JUDGMENT SHEET

PESHAWAR HIGH COURT, BANNU BENCH

(Judicial Department)

Cr.A. No.323-B of 2019 with
Murder Reference No.07-B of 2019

Rifaqatullah
Vs.
The State etc.

JUDGMENT

Date of hearing: **25.02.2020.**

For Appellants: **Mr. Anwar-ul-Haq Advocate.**

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

For Respondents:. **Mr. Abdul Jabbar Khan Khattak Advocate.**

SAHIBZADA ASADULLAH, J.- Rafaqatullah, the appellant has called in question the judgment dated 24.10.2019, of learned Additional Sessions Judge-II, Karak, whereby appellant involved in case F.I.R No. 198 dated 20.4.2018, registered at Police Station Latamber, District Karak, has been convicted under section 302(b) P.P.C and sentenced to death as Taazir, with compensation Rs.200000/- to the legal heirs of deceased under section 544 Cr.P.C or in default thereof to further undergo six months SI. Murder Reference No.7-B/2019 has also been sent by the learned trial Court for its confirmation, hence this judgment shall decide both the criminal appeal and murder reference.

2. Brief facts of the case, as spelt out from the F.I.R, are that on 20.4.2018, at 1815 hours, Umar Fayaz, in injured

condition, at Emergency Room of K.D.A Hospital, Karak reported the matter to Habibullah HC,(PW-1) to the effect that he was busy in laboring through wheel barrow in cattle fair Ahmad Abad, at about 07.00 hours, accused Rafaqatullah, duly armed with firearm, arrived and on seeing him started firing at him, as a result of which he was hit and sustained injuries and fell down. The occurrence was witnessed by the persons present there. The report of complainant was reduced in shape of *Murasila* Ex:PA, and sent to the Police Station through constable Raufullah No. 854,(PW-2), where Mumtaz Khan SI culminated the contents of *Murasila* into F.I.R Ex:PA/1. After preparing the injury sheet Ex:PW 1/1, the injured complainant was sent to the doctor under the escort of Noor Islam No.374. Later on, the injured complainant succumbed to his injuries and section of law 324 P.P.C was altered with section 302 P.P.C. After completion of investigation complete challan under section 512 Cr.P.C was submitted before the learned trial Court 01.05.2018. The accused was arrested on 15.07.2018. The prosecution after completion of investigation submitted supplementary challan against the accused/ appellant on 02.09.2018.

3. On commencement of trial, the learned trial Court summoned the accused from jail, who was produced in custody. The learned trial Court after complying with the provision of section 265-C Cr.P.C, framed the charge against the appellant, to which he pleaded not guilty and claimed trial. The prosecution in

order to prove its case, produced and examined (10) PWs in support of its case, whereafter, statement of accused/ appellant was recorded under section 342 Cr.P.C, wherein he professed his innocence, however, neither he wished to be examined under section 340(2) Cr.P.C., nor produced evidence in his defence. The learned trial Court after hearing arguments of learned counsels for the parties vide impugned judgment dated 24.10.2019, convicted and sentenced the appellant as mentioned above. The accused/ appellant challenged the impugned judgment through instant criminal appeal, while the Murder Reference No.7 -B/2019 has also been sent by the learned trial Court for its confirmation.

4. Arguments of learned counsels for the parties heard and the records perused with their valuable assistance.

5. The unfortunate incident occurred in the cattle fair of village Ahmad Abad, where the complainant was selling vegetable in his handcart, it was at about 07.00 a.m, when he was fired at by the accused, fell down on the ground and was rushed to the K.D.A hospital Karak, where in the Emergency room his report was taken down, wherein he stated that at the time of occurrence he was busy in selling vegetable in the cattle fair (Mela Muwashian) Ahmad Abad, when the accused/ appellant fired at him and he fell down. No motive was given for the offence. The prosecution story is based on the dying declaration of the complainant, whereafter, his brother namely Muhammad

Riaz introduced himself as an eyewitness. The learned trial Court relied upon the report of the deceased then injured and PW-10, Muhammad Riaz, brother of the deceased and awarded death sentence to the appellant. In order to reach a just conclusion this Court is burdened with heavy duty to consider and reconsider the available circumstances of the case and the status of the sole eye-witness, who happens to be the brother of the deceased. Muhammad Riaz was examined as PW-10, who stated that by profession he was a labourer and also worked in Punjab. He further stated that on the eventful day he was present in his village and it was 06.30 a.m that he left his house for the cattle fair to purchase household articles and was busy in the nearby shops, when the accused Rafaqatullah came and started firing at his brother. He further stated that after receiving the fire shot the deceased then injured fell to the ground and the appellant decamped from the spot. He went on to say that he asked the nearby people to arrange a vehicle for transportation of the injured to the hospital and that in the meanwhile his uncle Mir Sardar also reached to the spot, who took the injured in a Datsun pickup to the hospital accompanied by other co-villagers and that he was asked to stay on the spot. The prosecution case hinges on the testimony of this witness and that was what prevailed with the learned trial Court. The learned trial Court could not appreciate the status of this witness and his presence on the spot, the way it should have been. This Court is to see as to whether

the occurrence happened in the manner as it was presented and that whether the complainant was in fact present on the spot. This is on record that soon after arrival of the injured to the hospital his report was taken down by PW-01, Habibullah HC and if this is presumed that the complainant was well oriented in time and space then despite mentioning other people as witnesses of the occurrence the complainant would have straightaway named his brother Muhammad Riaz as the eye-witness but he was not named so. Had he been present there he would have been named in the report by the complainant and he would have signed the F.I.R as a rider. This is again surprising that when the complainant received firearm injuries, why PW-10 being present on the spot did not accompany his injured brother to the hospital to save his life. This witness was put to lengthy and searching cross-examination which he could not resist and when a question was put to him that why he did not accompany his injured brother to the hospital, he stated that soon after the occurrence his uncle Mir Sardar reached to the spot and he with the help of other co-villagers put the injured in the vehicle left for the hospital and directed him to stay on the spot till arrival of the Investigating Officer. The distance between the village of the complainant and the cattle fair where the incident occurred, is 2/3 kilometers and the circumstances suggest that PW-10 and other relatives got information in the village, and thereafter, they came to the spot. The presence of PW-10 is further doubtful as

one of the marginal witness, namely, Ahmad Saeed who was examined as PW-7, stated that he alongwith the Investigating Officer reached to the spot at 10.35 a.m. and that no one from the locality including the eye-witness was present there. He further stated that after arrival to the spot the Investigating Officer informed PW-10 to reach to the spot and accordingly he did. The Investigating Officer recovered one empty of .30 bore alongwith blood stained earth from place of the deceased and on pointation of the eye-witness the site-plan was prepared. Despite the fact that Mir Sardar Khan was shown as identifier in the column of identification in the inquest report, but he was not examined as prosecution witness to confirm the presence of PW-10 at the time of occurrence, the mode in which the vehicle was arranged and the deceased then injured was shifted to the hospital. Habibullah HC was examined as PW-01, who scribed the report and he stated that the deceased was accompanied by 4/5 persons, but he did not know them. Had Mir Sardar been present with the injured in the hospital, then he would have introduced himself as uncle of the deceased and would have at least signed the F.I.R as a rider. The Investigating Officer was examined as PW-8, who stated that when he reached to the spot many people were present there but he did not ask any one regarding the occurrence and he did not record the statements of the shop keepers of the surrounding shops. The Investigating Officer took into possession an empty handcart, allegedly used by the complainant

for selling vegetable, but nothing was brought on record to substantiate the stance of the complainant and the eye-witness regarding selling of vegetable on the spot. The eye-witness when examined as PW-10, stated that he had come from his house to purchase household articles and that he was busy in the said purchases when the incident occurred, even this witness could not produce the articles he allegedly purchased from the shops as this was the sole purpose of his presence. The prosecution could not prove presence of the witness on the spot but it was after the incident that PW-10 attracted from the village on getting information regarding the incident. We have no other choice but to hold that the witness was not present on the spot. This PW i.e. PW-10, stated that soon after the occurrence he asked the nearby people to arrange the vehicle for transportation of the injured to the hospital and that these were the people who arranged the vehicle and the injured was placed therein, but the Investigating Officer did not bother to record the statements of the cleaner and driver of the vehicle. If the witness was present on the spot then why he remained on the spot despite the fact that his brother after receipt of the fire shots had not then died and in such eventuality the prime purpose with a brother present on the spot would be nothing but to rush to the hospital and to save the life of his brother. This witness has shown an unnatural conduct and the way he behaved could not impress this Court to stamp him as a truthful witness, rather he can be termed as interested and a

chance witness with the sole purpose to implicate the appellant for commission of the offence, that too to fulfill the wishes of the Investigating Officer.

6. Chance witness, in legal parlance, is one who claims that he was present on the crime spot at the fateful time, albeit his presence there was a sheer chance as in the ordinary course of business, he was not supposed to be present on the spot, but should have been present at the place where he resides, carries on business and runs day to day life affairs. It is in this context that the testimony of chance witness ordinarily, is not accepted unless justiciable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanation appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall within the category of suspected evidence and cannot be accepted without a pinch of salt. In case titled ***Khalid Javed and another vs. The State (2003 SCMR 1419)***, it was observed that evidence of chance witness would be acceptable subject to establishing his presence at the place of incident and in the absence of corroborative evidence to support the version of a chance witness the same had to be excluded from consideration. Reference can also be made to the

cases reported as ***Javed Ahmad alias Jaida vs. The State (1978 SCMR 114), Muhammad Ahmad & another vs. The State & others (1997 SCMR 89), Imran Ashraf & others vs. The State (2001 SCMR 424) and Zafar Hayat vs. The State (1995 SCMR 896)***. In the case titled ***Allah Ditta vs. The State (1999 YLR 1478)***, the Hon'ble Lahore High Court held that chance witnesses cannot be safely relied upon on a capital charge in the absence of satisfactory explanation regarding their presence near the place of occurrence where they were ordinarily expected to be present. In the case of ***Muhammad Akram vs. The State (2008 P.Cr.L.J 993)***, it was observed that chance witness cannot be believed safely if he fails to offer cause of his presence at the spot at a given time.

7. We have no intention of laying down an inflexible rule that the statement of an interested witness can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order to satisfy that no innocent persons are being implicated alongwith the guilty, the Court will in the case of an ordinary interested witness look for some circumstance that gives sufficient support to his statement so as to create that degree of

probability which can be made the basis of conviction. This is what is meant by saying that the statement of an interested witness ordinarily needs corroboration. In this respect, reliance is placed on the case reported as ***Muhammad Ahmed & another Vs. The State & others (1997 SCMR 89).***

8. The injured was statedly brought to the hospital at about 08.15 a.m where the matter was reported to one Habibullah who prepared his injury sheet and sent the deceased then injured under the escort of Noor Aslam constable to the doctor for his medical examination. The scribe was examined as PW-01, who stated that the injured was received conscious and his report was taken down, but his this stance cannot be accepted as correct as he did not observed the legal formalities. Despite the fact that the report was made in the emergency room of hospital, we are surprised that why PW-1 did not feel the need to call for the doctor and to ask for a certificate as to whether the injured was oriented in time and space and to ascertain his capability to talk. PW Habibullah stated that at the time of report the doctor was not present and that it was after the report that the injured was sent to the doctor alongwith injury sheet for his Medico-legal examination. This attitude of the scribe cannot be ignored and this fact has created dents in the prosecution case and it has put a question mark to the capability of the deceased then injured to talk. One Dr. Abdul Samad (PW-04), examined the complainant and prepared his Medico-legal report, who stated that the injured

was conscious and capable to talk and that he had given these observations in the Medico-legal report of the injured. The record is silent as to where from PW-04, confirmed that the injured was conscious, oriented in time and space, when there is nothing on record that either his pulse was noted or blood pressure was checked. This witness was thoroughly cross-examined who stated that soon after bringing the injured before him, he observed the injured in severe shock and without wasting time the patient was referred for onward management to a surgeon, when this witness has admitted that the patient was in the state of severe shock then how it was held that the patient was conscious. No certificate was given by the doctor regarding the condition of the injured and even the report of the injured was not taken down in his presence. There was a willful attempt on part of the prosecution and the doctor to make the case a success. The deceased then injured was shifted to Peshawar for onward treatment as his condition was turning from bad to worse but he succumbed to the injuries and was brought back to the hospital at 19.10 hours and thereafter his post mortem examination was conducted. The post mortem report shows the following:-

WOUNDS

1. One entry wound in the RHC (right hypochondria) 4cm from costal margin and 10cm from midline, laparotomy

wound closed and dressed with bandages. The bullet entry marked and signed.

CRANIUM AND SPINAL CORD..... Normal

THORAX. All the organs found normal

ABDOMEN. Walls, peritoneum, pancreas, small intestine, lever were found damaged.

When this was the condition of the deceased then injured and when the doctor who examined the injured neither attested the report nor issued a certificate, this Court cannot exclude the possibility that the patient was unable to talk and that no report was made by him.

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.*

9. No doubt, dying declaration is an important piece of evidence and that sanctity is attached to the dying declaration, because a dying man is not expected to tell lie, but it is equally true that it is always considered as weak type of evidence being

un-tested by cross-examination, therefore, it puts the Courts on guard and great care is demanded to ascertain that:-

1. *Whether the maker has the physical capacity to make the dying declaration.*
2. *Whether the maker had opportunity to identify the assailant/assailants.*
3. *Whether there was a chance of mis-identification on the part of dying man in identifying and naming the attacker/attackers.*
4. *Whether it was free from prompting from any outside quarter; and*
5. *The witness who heard the deceased making his statement, heard him correctly and whether this evidence can be relied upon.*

10. It is universal principle of criminal justice that dying declaration by itself is not strong evidence being not tested by way of cross- examination. The only reason for accepting the same is the belief phenomenon of the Court of law that a person apprehending death due to injuries, caused to him, is ordinarily not expected to speak a falsehood. To believe or disbelieve a dying declaration thus is left to the ordinary human judgment, however, the Courts always insist upon strong, independent and reliable corroboratory evidence for the sake of safe dispensation of justice. Relying blindly and without proper scrutiny on such statement, would be no less dangerous approach on the part of the Courts of law.

In case titled ***Tahir Khan Vs. The State (2011 SCMR 646)***, it was held that:-

> *Mere dying declaration shrouded by and fraught with so many infirmities is not enough to convict a person.*

In case titled ***Mst. Ghulam Zohra and another Vs. Malik Muhammad Sadiq and another (1997 SCMR 449)***, it has been held that:-

> *"Police Officer had not obtained certificate from the Doctor before recording the statement of the deceased in an injured condition that he was in a fit condition to give the statement, nor he had given a plausible explanation for such omission and fitness of the deceased to make the statement, thus, remained doubtful".*

In this respect, case reported as ***Raza Khan Vs. Razeem (2018 P.Cr.L.J. Peshawar Note 66)*** can also be referred.

11. The motive alleged could not be proved. The motive once alleged, if not established will weigh against the prosecution. In case titled ***"Muhammad Ashraf alias Acchu Vs The State" (2019 SCMR 652 Para-7)***, wherein it has been held:-

> *"7. The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse."*

12. The learned counsel for the appellant vehemently argued that the accused/appellant remained absconder for sufficient long time, but mere absconsion of accused is not conclusive 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 absconion, therefore, depends on the facts of each case. In case titled ***"Liaqat Hussain and others Vs Falak Sher and others" (2003 SCMR 611(a)***, *wherein 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"*

13. Abscondence alone cannot be made the basis for conviction on a capital charge when the other evidence of the prosecution is doubtful. In this respect, cases reported as ***Muhammad Sadiq Vs. State (2017 SCMR 144), Muhammad Salim Vs. Muhammad Azam and another" (2011 SCMR-474) and Rohtas Khan Vs. State (2010 SCMR 566)*** can also be referred. Needless to say that absconsion is a corroborative piece of evidence and in cases where direct evidence fails, corroborative piece of evidence is of no avail, as in the instant case.

14. After thoroughly evaluating the evidence available on file, we feel no hesitation in concluding that the prosecution has miserably failed to prove its case against accused/appellant

beyond any reasonable doubt and the learned trial Court has not appreciated the evidence in its true perspective and fell into error by convicting the accused. 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 forthwith from jail, if not required to be detained in connection with any other case. Murder reference No.07 -B/2019 is answered in negative.

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

Announced:
25.02.2020
Azam/PS

JUDGE

JUDGE

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