does not matter that the name of the eyewitness was not mentioned in

the report. The same would be decisive only if the statement of the witness was not recorded on the day and soon thereafter. As admittedly, the statement of the eyewitness was recorded by the investigating officer, on the day of incident and few days after the incident by the court under section 164 Cr.P.C. The question regarding non-mentioning of the name, of the eyewitness, in the FIR has been answered by this court in case titled ***Rahat Ali Vs. The State and another (2018 PCr.LJ 206)***, which reads as follows:-

> ***"The significant piece of evidence before us is the statement of Abdar Ali Shah (PW-7). As stated earlier, he has not been named in the FIR to be the eye-witness of the occurrence. Learned counsel for the appellant during the course of his arguments vehemently urged that since the name of Abdar Ali Shah is not mentioned in the FIR, therefore, his testimony is not worth consideration. He was of the view that the safer course is to keep his statement out of consideration.***
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> ***We know that as a rule of prudent, Courts should keep out of consideration the testimony of a witness whose name is not figured in the FIR but it is not a rule of law. The Court in a fit case may go for***

> ***consideration of the testimony of such a witness if it is corroborated with other reliable evidence on record and in this view of the matter, we would see as to whether Abdar Ali Shah has witnessed the occurrence and, if so, up to what degree it has been corroborated."***

9. True that the incident was reported to the police, after a delay of 45 minutes, but the delay was duly explained by the complainant, and she disclosed the manner in which the dead body was picked up and shifted to the Police Station. Apart from the witnesses, the prosecution case is further supported by the recovery of an empty from the spot and the bullet marks on the outer gate of the Hujra of the deceased. The presence, of all concerned, is supported by the fact that the Hujra of the deceased was situated adjacent to the place of incident and the presence of the deceased and the eyewitness was natural. True that during spot inspection the investigating officer failed to collect blood from the spot, but keeping in view the seat of injury, there was every possibility that the blood would have travelled to the body cavity, and when so,

there was hardly an occasion for the investigating officer to collect the same from the ground. The credibility of the complainant could not be shattered, despite searching cross-examination and even the defence failed to attribute, any mala fide to the complainant, to charge. The record is silent regarding the abhorrence of the complainant against the appellant and even nothing was collected by the investigating officer, that could help in understanding that the charge against the appellant was based on mala fide and that the real culprits were let off. As in the instant case single accused is charged, so substitution is the rarest phenomenon. As is held in case titled Imran ***Mehmood*** ***Vs.*** ***The State*** ***(2023 SCMR 795)*** which reads as under:-

> ***"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."***

10. Right from the beginning the conduct of the complainant remained natural, despite the

fact that she had the opportunities to introduce the witnesses of her choice and to pose herself as the eyewitness of the incident, but she did not, rather she narrated the events as it occurred. An attempt was made to convince, that when the complainant was not the eyewitness and that when the eyewitness was not named in the FIR, then in that eventuality the witnesses lose their credibility and their testimony cannot be taken into consideration. The learned counsel forgot that at the time of incident the complainant was inside the house, but on hearing commotion and firing she rushed to the street and saw the appellant making aerial firing while running from the spot. As it was soon after the incident that she noticed the presence of the appellant on the spot with a pistol in his hand, making firing, so the subsequent events by itself are sufficient to tell that the appellant had hand in the affair and he was rightly held responsible for the murder of the deceased. We cannot forget that the law has taken note of the like circumstances and also the criminal jurisprudence was conscious of the same. The

concept of ‘Res gestae’ plays a vital role in criminal jurisprudence and the same has time and again been pressed into service by the superior courts of the land, more particularly, the apex court. In the like circumstances, we are benefited from a case titled ***Muhammad Ijaz Vs. The State (2023 SCMR 1375***), which reads as follows:-

> ***“Ghulam Akbar, complainant (PW-14) and Abdul Latif (PW-15) had heard the gunshot and witnessed the petitioner fleeing away from the place of occurrence after commission of offence while he was having a pistol in his hands. Evidence of these witnesses is in the nature of waj takar, the probative strength of which rests in the doctrine of res gestae in view of Article 19 of the Qanun-e-Shahadat Order, 1984. The said doctrine of res gestae is based upon the assumption that statements of witnesses that constitute part of the res gestae are attributed a certain degree of reliability because they are contemporaneous making them admissible by virtue of their nature and strength of their connection with a particular event and their ability to explain it comprehensively. These prosecution witnesses were residents of the same locality, therefore, their***

presence at the place of occurrence was natural."

11. True that the eyewitnesses are closely related to the deceased, but equally true that mere relationship of the witnesses with the deceased would hardly be a ground to disbelieve the witnesses or to label them interested witnesses. As the defence could not succeed in bringing on record, that the witnesses had a previous grudge with the appellant or that the parties were having blood feud, so in such eventuality, the relationship of the witnesses with the deceased would hardly be a ground for disbelieving them. Once the witnesses are found trustworthy and confidence inspiring, then their statements cannot be brushed aside and conviction can be based even on the testimony of related witnesses. The witnesses cannot be termed as interested witnesses, as no mala fide was attributed to them and nothing was brought on record that the witnesses under all circumstances wanted to implicate the appellant in the death of the deceased, knowing the fact that he was innocent. When such is the state of affairs, we are not ready to

accept the submissions of the learned counsel, and even the testimony of an interested witness can be taken into consideration, once it comes to surface that the witness had no mala fide to charge. In the like circumstances we are benefited from the judgment of the apex court reported as ***Muhammad Ijaz Vs. The State (2023 SCMR 1375)***, which reads as follows:-

> ***"There is no denial to this fact that these PWs were related with the deceased but the law in this regard is well settled. A related witness cannot be termed as an interested witness under all circumstances. A related witness can also be a natural witness. If an offence is committed within the presence of the family members then they assume the position of natural witnesses. In case, their evidence is reliable, cogent and clear, the prosecution case cannot be doubted. However, a related witness would become an interested witness when his evidence is tainted with malice and it shows that he is desirous of implicating the accused by fabricating and concocting evidence but the learned counsel for the petitioner could not show us anything in this regard."***

12. The medical evidence is in line with the ocular account. The eyewitness categorically stated that on arrival to the spot an altercation took place between the two and, thereafter the accused/appellant fired at the deceased. As in case of altercation the deceased and the appellant were facing each other, so the seat of injury on the chest of the deceased is a circumstance, which confirms the eyewitness account. Not only the medical evidence but the statements of the witnesses are in line and this harmony between the witnesses and the medical evidence, has strengthened the prosecution case beyond imagination.

13. The motive was stated to be the strained relationship between the parties and the cause of annoyance was the sitting of Mst.Sumbal in the house of the deceased. The record tells that Mst.Sumbal was married to the brother of the appellant and her husband was stationed abroad, so Mst.Sumbal developed some differences with her in-laws, and as such she came to the house of the deceased and was living there. It was brought on record that the appellant was interested in taking her back to

his house, but she was not willing and even on the day of incident the appellant had come with the same intention. We learnt that after the incident, Mst.Sumbal left the house of the deceased and is still residing in the house of her husband, so this court is confident in holding that the prosecution succeeded in establishing the motive. Even otherwise, absence or weakness of motive would hardly be a ground for acquittal of the accused, rather the same, in appropriate cases, can be pressed into service for determining, as to what sentence should be awarded.

14. Another circumstance which goes against the appellant is, his long abscondance to which he failed to explain, as admittedly, the incident occurred way back in the year 2009 and he was arrested in the year 2019 after almost 10 years of the occurrence. Once the prosecution succeeds in bringing forward reliable evidence, then abscondance can be taken a circumstance in favour of the prosecution and to the disfavor of the accused and the present case is no exception.

15. The crucial issue before this court for determination is, that what should be the appropriate sentence? True that in case of *"Qatl-i-Amd"*, the normal penalty is death, but equally true that the same sentence should not be awarded mechanically, instead the reasons must be given, and once it was found that the murder was cold blooded, then the normal penalty of death is the only reward, but for the same there must be reasons. In the present case, it was the appellant who arrived to the spot, and according to the eyewitness altercation took place between the two, and the appellant fired at the deceased. As the eyewitness failed to explain as to what words were exchanged between the two and that what agitated the mind of the appellant, to such an extent, that he fired at the deceased, so in such eventuality this court is not reluctant in holding that the prosecution failed to explain the real circumstances which prompted the appellant to kill. The single injury on the body of the deceased is another circumstance, which must be taken into consideration. As an atmosphere of uncertainty prevailed over the

causes, which led to the death of the deceased, the unclear atmosphere in case is the determining factor to determine the sentence to be awarded. To our understanding, the learned trial court went in haste on this particular aspect of the case, and the awarded sentence is more than the required, which calls for interference. The instant criminal appeal is partially allowed, and instead the appellant is convicted and sentenced under section 302 (b) PPC to life imprisonment, whereas the remaining sentences are left intact.

16. As the appeal is partially allowed, so the connected Murder Reference is answered in negative.

SENIOR PUISNE JUDGE

Announced. ***J U D G E***
Dt.07.09.2023.

HON'BLE MR.JUSTICE ISHTIAQ IBRAHIM &
HON'BLE MR.JUSTICE SAHIBZADA ASADULLAH.

(A·K·KHAN Court Secretary)