Judgment Sheet

PESHAWAR HIGH COURT, BANNU BENCH.

(Judicial Department)

Cr.A No. 186-B of 2018

Jehangir
Vs.
The State etc.

JUDGEMENT.

For Appellant:	**Muhammad Rashid Khan Dirma Khel, Advocate.**
For Respondent:	**Mr. Iftikhar Durrani Advocate.**
For State:	**Mr. Shahid Hameed Qureshi Addl: A.G**
Date of hearing:	**12.10.2020.**

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SAHIBZADA ASADULLAH, J.- We would like to decide instant criminal appeal No. 186-B of 2018 filed by the convict/ appellant Jahangir Khan and Cr.R. No.49-B of 2018, filed by complainant Muhammad Siraj Khan for enhancement of sentence against the appellant, through this single judgment, as both the appeal and revision petition are filed against the same judgment dated 19.10.2018 , rendered by learned Additional Sessions Judge-IV, Bannu, whereby accused/ appellant involved in case F.I.R No. 590 dated 21.12.2014 registered at Police Station Basia Khel, Bannu , was convicted under section 302(b) PPC and sentenced to life imprisonment with Rs.200000/-, as compensation to the L.Rs of the deceased under section 544-A Cr.P.C or in default thereof to suffer simple imprisonment for six months. Benefit of section 382-B, Cr.P.C was extended to the convict.

2. Brief facts of the case are that on 21.12.2014 at 09:50 a.m the complainant Muhammad Siraj alongwith dead-body of his brother Maraj Khan, reported the matter on the spot, to the effect that he alongwith his brother and cousin Fakhr-e-Alam, were busy in the construction of warkha/vial, meanwhile, at about 09:30 a.m. accused/ appellant Jahangir Khan, duly armed with Kalashnikov, appeared and started altercation with his brother Maraj Khan, and forthwith started firing at him, as a result of which he was hit, sustained injuries and fell down, while the accused decamped from the spot. When he attended his brother, he was dead. The motive was a dispute over the warkha/vial. Nabi Shah Inspector, reduced the report of complainant in shape of murasila Ex: PA, which was later on culminated into above-mentioned F.I.R Ex: PW 3/1. On completion of investigation the complete challan was submitted against the accused/appellant before the learned trial Court, who after complying with provision under section 265-C Cr.P.C, formally charge-sheeted the accused/ appellant to which he pleaded not guilty and claimed trial. The prosecution in order to substantiate its charge against the accused, produced and examined as many as nine (9) witnesses, whereafter, statement of accused was recorded under section 342 Cr.P.C, wherein he professed his innocence. He opted to record his statement on oath as provided under section 340(2) Cr.P.C and produced defence witnesses. Learned trial Court after hearing arguments of learned counsel for the parties, vide impugned judgment dated 19.10.2018, convicted the accused and sentenced him as mentioned above. Feeling aggrieved the convict/

appellant has filed the instant criminal appeal, while the complainant moved criminal revision petition for enhancement of his sentence.

3. The learned counsel for the parties alongwith Additional Advocate-General were heard at length and with their valuable assistance the record was gone through.

4. The incident occurred on 21.12.2014, at 09:30 a.m. when the complainant alongwith the deceased and eyewitness were busy in their construction work on the spot, where the convict/ appellant emerged from his house situated towards north, altercated with the deceased followed by firing, which hit the deceased, who fell to the ground and died on the spot.

5. True, that in the episode, single accused is charged with no previous blood-feud, equally true that substitution in case of single accused is a rear phenomenon, but that alone cannot absolve the Courts of law of their liability to assess and reassess the available material on file to reach a just and proper conclusion in order to avoid injustice to either side. The record tells that the matter was promptly reported by the complainant to the local police who arrived to the spot and that the occurrence besides the complainant was also witnessed by the eyewitness, but this alone is not sufficient, rather the trial Court as well as this Court is under the bounden duty to ascertain as to whether the incident in issue occurred in the mode and manner as presented.

6. The incident occurred on 21.12.2014 at 09:30 a.m. and the matter was reported to the scribe, who attracted to the spot after receiving information. It is for the complainant to establish his presence on the spot and to tell that why the dead body was not

taken either to the hospital or to the local police station to register the case and that why they kept on waiting till arrival of the local police to the spot, despite presence of the complainant and eyewitness at the time of incident no efforts were made to approach the local Police Station to register the case, rather the complainant kept on waiting till the police arrived. The complainant was examined as PW-6, who stated that he alongwith the eyewitness was present and busy in the construction work and the deceased was busy to supply bricks, when the convict/appellant attracted to the spot and killed the deceased. He further stated that soon after the incident the appellant decamped from the spot, but he failed to explain that why no efforts were made to shift the dead-body either to the hospital or to the concerned Police Station for registration of case. This witness was cross-examined on this particular aspect of the case but he failed to explain that what precluded them from approaching the local police of Police Station Basia Khel. The explanation he tendered is not only unsatisfactory but abnormal as well, as he stated that soon after the incident the nearby people attracted to the spot to whom he asked as what to do and how to transport the dead-body. The complainant was asked regarding the availability of transport both in the village and at the place of incident, to which he replied in negative. He explained that neither the Datsun could be arranged nor the Rikshaws were available which led them to wait till arrival of the police. The scribe was examined as PW-5, who stated that at the relevant time he was present near Akram Durrani College, when he received information from Police Station Basia Khel, regarding the incident and on

receiving the information he left for the spot. He further stated that while on *gasht* he had police *nafri*, but when leaving for the spot he retained only three, whereas rest of them were sent to the Police Station. This witness explained that on reaching to the spot, he found the complainant alongwith the eyewitness present there, whereas the dead-body of the deceased was lying on the spot. PW-6 stated that he prepared the injury sheet, inquest report followed by *murasila,* sensing the danger he in the same breath changed the sequence and stated that the *murasila* was prepared first followed by the injury sheet and inquest report. The dead-body was sent to the hospital but neither the complainant nor the eyewitness accompanied the same and when the complainant was cross-examined that why he did not accompany the dead-body to the hospital, he replied that he and the eyewitness were asked to stay on the spot till arrival of the Investigating Officer, but neither the Investigating Officer nor the scribe confirmed their this stance. It surprises that a real brother despite his presence on the spot did not accompany the dead-body of his younger brother to the hospital, which gives an impression that the complainant was not present on the spot and that the dead-body was shifted to the hospital by the people present there. His presence is further doubted when the dead-body was identified by the identifiers who hailed from a different village lying at a distance of 3/4 kilometers from the spot, who too are the close relatives of the deceased. The complainant stated that on arrival of the scribe only he and the eyewitness were present on the spot, but he could not tell that how the identifiers reached to the spot and identified the dead-body before the police and that who informed them regarding the

incident, puts a question-mark on the veracity of the complainant and on his presence on the spot.

7. The complainant was examined as PW-06, who stated that on the day of incident he alongwith Fakhr-e-Alam and the deceased were busy in constructing of a vial (*warkha*) and that for the purpose material including bricks were brought and lying on the spot. He further stated that they did not take the help of a mason and labourers for the purpose as they were intending to construct it by themselves. There is no denial to the fact that the complainant used to run a mobile shop and the deceased was a student during the days of occurrence and both were lacking the expertise to construct, so it surprises that why the experts (masons) were not hired for the purpose. The Investigating Officer was examined as PW-8, who stated that on arrival to the spot, he did not notice bricks, shingle etc. to be used for construction. This conflict between the two creates a dent in the prosecution case, as the purpose of his presence on the spot is not established. We cannot ignore that the deceased was a student of tender age with no direct motive with the convict/appellant, then what led the appellant to kill the deceased and leave the two, who were falling in the way while approaching the deceased. This aspect of the case creates doubt regarding presence of the complainant and the eyewitness on the spot at the time of incident.

In case titled ***"Muhammad Saleem Vs. the State" (2010 SCMR 374)***, it is held that:

> ***"General rule is that statement of a witness must be in consonance witness the***

probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent person. If these element are present, then the statement of a worst enemy of the accused can be accepted and relied upon without corroboration but if these elements are missing then the statement of a pious man can be rejected without section thought...applying the test to the pros witnesses, we find that their statements do not come within the ambit of above rule of acceptance of evidence, therefore, no implicit reliance can be placed on such type of evidence without any corroboration which is lacking in the present case."

8. The manner in which the convict/appellant was arrested gives a new twist to the prosecution case when the scribe stated that on arrival to the spot the matter was reported by the complainant and after doing the needful he went after the accused to his house, when he reached near the house, the accused came out and started running who was chased and after a hot pursuit was arrested, the Kalashnikov was taken into possession and murasila was drafted on the spot which led to registration of F.I.R No. 591 dated 21.12.2014 under section 15 Arms Act of Police Station Basia Khel. It is interesting to note that while drafting the murasila in respect of the arrest and recovery of the Kalashnikov, the scribe/ complainant inserted explanation that the accused is also required in case F.I.R No. 590 under section 302 P.P.C dated 21.12.2014, Police Station Basia Khel. We are surprised to see that how the complainant came to know that an F.I.R bearing No.590 has already

been registered, as the time of occurrence and drafting of murasila under Section 15 Arms Act was 10:30 a.m, whereas FIR No.590 was registered at 10:50 a.m. The conduct of the S.H.O (scribe) is not above board, rather he went on a conscious attempt to help the prosecution that too at the cost of the appellant. We are yet to see as to whether the convict/appellant was arrested in the manner as mentioned in F.I.R No.591 or that PW-5 was telling a lie, this is interesting to note that the appellant after his arrest was produced before the doctor who found multiple injuries on his body, the said doctor was examined as DW-1, whose examination in chief is reproduced for ready reference. ***"On 22.12.2014, at 01:35 p.m. accused Jehangir Khan was produced before me by the Investigating Officer of the present case, for obtaining his fitness certificate about his custody. On examination I found wounds on his both knees subcutaneous hematoma on lower leg and abdominal tenderness. I have mention my observation on his judicial remand paper already exhibited as Ex::PW8/3, while my observations are written on its corner, which correctly bears my signature and are in my head writing and are Ex: DW 1/1."*** This witness was cross-examined, who stated in his cross-examination, ***"subcutaneous hematoma means small blood clots immediately under the skin. There is no blood on the person of the accused, however, his clothes were crushed and besmeared with dust."*** The appellant, right from beginning, attempted hard to bring on record his plea to which we cannot close our eyes, it beings with an application submitted to the Deputy Inspector General of Police for fair investigation in the matter where he took the plea of his

innocence. The statement of accused under section 342 Cr.P.C was recorded, where he opted to be examined on oath and also to produce defence witnesses. While recording his statement under section 340(2) Cr.P.C, he explained that on the day of occurrence at about 08:30 a.m, he in routine started for his bargain center on his motorbike, when he reached at the corner of the mosque near the main road, he saw Muhammad Saeed, Abidullah and Ziad Khan, duly armed with Kalashnikovs while Fakhar-e-Alam was armed with pistol, Shahid Rehman, Saif ur Rehman and Meraj were busy in demolishing the "Warkha", he requested them to stop demolishing until the matter was resolved which annoyed them and they started beating him with their weapons etc, they broke his spectacles and torn his clothes when in the meanwhile, Muhammad Saeed made a fire which hit the deceased who fell on the ground. He further stated that the co-villagers namely Dil Fayyaz Khan, Noor Qadir, Rahm Subkhan, Umar Shad and others attracted to the spot and rescued him from the hands of the accused and to save his life, so he was taken inside the hujra of one Hazrat Bilal. Though the accused tried their best to broke open the door but the villagers resisted and they could not succeed and these were the villagers who informed the SHO of police station Basia Khel, who arrived to the spot after 30/40 minutes of the occurrence and took him into custody from the hujra empty-handed. The appellant also produced one Dil Fayyaz Khan son of Bahadur Khan as DW-2, who also supported the version of the accused/appellant. Though the SHO has clung to his stance reported vide case F.I.R No.591, but yet we are to thrash out as to which of the versions is correct. Though the accused has been

shown arrested by Nabbi Shah Khan S.I, but while preparing his card of arrest, he did not mention the injuries on his person and the condition of his clothes. It was then when the accused/appellant was examined by the doctor, who found multiple blunt injuries on his body with torn/crushed clothes, but the conduct of Nabbi Shah Khan SI tells *mala fide* on his part. As all the three came forward with their own version, so we deem it appropriate to place all i.e. the statement of accused recorded under section 340(2) Cr.P.C, that of the complainant and the S.H.O of the concerned Police Station in juxtaposition, in order to know as to whether it was the complainant, the S.H.O or the appellant who was telling the truth.

9. The overall situation attaches great importance to the plea of the accused which he took at the earliest. The record tells that on 25.12.2014, the convict/appellant submitted an application under section 22-A(6) Cr.P.C before the Ex-Officio Justice of Peace which was turned down vide order dated 25.01.2015, feeling aggrieved, the accused/appellant approached this Court through a writ petition, but the same did not succeed and was dismissed vide judgment dated 12.01.2016, when the appellant was knocked out by this Court, he then opted to file a criminal complaint under section 200, Cr.P.C. before the trial Court, where a reply was sought from the S.H.O concerned and finally the complaint was dismissed vide order dated 13.10.2016, which was assailed through a revision petition which too met the same fate on 18.01.2017. It was argued that when the plea of the appellant was turned down by the competent Courts of law, could it be taken into consideration to benefit the convict/appellant, we do not find ourselves in agreement

with the learned counsel, as this Court is yet to see as to which of the theories is more probable, we cannot deny the efforts of the appellant to bring on record his plea and even he ran the risk to be examined under section 340(2) Cr.P.C and to produce defence witnesses, knowing the fact that he and his witnesses were to stand the test of cross-examination.

10. There is no denial to the fact that the appellant is directly charged for the murder of the deceased and that the accused was arrested from near the place of occurrence alongwith a Kalashnikov used in the incident which matched with the recovered empties, but yet the prosecution is lagging behind to convince this Court regarding the mode and manner of the incident. Though the complainant struggled hard to establish his presence on the spot, but at the same time, we cannot say goodbye to the plea taken by the appellant, at the earliest. We are confident that all the three i.e. the S.H.O, who arrested the appellant, the complainant and the appellant have suppressed the true facts, but we are to apply our judicial mind to the attending circumstances of the case, while doing so, we reach to an inescapable conclusion that out of the three, it is the appellant whose plea is nearer to the truth, however, we a little disagree with his stance that it was the fire shot of one Muhammad Saeed which went effective. We feel no hesitation to hold that it was from the fire shot of the convict/appellant that the deceased got hit and died, but the injuries on person of the appellant and his torn clothes belie what the SHO (PW-5) stated. We while appreciating the evidence, have reached to the safest conclusion that the incident occurred when the parties were engaged in a free fight, which resulted into the death of

the deceased and to injuries on person of the appellant, we are confirmed in our mind that the deceased was never the target.

In case titled ***"Abdur Rehman alias Boota and another Vs the State and another" (2011 SCMR 34)***, it is held that:

> ***"8. In the interest of justice and fair play we have also re-examined the evidence on record with the assistance of the learned counsel of the parties and come to the same conclusion after re-appraisal of the evidence that eye witnesses were not present on the spot, therefore, the learned High Court was justified to ignore their statements. The convict was convicted in terms of his statement under section 342 Cr.P.C, therefore, the learned High Court was justified to alter the conviction of the convict from under section 302(b) P.P.C to section 302(c) P.P.C. It is settled principle of law that statement of the accused has to be accepted or rejected as a whole when entire prosecution evidence disbelieved as the eyewitnesses were not present at the spot, then conviction under section 302(b) P.P.C altered to section 302(c) P.P.C and sentence of death awarded by trial Court was reduced to 14 years R.I. by learned High Court was not against the law laid down by this court in various pronouncements."***

11. We have before us the legality of the awarded sentence and we are to thrash it out as to whether the sentence awarded will meet the ends of justice. The overall impact of what has been stated above, leads us nowhere, but to hold that the occurrence was the

result of free fight and that both the sides twisted the facts to their benefit, hence, in such eventuality the quantum of sentence calls for interference, resultantly, we partially allow this appeal by altering the conviction awarded to the appellant under Section 302(b) P.P.C to one under Section 302(c) P.P.C and the appellant is convicted and sentenced to ten years R.I. Needless to mention that the amount of compensation awarded to the legal heirs under section 544-A, Cr.P.C. shall remain intact. Benefit of section 382-B Cr.P.C. is extended in favour of the convict/appellant. However, criminal revision No.49-B of 2018, stands dismissed.

Announced.
Dt: 12.10.2020
Azam/P.S

JUDGE.

JUDGE.

(D.B)
Hon'ble Ms. Justice Musarrat Hilali
Hon'ble Mr. Justice Sahibzada Asadullah