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

Cr. A No.192-B of 2021

Ahmad Kamal etc

Vs

The State etc

JUDGMENT

For Appellants: Messrs Salah-ud-Din Khan and Inam Ullah Khan Marwat, Advocates

For Respondents: Haji Hamayun Khan Wazir, Advocate

For State: Sardar Muhammad Asif, Asstt: AG for the State

Date of hearing: 12.05.2022

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SAHIBZADA ASADULLAH, J.- Ahmad Kamal alias Kamal Khan and Iqbal Khan, appellants herein, have impugned the judgment dated 16.11.2021, passed by the learned Additional Sessions Judge-III, Lakki Marwat, whereby, they were convicted under section 302(b)/34 PPC and sentenced to imprisonment for life as Ta'zir and were made liable to pay Rs.500,000/- as compensation under section 544-A (2) CrPC to the legal heirs of deceased or in default thereof, to suffer S.I for 06 months, whereas, both the appellants / convicts were acquitted of the charge under section 324 PPC. Benefit of section 382-B CrPC extended as well.

2. Complainant, Naimat Ullah, moved criminal revision petition No.46-B/2021 for enhancement of sentence of the

appellants and Cr.A No.196-B/2021 against their acquittal under section 324 PPC. Since all these matters have arisen out of the same judgment, therefore, we intend to decide the same through this common judgment.

3. Case of the prosecution, as divulged in the first information report, in brevity, is that on 03.08.2014 at 23:15 hours, complainant Naimat Ullah, in presence of dead body of his son Rehmat Ullah, reported the occurrence to the local police in Emergency Ward of City Hospital, Lakki Marwat to the effect that on the night of occurrence, he alongwith his brother Zafar Khan and his deceased son Rehmat Ullah was going to the mosque in their village for offering Isha prayer; that Rehmat Ullah was some paces ahead and lights in the street were glowing; that at 21:00 hours, when they were taking turn in the street, accused / appellants Kamal Khan and Iqbal Khan duly armed with Kalashnikovs were present there in the street and raised voice at the complainant party that they would not be spared and the moment started firing at them through their respective weapons, due to which, Rehmat Ullah got hit, injured and fell to the ground, while complainant and Zafar Khan luckily escaped unhurt; that the accused decamped from the spot after the commission of offence; that complainant and Zafar Khan took the injured to the hospital, but he succumbed to the injuries on the way to hospital. Motive for the offence is

alleged to be altercation which had taken place between the deceased and accused party. Hence, the instant case FIR.

4. After completion of investigation and arrest of the accused / appellants, prosecution submitted supplementary challans against them, where at the commencement of trial, the prosecution produced and examined as many as 12 witnesses. On close of prosecution evidence, statements of accused / appellants were recorded under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they 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 16.11.2021, convicted and sentenced the accused / appellants Ahmad Kamal alias Kamal Khan and Iqbal Khan as mentioned above. Hence, the instant appeal and revision against the judgment of conviction.

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 claimed the life of the deceased, who, after receiving firearm injuries, lost his life and was shifted to Civil Hospital, Lakki Marwat where the matter was reported. The complainant, while reporting the matter, charged the appellants for the death of the deceased and after

registration of the case, the injury sheet and inquest report were prepared and the dead body was sent to the doctor for postmortem examination. The investigating officer, after receiving copy of the F.I.R, visited the spot and on pointation of the eye witnesses, prepared the site plan. During spot inspection, the investigating officer collected 21 empties of 7.62 bore from the places of the appellants, whereas, bloodstained earth was recovered from the place of the deceased. During spot inspection, the investigating officer took into possession a bulb installed on the main gate of the house of the complainant and a tube light from an electric pole near the place of occurrence. The collected empties were sent to the firearms expert, where a report was received in positive with explanation that the recovered empties were fired from different weapons. The appellant Ahmad Kamal was arrested on 07.08.2019, when he could not succeed in getting his bail before arrest confirmed, whereas, the accused Iqbal Khan was arrested on 12.06.2020. The appellants after their arrest faced trial and on conclusion of the trial, the learned trial court was pleased to convict the appellants vide the impugned judgment. Feeling disgruntled, the appellants approached this Court through the instant criminal appeals. As both the appeals are arising out of one and the same judgment, so we intend to decide the same through a consolidated judgment.

7. The learned trial court dealt with the matter comprehensively and after application of judicial mind to the collected evidence on file and the recorded statements before the trial court, convicted the appellants as mentioned above.

8. Though, the learned trial judge applied his judicial mind to the record of the case and while returning a guilty verdict against the appellant, all the material aspects of the case were taken into consideration and thereafter, the fate of the appellants was determined. True that in the incident, the deceased lost his life owing to oral altercation, but equally true that the matter was reported by his real father to the local police after shifting the dead body to the Civil Hospital, Lakki Marwat, but the same does not absolve the prosecution of its liability to establish its case through independent witnesses. As in the incident, two real brothers were charged and convicted, so we feel it essential to scan through the record once again, so to know as to whether the approach of the learned trial court was correct and as to whether the learned trial judge, while passing the impugned judgment, took into consideration the material aspects of the case. This being the Court of appeal is under the obligation to reassess the already assessed evidence, so that miscarriage of justice could be avoided.

9. The tragic incident occurred on 03.08.2014 at 21:00 hours, when the deceased, in the company of his father (the

complainant) and his real uncle, were on their way to the local mosque to perform Isha prayer. It is the case of the prosecution that when the deceased took a turn in the street, the assailants, who were already present, duly armed, started firing at them, which resulted into injuries on the person of deceased and, who, after receiving firearm injuries, rushed back and fell on the ground at point No.1A, wherefrom the investigating officer recovered bloodstained earth. The moot questions for determination before this court are, as to whether the incident occurred in the mode, manner and at the stated time; and as to whether the complainant alongwith the deceased was present when he received firearm injuries; and as to whether the matter was reported in the manner and at the stated time and as to whether these were the appellants who killed the deceased. In order to resolve the controversy, we deem it essential to go through the statements of the witnesses who appeared before the trial court. The complainant was examined as PW-08 who stated that on the day of incident, he alongwith the deceased and the eye witness were on their way to the local mosque, when they took a turn, the appellants were already present duly armed, started firing at the deceased and the deceased, after receiving firearm injuries, fell to the ground and while shifting to the hospital, the deceased succumbed to the injuries; that the complainant alongwith the eye witness accompanied the dead

body to the hospital where the matter was reported to the local police; that after doing the needful, they accompanied the investigating officer to the spot and on their pointation, the site plan was prepared. It is essential to note that while reporting the matter, the complainant disclosed that soon after leaving their house, when they took a turn in the street, the deceased was fired at and that the accused were identified in the light of bulbs, which were installed on different houses in the street. The complainant was examined on this particular aspect of the case, where he stated that the investigating officer recovered a bulb from the main gate of his house and another, installed in the electric pole. It is pertinent to mention that the investigating officer, while preparing the site plan, allegedly took into possession a bulb from the main gate of the complainant which has been shown at point-D, whereas, the recovered tube light from the electric pole is mentioned at point-A in the site plan. As at the time of incident, it was pitched dark and that the complainant and eye witness were able to identify the assailants in the bulbs light installed at the place of incident, so its importance cannot be overlooked and the same needs consideration. While going through the site plan, it transpired that the place where the deceased received firearm injuries no electric tube light was installed. It was argued that the assailants were identified in the tube light installed in the electric pole. In

order to ascertain as to whether the identification from such a long distance i.e. the pole where the tube light was installed, and the assailants wherefrom they fired at the deceased, was possible? To resolve the controversy, we deem it essential to go through the statements of the witnesses and that of the investigating officer. The complainant was examined as PW-08 who stated that the *inter se* distance between the electric pole and the assailants was 35 paces with further explanation that the deceased was seven paces ahead from them, whereas, the distance between the assailants and the deceased is given as eight paces. Keeping in view the distance between the parties and that of the electric pole, it does not appeal to a prudent mind that from such a long distance of more than seventy feet the identification was possible. It is interesting to note that the investigating officer, during spot inspection, took into possession an electric bulb from the main gate of the complainant, but he did not collect any bulb from the house where the deceased received firearm injuries. If we admit to what the complainant stated, as correct that different lights were installed on the surrounding houses, then in that eventuality, it would have been of prime importance for the investigating officer to collect an electric bulb from the house of one Habib Ullah, where the deceased received firearm injuries. The circumstances do suggest that the deceased was not fired at, at

point No.1, rather he was fired at, at point No.1A, in front of his house. The physical circumstances of the case run in conflict with the statements of the witnesses, had the deceased received firearm injuries at point No.1, then there was hardly an occasion for him to rush back to point No.1A, as the injuries received by the deceased were on the most sensitive parts of the body. If, for the sake of arguments, we admit that the deceased received firearm injuries at point No.1 and fell on the ground at point No.1A, then in that eventuality, the investigating officer would have found the trail of blood between the two points, but neither he mentioned the same nor it was found. This circumstance of the case negates the version of the complainant and it gives birth to suspicion that the deceased did not receive firearm injuries on the stated position.

10. It is pertinent to mention that if the deceased and eye witnesses were present on the points, as have been shown in the site plan, then in that eventuality, the complainant and eye witness would have also received firearm injuries, but they did not. The complainant in his court statement stated that the street was closed towards north, but surprisingly, the investigating officer did not notice any bullet mark on the surrounding walls. The complainant, when appeared before the Court, stated that he alongwith the deceased and the witness were on their way to the local mosque to perform Isha prayer, when the incident

occurred. This has time & again come from the mouth of the witnesses that Isha prayer was to be performed at 09:00 PM. We cannot ignore that the witnesses stated that it was their routine to go to the mosque and perform prayer, if we take it correct, then in that eventuality, the complainant, eye witness and the deceased would have gone to the mosque a little earlier. The record tells that it was the deceased who was walking ahead, whereas, in this part of the country, if father and a son would go to the mosque together, then as a matter of respect, the elders take the lead and the youngster follows. If all the three left the house together, then there was hardly an occasion for the deceased to go eight paces ahead, rather all the three would walk together. The complainant, when appeared before the trial Court, stated that soon they took a turn, the assailants fired at them, whereas, the site plan depicts that after taking turn, the deceased walked eight paces towards the assailants. So, the witnesses remained inconsistent on this particular aspect of the case and even, the site plan contradicts the stance of the complainant.

11. The deceased, after receiving firearm injuries, as per statement of the complainant, survived for considerable time and while en-route to the hospital, succumbed to the injuries. This is for the prosecution to explain that when the occurrence took place at 09:00 PM, what took it to consume a long two and

a half hours to report the matter. The eye witness was examined as PW-09, who stated that after collecting the dead body from the spot, they reached to the hospital at 10:00 PM, whereas, in the same breath, he further explained that it was 10:08 PM that they reached to the hospital. If we go with what the witnesses stated, then it is for the prosecution to explain that why the matter was not reported soon after reaching to the hospital. This is intriguing to note that the dead body was received by the doctor for postmortem examination at 11:00 PM and the same was completed at 11:30 PM, whereas, the report was made at 11:15 PM. The prosecution remained silent on this particular aspect of the case and even, if the statements of the witnesses are taken to be correct, then in that eventuality, the time of report and the time when the postmortem examination was conducted, do not support each other. It is pertinent to mention that after reporting the matter, the injury sheet and inquest report were prepared. In the relevant column of the inquest report, the time of death is mentioned as 21:30 hours, which further belies the stance of the complainant regarding the time of occurrence. In order to ascertain as to whether the deceased received firearm injuries at 09:00 PM or earlier, we deem it essential to go through the opinion of the doctor, who, at the time of postmortem examination, mentioned the time between injury and death from one to 1 – 1/2 hours. As the witnesses

went in conflict regarding the survival of the deceased after receiving the firearm injuries and when the doctor mentioned the time between injury and death as 1 – ½ hours, then the statements of all these three witnesses when placed in juxtaposition, no other opinion can be formed, but that the incident did not occur at the stated time. Both the witnesses i.e. the complainant and the eye witness did not support each other regarding the place where the deceased died, as the complainant stated that soon after receiving firearm injuries, the deceased fell on the ground, and so the eye witness, but the complainant never stated that after receiving firearm injuries, the deceased rushed back and fell at point No.1A. The conflict between the statements of witnesses and the site plan leave no ambiguity to hold that the deceased received firearm injury at point No.1A and not at point No.1.

12. It was after 12:00 midnight that the investigating officer visited the spot after receiving copy of the F.I.R, to be more specific, the investigating officer, visited the spot on 04.08.2014 as the F.I.R was registered after 12:00 hours in the night. The witnesses were examined who stated that the investigating officer recorded their statements on 04.08.2014, whereas, the record tells that their statements under section 161 Cr.P.C were recorded on 03.08.2014. This is for the prosecution to explain that when the FIR was yet to be chalked out, then

how the investigating officer visited the spot and recorded statements of the witnesses. The record was consulted where initially, the date of preparation of site plan was mentioned as 03.08.2014, whereas, later on, the same was tampered and rectified as 04.08.2014. The overall situation has created an atmosphere of confusion which the prosecution failed to resolve. Another important aspect of the case is that the dead body was brought before the doctor for postmortem examination at 11:00 PM, the time, by then, no report was made. The doctor was examined as PW-07, who stated that he started postmortem examination of the dead body at 11:00 PM and completed the same at 11:30 PM. When he appeared before the trial Court, he stated that at 11:00 PM, the dead body was brought before him alongwith injury sheet and inquest report. The statement of the doctor does not find support from record of the case, as, by then, the report was not made. We are surprised that when the matter was reported at 11:15 PM, how the doctor could lay hands on the injury sheet and inquest report, as the same were admittedly prepared after the *Murasila* was drafted. When all these anomalies are taken into consideration, coupled with the column of identification, where neither the complainant nor the eye witness stood identifiers, then in such eventuality, an inference can be drawn that either the dead body was shifted to the hospital by the co-villagers,

where the injury sheet and inquest report were prepared and by then the report was not made, as the complainant was not available or the complainant was searching for the real culprits, who killed the deceased, and that it was after consultation and deliberation that the appellants were charged for the death of the deceased. The superior courts of the country interpreted the importance of the identifiers of the dead body before the police at the time of report and before the doctor, at the time of postmortem examination keeping before them the particular circumstances of a particular case. It is not the rule of thumb that in all cases, the complainant and the witnesses must be the identifiers of the dead body before the police at the time of report or the doctor, at the time of postmortem examination. Their importance is to be seen in light of the attending circumstances of every individual case, we cannot make their presence or absence in the columns of identification, both in the inquest and postmortem report, as a touchstone. If the principle is universally acknowledged then it will yield to drastic results and that has never been the intent and purpose behind the pronouncements of the superior courts. In this particular case, though the incident occurred in front of the house of the complainant and that the complainant alongwith his relatives shifted the dead body to the hospital, but the delay caused in reporting the matter and thereafter, in chalking out the first

information report has increased the anxiety of this Court to a greater extent and has compelled this Court to observe that either the complainant was not present at the time of incident in his village or that the real culprits were not known. When both the probabilities are placed in juxtaposition, this Court is not reluctant to go for the second choice, that is, the complainant was not in the knowledge of the real culprits and that it was after inquiry and consultation that the appellants were charged and the benefit of doubt, in the circumstances, can only be extended in favour of the appellants, as is held in case titled **"Muhammad Manshah Vs The State" (2018 SCMR 772):**

> **"Needless to mention that while giving the benefit of doubt to an accused, 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 accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim: *It is better that ten guilty persons be acquitted, rather than one innocent person be convicted"***

13. The eye witness appeared before the Court as PW-09, who stated that when the complainant was reporting the matter, he was expelled from the room by the scribe and that he was not asked to verify the report of the complainant. The overall

circumstances, as discussed above, tarnish the veracity of the witnesses and also their credibility. The situation has been beautifully answered by the Apex Court in case titled **Khair Muhammad and another Vs The State through P.G Punjab and another (2021 SCMR 130)**:

> **"There is no denial to this fact that the petitioners are nominated in the crime report. According to the contents of the crime report, it is mentioned that the occurrence has taken place in the morning whereas the matter was reported to police at 10:50 AM. Admittedly, the inter se distance between the place of occurrence and police station is 08 KM. Inordinate delay qua time of occurrence and registration clearly reveals that possibility of deliberation and consultation cannot be ruled out."**

14. The medical evidence does not support the case of the prosecution, the doctor who was examined as PW-07, he admitted that the deceased received injuries on the vital parts of his body, his statement get support from the postmortem report. The postmortem report tells that the most vital organs of the body of deceased were damaged. When such was the precarious condition of the deceased at the time of incident, we are not in a happy mood to accept that the deceased could run from point No.1 to point No.1A, if so then between the two places, the investigating officer would have shown the trail of blood. The

conflict between the medical evidence and ocular account has damaged the prosecution case beyond repair. True that the medical evidence is confirmatory in nature and in case of availability of strong eye witness account, it plays a little role, but in case where the witnesses fail to establish their presence on the spot then in that eventuality, it becomes obligatory that the medical evidence must be respected and appreciated. In case in hand, we lurk no doubt in mind that the witnesses failed to establish their presence on the spot at the time of incident, so the medical evidence is to play the decisive role and as such, the conflict between the two has created dents in the prosecution story.

15. It is evident from the record that the investigating officer collected 21 empties of 7.62 bore from the place of incident, but surprisingly, the same were not sent to the firearms expert soon after its recovery, rather the same were received to the laboratory on 08.09.2014, after a considerable delay of 34 days, which the prosecution failed to explain. The investigating officer did not record the statements of independent witnesses regarding the safe custody of the collected empties and even no record was collected from the concerned police station as to where these empties were lying. Neither the Muhrrir of the concerned police station was produced nor the police official who took the same to the firearms expert. When the safe

custody of the collected empties could not be proved on record, then in such eventuality, this piece of evidence cannot be taken into consideration and as such, it has lost its evidentiary value.

16. True that the incident occurred on 03.08.2014, whereas, one of the appellant was arrested on 07.08.2019, who could not succeed in getting his bail before arrest confirmed and the other on 12.06.2020, no plausible explanation was given regarding their long abscondance. An attempt was made to convince this Court that the long abscondance of the appellants is a sufficient factor to help in their conviction, but we are not impressed, as the law is settled that abscondance is a circumstance which can be aided to the benefit of the prosecution, provided the prosecution succeeds in establishing its case against the accused charged, but when the prosecution is lacking evidence, then abscondance has a little role to play. In case in hand, as the witnesses could not succeed in establishing their presence on the spot and the mode and manner is still shrouded in mystery, so the abscondance cannot be taken into consideration, that too, to convict the appellants.

17. The motive was alleged as oral altercation between the appellants and the deceased a few days earlier to the incident, but the complainant could not bring on record any substantial evidence in that respect and even the investigating officer did not record the statements of independent witnesses in support of

the alleged motive. Except mere oral assertion by the complainant, no positive evidence was produced in respect of the motive, thus, this Court has no other option, but to hold that the prosecution failed to establish the motive. True that absence or weakness of motive, in itself, is not sufficient to dislodge the prosecution story, but at the same time, we cannot ignore its importance, more particularly in the given circumstances of the present case. As the reason to kill was the altercation between the deceased and accused, so the liability of the prosecution was more than the ordinary cases. When the complainant failed to convince this Court through reliable witnesses that a day earlier to the incident, an altercation took place between the parties, this Court is not hesitant to hold that the charge against the appellants was the outcome of consultation and deliberation.

18. After evaluating the evidence from different angles, this Court reaches nowhere, but to hold that the prosecution failed to bring home guilt against the appellants. The learned trial judge could not appreciate the available evidence on file and the unique characteristics of the present case, so he fell in error while passing the impugned judgment. We are firm in our belief that miscarriage of justice has occasioned while passing the impugned judgment. Not only the learned trial Court fell in error on facts of the case, rather it misdirected itself in law and in that eventuality, this Court reserves no option, but to

interfere and as such, the impugned judgment is set aside by acquitting the appellants of the charges. They shall be released forthwith, if not required to be detained in connection of any other criminal case. The Cr.A#196-B/2021 stands dismissed.

19. As the prosecution failed in establishing its case, so the criminal revision petition No.46-B/2021 filed for enhancement of the sentence cannot proceed further and is dismissed as such.

Announced
12.05.2022
Ghafoor Zaman/*

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice S.M Attique Shah
Hon'ble Mr. Justice Sahibzada Asadullah