

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.A No.356-M/2019

Bakht Anwar and two others.

(Appellants)

Versus

Naik Muhammad and another.

(Respondents)

Present: Mr. Jalal-ud-Din Akbar Azam Khan Gara, Advocate for
the Appellants.
Mr. Haq Nawaz Khan, A.A.G for the State.
Mr. Badi-uz-Zaman, Advocate for the Respondent/
Complainant.

Date of hearing: **20.05.2021**

Date of Announcement: **03.06.2021**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Through this criminal appeal, the appellants have called in question judgment dated 10.08.2019 rendered by the learned Additional Sessions Judge/Model Criminal Trial Court, *Buner*, in case F.I.R No.19 dated 17.01.2014 registered under sections 302/449/34 P.P.C and section 15 of the Khyber Pakhtunkhwa Arms Act, 2013 at Police Station *Gulbandi*, District *Buner*, whereby each appellant was convicted and sentenced;

1. u/s 302 (b) P.P.C to undergo life imprisonment, with directions to pay Rs.800,000/- each as compensation to the legal heirs of the deceased within the meaning of section 544-A Cr.P.C or in

default each appellant shall undergo six months S.I.

2. u/s 449/34 P.P.C to undergo ten (10) years R.I, with a fine of Rs.50,000/- each.

Appellant Bakht Anwar was also convicted u/s 15 of the Act and sentenced to undergo five (05) years R.I, with a fine of Rs.20,000/- or in default to undergo one month S.I.

Substantive sentences of all the appellants were ordered to run concurrently with benefit of section 382-B Cr.P.C.

2. The complainant-party has also preferred connected Cr.R No.70-M/2019 titled 'Naik Muhammad Vs. Bakht Anwar and 03 others' against the same impugned judgment of the learned trial Court seeking enhancement of the above sentence of the appellants, therefore, we would decide both these matters through this single judgment.

3. On 17.01.2014 at 20:00 hours, complainant Naik Muhammad (PW-12) at his house reported the matter before the police in presence of dead body of his daughter Mst. Zakia to the effect that on the eventful day, he went to mosque for *maghrib* prayer. On hearing noise, returned home and saw that his daughter Mst. Zakia was lying dead being murdered while his wife

Mst. Shahmina was lying in injured condition. Injured Mst. Shamina was shifted to the hospital. The complainant was informed by inmates of the house that the appellants entered his house and fired at his wife and daughter, as a result of which, his daughter Mst. Zakia died on spot while his wife Mst. Shahmina sustained injuries. Motive behind the occurrence was stated that deceased Mst. Zakia was engaged to appellant Bakht Anwar in childhood and in exchange thereof, one Mst. Khairon d/o Nasib Zaman was engaged to Noor Muhammad (son of complainant) but due to strained relations between the parties, both the engagements were broken. Womenfolk of the house were cited as eyewitnesses to the occurrence. This report of the complainant (PW-12) was reduced into writing in shape of *murasila* (Ex.PW3/1) by Muhammad Ali Inspector (PW-3). On receipt of *murasila* at Police Station, its contents were incorporated into F.I.R (Ex.PW4/1) by Fazal Rahim Inspector (PW-4).

4. Injury sheet (Ex.PW3/2) and inquest report (Ex.PW3/3) of deceased Mst. Zakia were prepared by PW-3 and thereafter same alongwith dead body were sent to Hospital for medical examination. On same day, injured Mst. Shamina also succumbed to injuries and

accordingly section 324 P.P.C was deleted from record of the case. Injury sheet (Ex.PW10/1) and inquest report (Ex.PW10/2) deceased then injured Shamina were prepared by Wakil Zada Khan (PW-10). The dead bodies of both the deceased were examined by lady Dr. Shah Bano (PW-2) at District Headquarter Hospital *Daggar*, Buner vide medico-legal reports Ex.PW2/1 & Ex.PW2/2. Investigating Officer prepared site plan Ex.PB on pointation of the complainant and eyewitnesses. During spot inspection, blood stained earth etc were taken into possession from place of deceased Mst. Zakia through recovery memo Ex.PW7/1. Blood stained earth etc from place of deceased Mst. Shamina were also taken into possession through recovery memo Ex.PW7/2. Vide recovery memo Ex.PW7/3, eight empties of 7.62 bore (Ex.P5) from place of presence of appellant Bakht Anwar, five empties of 7.62 bore (Ex.P6) from place of presence of appellant Bakht Amin and five empties of 7.62 bore (Ex.P7) from place of presence of appellant Muhammad Anwar were also taken into possession.

The appellants were initially absconding, therefore *challan* for proceedings u/s 512 Cr.P.C was submitted against them and on completion of proceedings in their absentia, they were declared

proclaimed offenders and perpetual warrant of arrest was issued against them by the then learned trial Court vide order dated 05.05.2014.

On 14.12.2016, appellant Muhammad Anwar was arrested by Riaz Khan SHO (PW-6) vide his card of arrest Ex.PW6/1. During interrogation, he pointed out the place of occurrence to the I.O vide pointation memo Ex.PW15/1. On completion of his investigation, supplementary *challan* was submitted against him. On 31.03.2017, he was charge sheeted. In the meanwhile, on 18.04.2017, appellant Bakht Anwar was also arrested in Karachi u/s 54 Cr.P.C and accordingly he was transferred to District *Buner* in this case. During interrogation, he allegedly led the I.O to the crime scene vide pointation memo Ex.PW11/1. Crime weapon was also recovered on his pointation in presence of marginal witnesses from his house vide recovery memo Ex.PW11/2. On completion of his investigation, supplementary *challan* against him was submitted before the learned trial Court. On 21.06.2017, a joint formal charge was framed against both the arrested appellants namely Muhammad Anwar and Bakht Anwar. However, during their trial, on 23.02.2018, appellant Bakht Amin was also arrested in Karachi u/s 54 Cr.P.C and


accordingly, he was also transferred to District *Buner* in this case. During his interrogation, he pointed out the place of incident to I.O vide pointation memo Ex.PW16/4 while pictures of pointation proceedings are Ex.PW16/5. Crime weapon was also recovered on his pointation vide recovery memo Ex.PW16/5. Site sketch of said recovery is Ex.PW16/6. Section 15 of the Act was inserted in the case through memo Ex.PW16/7. On completion of his investigation, supplementary *challan* was submitted against him. On 31.07.2019, all the three appellants were jointly charge sheeted, to which, they pleaded not guilty and claimed trial.

In order to substantiate its case against the present appellants/convicts, the prosecution produced and examined as many as 18 witnesses. Lal Said Shah Khan S.I who has conducted investigation prior to the arrest of the appellants was reported dead. In this regard, statement of the concerned D.F.C as CW-1 is placed on file. On acceptance of the request of the prosecution, earlier statement of said dead PW Lal Said Shah Khan S.I recorded during proceedings u/s 512 Cr.P.C was transposed in the trial against the appellants. Then statements of the appellants were recorded u/s 342, Cr.P.C, wherein they denied the prosecution allegations,

however they neither wished to be examined on oath nor desired to produce evidence in defence.

5. On conclusion of the trial, the appellants were convicted and sentenced by the learned trial Court as stated above vide its judgment dated 10.08.2019, hence, this criminal appeal and the connected criminal revision petition.

6. Arguments heard and record of the case perused with the valuable assistance of learned counsel for the parties and learned Assistant A.G representing the State.



7. It is case of the prosecution against the appellants that on 17.01.2014 at 17:30 hours, they entered the house of complainant and committed murders of his daughter Mst. Zakia and wife Mst. Shamina through firing. Breaking of engagements of appellant Bakht Anwar with deceased Mst. Zakia and of one Mst. Khairon with Noor Muhammad (son of complainant) due to strained relations between the parties was disclosed as motive behind the occurrence. In support of its allegations against the appellants, the prosecution mainly relies upon ocular account furnished by the eyewitnesses namely Mst. Khaman Bibi and Said

Khan. They have been examined during trial before the learned trial Court as PW-13 & PW-14, respectively. Mst. Khaman Bibi (PW-13) is a rustic/uneducated female while Said Khan (PW-14) is a farmer by profession. The complainant has also been examined as PW-12 before the learned trial Court. From critical analysis of their statements, it appears that their testimonies are trustworthy, confidence inspiring and unimpeachable, as on all the materials points they have remained consistent. Their testimonies are also fully in line with the initial prosecution version as well as the site plan. Needless to note here that the occurrence had taken place on 17.01.2014 whereas all the three prime prosecution witnesses have been examined by the prosecution, after a considerable time on 25.06.2019, before the learned trial Court, despite that they are in conformity with each other qua time and place of occurrence beside being unanimous regarding all other events having relevancy with the incident, for instance in the initial report as well as in his statement before the Court, the complainant (PW-12) asserts that at the relevant time, he went to the mosque for *maghrib* prayer but on hearing noise returned home. This assertion has been confirmed by both the eyewitnesses (PW-13 & PW-14) in their respective statements. The complainant

(PW-12) is also unanimous with the eyewitnesses (PW-13 & PW-14) on certain other crucial points of the matter, such as the approximate distance between their house and mosque where the complainant has gone for *maghrib* prayer before the incident and time of arrival of complainant to the house. In view of simple-minded nature of the PWs even not knowing the consequences of some answers by them, the eyewitnesses (PW-13 & PW-14) have given confirmatory answers to the questions put to them by defence in a perplexing manner as the female eyewitness (PW-13) states to have not made any consultation before lodging the report. This fact has also been confirmed by PW-3, the scribe of the report (Ex.PW3/1) by stating that before approaching the house of the complainant, he did not get any detail about the occurrence from any other person on way. Despite of confronting these eyewitnesses, during their cross examination by the defence in a very confusing manner, their testimonies could not be shattered by the defence that the occurrence has not taken place in the alleged mode and manner as they have successfully explained that the incident has taken place inside the house of the complainant. Both these eyewitnesses are the residents of the spot house as PW-13 is daughter-in-law of the complainant while PW-14 is son of the complainant,

therefore, in absence of their any disintegration in their testimonies to doubt their presence on the spot at the relevant time, their presence was natural on the spot at the relevant time. The entire testimony of these eyewitnesses of the incident could not be shattered by the defence besides upon careful scanning of the prosecution evidence, there could not be noticed even a single occasion on the entire record to render their presence on spot at the relevant time doubtful. Though there are certain minor contradictions in the statements of the PWs but same, in our considered view, would not go to the roots of the case to shake the truthfulness of the witnesses and thus same are excluded from consideration in the peculiar circumstances of the case. Moreso, there is nothing on record which would transpire that the PWs had any motive to falsely implicate the accused in the case, therefore, their established natural presence on the spot at the relevant time could not be brushed aside on the ground of their mere close relationship with the deceased. In this respect, reliance may also be placed on judgment in the case of "Zafar Iqbal and others V/s. The State" reported as **2014 SCMR 1227** wherein it was held by the august Supreme Court of Pakistan that:

"Mere relationship of prosecution witnesses with deceased cannot render their evidence

unreliable unless it is established that they had motive to implicate accused falsely”.

8. Time of incident in the report has been shown as 17:30 hours (*sham vela*) by the complainant (PW-12). It has also been confirmed by PWs that at the time of occurrence, the complainant (PW-12) has left the house for *maghrib* prayer. Sunset time during relevant days at District *Buner* was about 05:24 pm. No doubt, the report has been lodged by the complainant at 20:00 hours in his house, however, the place where the occurrence has taken place is a hilly area as admittedly a considerable distance has been covered by the police through walk while approaching the place of incident for lodging the report, after receipt of the information. Record shows distance between the spot and police station is 12/13 kms. It is not clear from the available record that how much distance was covered through vehicle and how much through walk by the police who at the time of receipt of information was on patrolling duty. In absence of any question regarding the said distance, a strong presumption would always exist that distance of place where the police has received information qua the incident would be more than the distance of the police station and the spot shown in the F.I.R by the prosecution. It is also on record that soon after the

occurrence, deceased then injured Mst. Shamina was shifted to the hospital and as she was being shifted in injured condition, therefore, the persons shifting her would have made immediate arrangements for her shifting to hospital without wasting any time. She has been mentioned as injured in the initial report by the complainant and has succumbed on the way to the hospital. On same day at 09:10 hours, her dead body was examined by the doctor (PW-2). So, it appears that shifting of deceased then injured Mst. Shamina from the mountainous area to the hospital would have taken sufficient time. The I.O (PW-16) also affirmed that house of the complainant is situated in a hilly area. Therefore, keeping in mind the spot being located in difficult hilly area and its *inter se* distance from place of presence of the police where they received information, the arrival of police to the spot and recording report of the complainant at 20:00 hours qua the incident, would be considered as a promptly lodged report without any undue delay, excluding the probabilities of deliberation and consultation of false implication of the accused as well as substitution of real culprit in light of the established presence of the eyewitnesses on the spot at the relevant time. The time of occurrence has also been corroborated by the medical evidence furnished by the

prosecution through lady doctor (PW-2). The medical evidence also confirms that death of both the deceased was as a result of sustaining firearm injuries by them. Hence, the medical evidence is also in line with the prosecution version.

9. Breaking of engagements of appellant Bakht Anwar with deceased Mst. Zakia and of one Mst. Khairon with Noor Muhammad (son of complainant) due to subsequent strained relations between the parties was alleged as a motive behind the occurrence. Same is duly mentioned in the initial report by the complainant. It has also been confirmed by relevant PWs in their statements before the Court. This motive has also been admitted by appellant Bakht Anwar in his statement recorded u/s 342 Cr.P.C. However, the defence has failed to elicit desirable answers from mouths of the PWs qua certain questions put to them to falsify the alleged motive. The motive was directly related to appellant Bakht Anwar and same has also been proved by the prosecution through confidence inspiring evidence.

10. The crime weapon (Kalashnikov) was also recovered on pointation of the appellant Bakht Anwar from his house vide pointation/recovery memo Ex.PW11/2. Site sketch of said recovery is Ex.PW15/6.

With regard to the recovery of this crime weapon, the testimonies of the F.C Ajmal Said (PW-11) and Hashim Ali Khan ASI (PW-15) could not be shattered by the defence during their cross examination. The matching report (Ex.PW15/10) of F.S.L regarding the crime Kalashnikov and crime empties, which were taken into possession from place of appellant Bakht Anwar, is also supporting the prosecution version against appellant Bakht Anwar. He has also absconded for sufficient long period and during period of his abscondence, all proceedings requiring to be carried out against a fugitive, were completed in his absentia and even he was declared as proclaimed offender. In peculiar facts & circumstances of the case, it cannot be said that he was not having knowledge of his nomination as accused in present case. As he has failed to plausibly explain his abscondence, therefore, same is to be used against him as a corroboratory piece of evidence. In this regard, reliance is placed on the case of 'Oaiser Khan and other Vs. The State and others' (2009 SCMR 471), wherein the august Supreme Court of Pakistan has held that;

“Long abscondence of accused without any plausible and reasonable explanation indicates his guilt, when considered in conjunction with the ocular and circumstantial evidence.”

11. Adverting to the case of rest of the two appellants/convicts namely Bakht Amin and Muhammad Amin. Record shows that the motive is not directly related to them. Though, they have been assigned the role of firing at the deceased, however, report of the F.S.L (Ex.PW16/9) regarding the crime weapon recovered on pointation of appellant Bakht Amin with crime empties allegedly taken into possession during spot inspection from the place of his presence is in negative, whereas no recovery of incriminating article has been effected either from possession or on pointation of appellant Muhammad Anwar during the course of investigation. It is a cardinal principle of criminal justice that a person who is sought to be held liable for doing a criminal act with a specific role, his role in that particular manner must be established on record by the prosecution through confidence inspiring evidence, which is missing in this case to the extent of appellants Bakht Amin and Bakht Anwar. Even in this case, nothing has been brought on record by the prosecution, which could at least, deduce preconcert of both the appellants in the commission of offence showing their criminal intent, which is prime requirement of section 34 P.P.C. The existence of above facts on the record would clearly create reasonable doubts in a prudent mind regarding

their participation in the crime. In peculiar circumstances of the case, it would not be out of place to note here that appellants Bakht Amin and Bakht Anwar are brothers inter-se. According to their statements recorded u/s 342 Cr.P.C, Bakht Amin is about 11/12 years elders than Bakht Anwar. We see no convincing reason in the entire prosecution evidence that how it is possible for an elder brother to join hands with his younger brother in such a crime. Even otherwise, in light of the above evidence the commission of crime would be the doing of one person and to that effect that prosecution has successfully discharged its burden of proving the offence against appellant Bakht Anwar. It is noteworthy to highlight here that these factors in the case favouring appellants Bakht Amin and Muhammad Anwar would create no suspicion in establishing the presence of the eyewitnesses on the spot at the relevant time, however, same would only show a reasonable possibility in our mind that participation of appellants Bakht Amin and Muhammad Anwar has not been proved by the prosecution to the hilt, as such, for safe administration of justice they are entitled to benefit of said doubt. At times, Court extends benefit of doubt to some of accused as abundant caution that will not signify that the witnesses were not credible. Hence, we hold that the learned trial Court has not



properly evaluated the prosecution evidence to the extent of appellants Bakht Amin and Bakht Anwar while awarding them the impugned punishment.

12. By evaluating the facts and circumstances of the case, we hold that to the extent of appellant Bakht Anwar the learned trial Court has rightly awarded him life imprisonment but in the impugned judgment the learned trial Court has inadvertently not mentioned two counts, otherwise it was held that charge of murder of two deceased Mst. Zakia and Mst. Shamina has been proved against appellant Bakht Anwar.

13. For what has been discussed above, this appeal is dismissed to the extent of appellant-convict Bakht Anwar and impugned conviction & sentences awarded to him by the learned Additional Sessions Judge/MCTC, District *Buner*, through judgment dated 10.08.2019 in case F.I.R No.19 dated 17.01.2014 registered under sections 302/449/34 P.P.C and section 15 of the Khyber Pakhtunkhwa Arms Act, 2013, at Police Station *Gulbandi*, District *Buner*, are maintained. Since, two persons have died as a result of firing of appellant Bakht Anwar, therefore, it is clarified that u/s 302 (b) P.P.C, appellant Bakht Anwar shall undergo life imprisonment on two counts, with direction to him to pay Rs.800,000/- as compensation to the legal heirs of each deceased

within the meaning of section 544-A Cr.P.C or in default to undergo 06 months S.I each. It is further clarified that in default of sentence of payment of fine awarded u/s 449 P.P.C to appellant Bakht Anwar, he shall undergo 02 months S.I. All his substantive sentences shall run concurrently with benefit of section 382-B Cr.P.C, whereas this appeal to the extent of appellants-convicts Bakht Amin Muhammad Anwar is allowed by extending them benefit of doubt. Resultantly, *ibid* impugned judgment to the extent of appellants-convicts Bakht Amin and Muhammad Anwar is set aside and they are acquitted of the charges. Appellants Bakht Amin and Muhammad Anwar be released forthwith from jail if not required in any other case.

14. Consequently, the connected Cr.R No.70-M/2019 owing to the above reasons is meritless, which is accordingly dismissed.

15. These are the reasons of our short order of the even date.

Announced.
Dt: 03.06.2021


JUDGE


JUDGE

Office
15/7/2021
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