

Judgment sheet
PESHAWAR HIGH COURT, BANNU BENCH.
(Judicial Department)

Cr.A. No.236-B of 2018

Noor Zaman
Vs.
The State etc.

JUDGEMENT

For Appellant: **Mr. Saifur Rehman Khan,**
Advocate.

For State: **Mr. Shahid Hameed Qureshi Addl: A.G.**

For Respondent: **Nemo.**

Date of hearing: **13.10.2020.**

SAHIBZADA ASADULLAH, J.- Through present criminal appeal preferred under section 410 Cr.P.C. appellant Noor Zaman has impugned the judgment dated 29.11.2018, rendered by learned Additional Sessions Judge-I, Lakki Marwat, in case F.I.R No. 485 dated 19.07.2014, under sections 302/34 P.P.C, registered at Police Station, Naurang, District Lakki Marwat, whereby he has been convicted under section 302(b) PPC and sentenced to imprisonment for life as Tazir, on two counts with compensation of Rs.30,00,000/- (rupees thirty lacs) payable to the legal heirs of deceased Khalid Khan and Yasmina Khalid, in terms of section 544-A, Cr.P.C. The sentences awarded to the appellant were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. was extended to him.

2. The prosecution story as disclosed in the F.I.R (Ex:PA) registered on the basis of murasila Ex.: PW-13/1, is that on 19.7.2014

at 08:10 a.m. complainant Yasmina Khalid, in injured condition, made report in Emergency Room of Civil Hospital, Naurang, to the effect that on the eventful day, she alongwith her husband Khalid Khan went out of their house in order to meet their cousins, her husband was following her at a distance of some paces, meanwhile, at about 07:12 hours, accused Noor Zaman son of Akbar Zaman, duly armed with pistol, came there and started firing upon them with the intention to commit their *qatl-e-amd*, resultantly, both of them were hit and fell down; that her husband Khalid Khan succumbed to the injuries on the spot. After the occurrence, the accused decamped from the spot. Motive for the offence was stated to be a dispute over use of pathway.

3. The report of deceased, then injured Mst. Yasmina Khalid was reduced into writing in shape of murasila (Ex: PW 13/1) by Sahar Gul Assistant Sub Inspector (PW-13). He also prepared injury sheets and inquest report of deceased Khalid Khan, Ex: PW 13/2 to Ex: PW 13/4, respectively and murasila was sent by him through constable Bashir Khan No.189 for registration of case to the police station while deceased Khalid Khan and deceased, then injured Yasmina Khalid were sent to the doctor under the escort of constable Hamidullah No.6507 alongwith the relevant documents.

4. It is pertinent to mention here that Mst. Yasmina Khalid (widow of Khalid Khan), was referred to Civil Hospital Bannu, for medical treatment, where she succumbed to her injuries on 27.7.2014, hence, Section 324 P.P.C was deleted and section 302 P.P.C was inserted. Her inquest report was prepared by PW-10, Naizam Khan ASI, whereafter, her dead-body was sent under the escort of constable

Siraj-ud-din to the Civil Hospital, Naurang for postmortem examination, as reflected from Daily Diary No. 24.

5. After completion of investigation by Mr. Sahib Khan SI investigation (PW-13), complete challan was submitted before the trial Court against the accused where he was charge-sheeted for the offence to which he pleaded not guilty and claimed trial. In order to substantiate the charge against the accused, prosecution examined as many as thirteen witnesses, whereafter, statement of accused was recorded under section 342 Cr.P.C, where the accused professed his innocence and false implication in the case, however, neither he wished to be examined on oath in terms of section 340(2) Cr.P.C, nor opted to produce evidence in his defence. After hearing arguments, the learned trial Court convicted the accused and sentenced him, as mentioned above, hence, the instant appeal.

7. It is worth mentioning that as per report of the SHO police station Naurang, the complainant Mst. Yasmina Khalid passed away and her family members had shifted to unknown abode, as such, her legal heirs could not be traced out. In such view of the matter, this Court heard arguments of the learned counsel for the appellant and the learned Additional Advocate General, at length, and perused the record with their valuable assistance.

8. It was the bloodiest day, when both the unfortunate husband and wife were done to death, without knowing their fault. After receiving firearm injuries, the husband Khalid Khan died on the spot, whereas the complainant Mst. Yasmina Khalid was rushed to the hospital in serious condition, where she reported the matter to one

Sahar Gul ASI (PW-13), which led to a charge against the appellant. The motive was stated to be a dispute over a thoroughfare; besides the complainant, none else saw the incident. Though the appellant has been convicted by the learned trial Court after appreciating the evidence, but we have to scrutinize as to whether the learned trial Court, while convicting the appellant, has applied its judicial mind to the facts and circumstances of the case, it is yet to be seen as to whether the complainant while making the report was oriented in time and space and was capable to talk, as the only evidence against the appellant is the dying declaration of the complainant, so need is there to see as to whether it gets corroboration from the independent sources or otherwise.

9. The injured was taken to the hospital by one Abdus Samad Khan, who was the owner of the house where the unfortunate husband and wife were residing. After arrival of the injured and dead-body to the hospital, the scribe namely Sahar Gul Khan ASI (PW-13), also attracted. After the report was made, he prepared the injury sheet of the complainant and also the injury sheet and inquest report of the deceased. After the requisite formalities, the injured was sent to the doctor under the escort of PW Hamidullah, for her medical examination, who was examined by the doctor and her medico-legal report was prepared.

10. The scribe was examined as PW-13, who stated that on his arrival to the hospital it was 08:10 a.m. when the complainant reported the matter and thereafter, he prepared the injury sheets and inquest report, after the needful was done the injured was sent to the

doctor for her medical examination. The complainant was examined by Dr. Azad Khan (PW-7), who stated that it was at 08:00 a.m. when the injured Mst. Yasmina Khalid was produced before him for her medical examination, he examined the injuries of the injured and prepared her medico-legal report. He further stated that at the time of examination, apart from him and his paramedical staff, none else was present. In order to ascertain the time of arrival given by both the doctor and the scribe, it is essential to read the statement of PW-8 Hamidullah FC, who accompanied the scribe to the hospital, he stated that it was 08:20 a.m. that he alongwith PW-13, reached to the hospital and the complainant reported the matter at 08:20 a.m. and at the same time the injury sheets and inquest report were prepared and under his escort the injured was shifted to the doctor for her medical examination. All the three witnesses remained inconsistent with the time of arrival of the complainant to the hospital and her medical examination. We are surprised, if the doctor examined the lady at 8:00 a.m. the time when the report was not yet made, then how he endorsed the injury sheet which was prepared at 08:20 a.m. and the report was made at 08:10 a.m. Again, it is astonishing that the doctor did not mention as to whether the complainant was fully conscious, capable to talk and oriented in time and space, so much so, her blood pressure and pulse rate was not recorded. The doctor was examined as PW-7, who stated that at the time of her examination the complainant was in critical condition. He further stated that besides other major organs of the body, her lungs were injured and according to medical jurisprudence, when the lungs get injured, it turns hard to breath. The

doctor went on to say that neither he issued a certificate regarding her capability to talk nor he gave his opinion, so much so the doctor did not endorse the *murasila*.

In case titled *Khyber Khan Vs. Shahid Zaman and another (2019 P.Cr.L.J. Peshawar 979)*, it was held that:-

“For believing a dying declaration, inter alia, one of the essential ingredient is that the prosecution shall establish through cogent evidence that the dying man was in full senses, conscious and alert to the surroundings, was fully oriented in space and time and was able to make a coherent statement and the doctor present at the occasion shall give a fitness certificate about the condition of a dying man, but such is not the case herein”.

11. The scribe was examined as PW-13, who stated that the complainant reported the matter, whereafter, he prepared injury sheet. We cannot ignore this aspect of the case that when the report was made in the hospital and the doctor was available what prevented PW-13 to request the doctor for a fitness certificate to ascertain as to whether the injured was capable to talk or not. PW-13 did not take the pains to call for the doctor so that the report of the complainant could be taken in his presence and even after the report was made no endorsement of the doctor was requested on the *murasila*. The conduct of PW-13 is not above board and also that of the doctor who examined the injured, as admittedly, the report was made at 08:10 a.m. and the injured alongwith injury sheet was produced to the doctor, then how the doctor examined the injured at 08:00 a.m. and how he endorsed the injury sheet when it was not yet prepared. The cumulative effect of what is stated above, leads us nowhere but to hold that the injured was brought to the hospital by the co-villagers


and the initial investigation was conducted prior to the report and it was on arrival of some interested persons that the matter was shown reported by the complainant and the appellant was charged.

12. Admittedly, the complainant alongwith her deceased husband were residing in the house of one Abdus Samad, as the deceased had migrated from Waziristan and Abdus Samad was the first person who attracted to the spot soon after the incident and took the then injured/complainant to the hospital in a Rickshaw. He was examined as PW-7, who stated that while enroute to the hospital, the injured did not talk to him, but this witness maintained calmness and kept mum of what next happened in the hospital, however, he stated that it was his brother Abdul Qayum, who told him that the lady reported the matter in his presence, but what surprises us, is, that neither the said Abdul Qayum was cited as a prosecution witness, nor the Investigating Officer recorded his statement in this respect. Had Abdul Qayum been present, he would have signed/verified the report as a rider, but he did not.

13. The issue in hand to resolve is, as to whether the seat of injuries could allow the injured to retain her senses, so much so, to report the matter. The doctor categorically stated that the patient was in a critical condition with her major organs injured including lungs. The complainant being in critical condition was referred to Civil Hospital, Bannu for further management and it was on the next day i.e. 27.7.2014, that the complainant breathed her last. Dr. Zeenat Jamal conducted autopsy on the body of the deceased, where she explained that most of the major organs of the body were

damaged/injured. She was examined as PW-9, the relevant portion of her cross-examination is reproduced as: ***“According to my examination with other organs the left lung, pericardium, heart and main blood vessels were injured.”***, While applying our judicial mind to what the doctor stated we can form no other opinion but to hold that the complainant was not capable to talk and was unable to report.

The apex Court in case titled **“Tahir Khan Versus the State” (2011 SCMR 646)** held that:-



“It is thus absolutely clear from the principles laid-down by this court that dying declaration is a weaker type of evidence which needs corroboration and that conviction can be based on the basis of such a declaration when fully corroborated by the other reliable evidence. Thus the facts and circumstances of each case have to be kept in view and also the credibility, reliability and acceptability of such a declaration, by the Court. ”

14. The Investigating Officer visited the spot and recovered blood-stained earth alongwith four empties of 30 bore pistol and on the pointation of Abdus Samad PW-5, the site-plan was prepared. Though the recoveries were effected on 19.7.2014, but received to the Forensic Sciences Laboratory on two different dates, the blood stained earth alongwith garments of the deceased were received on 24.7.2014, whereas the empties on 06.8.2014. The Investigating Officer was examined on this particular aspect of the case, but he could not explain that why the empties were received much later than the garments and even he could not explain that where and in whose custody these empties were lying. He expressed his inability to

confirm the same. It was the duty of Investigating Officer to record the statement of the Moharrir of the concerned Police Station and to place on record a copy from Register No.19, but neither the Moharrir was examined to confirm the safe custody, nor an abstract from the said register was collected and placed on the file. The Investigating Officer did not take the pains to examine the person, who took these empties to the Forensic Sciences Laboratory. When such is the state of affairs, the FSL report in respect of the empties gains no ground and it cannot be taken against the accused.

15. The motive was stated to be a dispute over the thoroughfare, but admittedly the complainant and her husband were not the residents of the village where the unfortunate incident occurred, rather they had migrated from Waziristan and were temporarily residing in the house, whereas the appellant is the permanent resident of the village. The Investigating Officer did not probe into the matter and he did not record the statement of any independent witness to confirm the dispute, so much so, the owner of the house who was examined as PW-5, did not utter a single word in this regard. We know that prosecution is not bound to setup motive in every case but once it is alleged and not proved, then ocular account is required to be scrutinized with great caution. It has been held in the case titled "Hakim Ali Vs. The State" (1971 SCMR-432), that the prosecution though not called upon to establish motive in every case, yet once it has setup a motive and failed to establish, the prosecution must suffer consequences and not the defence. The above view has been reiterated in the case of "Amin Ullah Vs. The State" (PLD 1976

S.C. 629), wherein it has been observed by their lordships that, "motive is an important constituent and if found by the Court to be untrue, the Court should be on guard to accept the prosecution story".

16. The learned counsel for the appellant vehemently argued that the appellant remained absconder for sufficient long time, but mere absconcion of accused is not conclusive proof of guilt of an accused person; it is only a suspicious circumstance against an accused that he was found guilty of the offence. However, suspicions after all are suspicions, the same cannot take the place of proof, the value of absconcion, therefore, depends on the facts of each case. In case titled "Liaqat Hussain and others Vs Falak Sher and others" (2003 SCMR 611(a), it has been held:-

"(a) Eye-witnesses including the complainant had failed to furnish a plausible and acceptable explanation for being present on the scene of occurrence and were chance witnesses---Prosecution case did not inspire confidence and fell for short of sounding probable to a man of reasonable prudence---Abscondence of accused in such circumstances could not offer any useful corroboration to the case of prosecution"


17. After thoroughly evaluating the evidence available on file, this Court reaches to an inescapable conclusion that the prosecution has miserably failed to prove its case against appellant. Resultantly, this appeal is allowed, the conviction and sentence of the appellant recorded by the learned trial Court is set-aside and he is acquitted of the charge by extending him the benefit of doubt, he shall

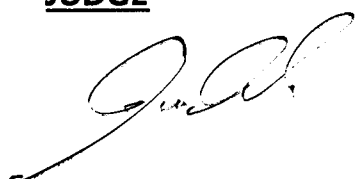
be released forth with from jail, if not required to be detained in connection with any other case.


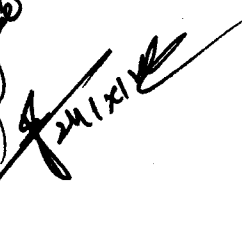
18. Above are the reasons of our short order of the even date.

Announced.
Dt: 13.10.2020

Azam/P.S


JUDGE


JUDGE

(D.B)

Hon'ble Ms. Justice Musarrat Hilali and
Hon'ble Mr. Justice Sahibzada Asadullah

SCANNED

24 OCT 2020

Khalid Khan