

Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr.A.No.1072-P/2023

Sher Zaman Vs. The State etc.

JUDGMENT

Date of hearing ----- 29.05.2024.

Appellant by --- Mr.Muhammad Saeed Khan, Advocate.

State by --- Muhammad Riaz Khan Paindakhel, A.A.G.

Complainant by --- Qazi Intekhab Ahmad, Advocate.

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SAHIBZADA ASADULLAH, J:- This criminal appeal is directed against the judgment dated 14.06.2023 of the learned Additional Session Judge-I, Peshawar delivered in case FIR No.101 dated 26.01.2021 under sections 302/324 PPC of Police Station Chamkani, Peshawar, whereby the appellant has been convicted under section 302 (b) PPC and sentenced to imprisonment for life and to pay Rs.100,000/- as compensation to legal heirs of the deceased within the meaning of Section 544-A Cr.P.C recoverable as arrears of land revenue or in default whereof to undergo simple imprisonment for six months. He has also been convicted under section 324 PPC and sentenced to undergo seven years RI with fine of

Rs.10,000/- or in default thereof to suffer 01 month SI. Both the sentences were directed to run concurrently, while benefit of section 382-B Cr.P.C was extended to the convict.

2. Case of the prosecution, as per *Murasila* (Ex.PW.4/1) followed by FIR, is that on 26.01.2021 Sajjad Khan, ASI (P.W.4) during *Gasht*, after receiving information regarding the occurrence, rushed to the spot, where complainant (Noor Rehman) reported the matter to him to the effect that on the eventful day, he and his father Gul Rahman were going to their fields; that when they reached to the place of occurrence, Sher Zaman s/o Khan Rahman (accused/appellant) came from opposite side, took out the pistol from his trouser-fold (بڈھ شلوار) and suddenly started firing at them with the intention to kill, as a result of which his father got hit and died on the spot, while the complainant escaped unhurt. Motive for the occurrence was stated to be an altercation between the deceased and the accused/ appellant. Consequently, on the report of complainant, a case vide FIR No.101 was registered against the appellant.

3. On arrest of the appellant and completion of investigation, initially challan was submitted before the court of competent jurisdiction, charge was framed to which he did not plead guilty and wished for trial. As such the learned trial court was pleased to direct the prosecution to produce its evidence. In order to prove its case, prosecution produced and examined as many as 10 witnesses, whereafter statement of the accused was recorded, where the accused professed his innocence, but did not opt to record his statement under section 340 (2) Cr.P.C. After conclusion of trial, the learned trial court found the appellant guilty of the charge and whilst recording his conviction, sentenced him as mentioned above, whereagainst he has filed the instant appeal.

4. The learned counsel for parties as well as the worthy Additional Advocate General were heard at length and with their valuable assistance the record was scanned through.

5. The tragic incident claimed life of the deceased and the matter was reported by the complainant to the local police after their arrival to

the spot. The injury sheet and inquest report were prepared and the dead body was shifted to the hospital for post mortem examination. The investigating officer visited the spot and on the pointation of the complainant prepared the site plan. During spot inspection, the investigating officer collected blood-stained earth from the place of the deceased and he also took into possession an empty of .30 bore near from the place given to the accused. The accused volunteered his arrest on the day of incident and as such he was arrested. The trial commenced and on conclusion of the trial, the appellant was convicted and sentenced vide the impugned judgment.

6. The learned trial court appreciated the evidence on file and it also took into consideration the status of the accused, as the accused/appellant was singularly charged. The learned trial court applied its judicial mind to the evidence on file and it was after appreciating the evidence that the appellant was held responsible for the murder of the deceased. True that in case of single accused, substitution is a rare

phenomenon, but equally true that it by itself should not be the determining factor, rather the courts of law must take into consideration the collected evidence and statements of the witnesses, while determining the guilt or innocence of the accused. Single accused by itself would not guarantee that under all circumstances the accused is to be held responsible, rather in case of single accused extra care is needed and the prosecution is under the bounden duty to collect trustworthy confidence inspiring evidence, so that miscarriage of justice could be avoided.

7. The points for determination before this court are, as to whether the incident occurred in the mode, manner and at the stated time; as to whether the complainant was present on the spot at the time of report and in the hospital at the time of post mortem examination; as to whether the medical evidence supports the case of the prosecution and as to whether the prosecution succeeded in bringing home guilt against the appellant.

8. There is no denial to this fact that the unfortunate deceased lost his life and for the same the appellant is singularly charged, but there is no denial to this fact that the complainant is under the obligation to establish his presence on the spot, and that he must convince that the incident occurred at the stated time and in the stated manner. In order to ascertain the manner in which the incident occurred and to assess the presence of the complainant, we deem it essential to go through the statements of the witnesses. The complainant was examined as P.W.06, who stated that on the day of incident he along with the deceased was going towards their fields; that it was at 04:00 PM that from the opposite side the accused facing trial, Sher Zaman, came and took out his pistol from "*Badh Shalwar*"; that he started firing at them as a result of firing his father i.e. the deceased got hit and he escaped unhurt; that his father died on the spot; the police attracted to the spot and he reported the matter. As apart from the complainant there is no eyewitness, so we deem it essential to go through the statements of the one to whom the

report was made, the doctor who conducted the post mortem examination and the investigating officer who investigated the case, along with the witness who escorted the dead body from spot to Khyber Medical College. The complainant was put to the test of searching cross-examination with an attempt to extract something favourable to the appellant, from his mouth. The complainant is to tell that, when he and the deceased left their house and that for what purpose. As the record is silent regarding the availability of the fields of the complainant at the place of incident and even the investigating officer could not collect any evidence in that respect, so we are to see that for what purpose the complainant and the deceased went to the spot. It is pertinent to mention that while reporting the matter the complainant stated that he and the deceased were on their way to the fields that in the meanwhile the accused/ appellant appeared from the opposite side, pulled out his pistol from the fold of his trouser and started firing at them. When the statement of the complainant is juxtaposed with the site plan, prepared on his pointation, the two contradict

each other. If the statement of the complainant is taken to be correct then the dead body should have been recovered from the thoroughfare, but interestingly, the dead body of the deceased was found in the field having crop three feet in height. Even the blood was recovered from inside the field and so the empty. It is pertinent to mention that the complainant never stated that the deceased was busy in the field, rather the complainant disclosed that they were on their way to the fields. When the dead body of the deceased was found inside the field, then it is for the complainant to convince that what the deceased was doing in the field, as the complainant did not mention the purpose of their going to the field and even the record did not show the availability of their property near or at the place of incident. Another intriguing aspect of the case, which must be taken into consideration, is that the dead body was never shifted to the hospital at the earliest, rather the report was made to the local police when they arrived to the spot. The complainant in his cross-examination disclosed that the dead body remained on the

spot for 10 to 15 minutes and that he informed his first cousins who in turn informed the police and reached to the spot along with the police. The complainant is to explain that how he informed his relatives, and his relatives are to tell, that how they informed the local police.

9. The scribe was examined as P.W.04 who did not mention the names of the persons who informed him, regarding the tragic incident and he did not tell that who accompanied him to the spot. It does not inspire confidence that the witness instead of coming to the spot waited for police and when found, they were accompanied to the spot. Had they been informed regarding the incident, the witness would rush to the spot without waiting for police, to accompany. We are not convinced from what the complainant disclosed, as by doing so the complainant displayed an un-natural conduct. Being closely related, the witnesses would prefer to reach the spot instead, of waiting for bringing the police to the spot. The scribe was questioned regarding the time at which he received information and regarding the manner in which he reached to the

spot, but he did not disclose that he was informed by P.W Noor Zaman and P.W Shah Zaman and that they accompanied him to the spot. The scribe further disclosed that on reaching to the spot he found the dead body of the deceased inside the field. When admittedly, the police found the dead body inside the field and when admittedly, the scribe did not mention the presence of witnesses, then presumption can be drawn that the police after receiving information came to the spot of and recovered the dead body from the fields.

10. The complainant while reporting the matter claimed that the unfortunate incident occurred in his presence, but interestingly, the complainant did not make efforts to inform the local police, he did not attempt to remove the dead body of the deceased from the fields and he did not make arrangements for a vehicle for the shifting of the dead body of the deceased. It is interesting to note that the real son of the deceased did not bother to touch the dead body of his father, he did not bother to shift the dead body of the deceased to the hospital at the earliest, so an unnatural conduct was displayed by the complainant. The

presence of the complainant is not free from doubt, as the scribe explained that after the injury sheet and inquest report were prepared, ambulance was arranged by him and he shifted the dead body to the hospital, where one Muhammad Ullah, P.W.3, escorted the dead body. Had the complainant been present, then he would have accompanied the dead body to the hospital, but he admitted that he did not accompany the dead body to the hospital, rather P.Ws Noor Zaman and Shah Zaman accompanied the dead body. P.W.3 i.e. the constable who escorted the dead body from the spot to the Khyber Medical College, explained that the ambulance was called by Sajid Khan, ASI, and he with the help of other police officials put the dead body from spot in the ambulance. The lack of interest of the complainant in helping the local police in removing the dead body from spot to the ambulance and thereafter to Khyber Medical College, is a circumstance which cannot lightly be ignored. If the complainant was present on the spot along with his relatives, then they would have shifted the dead body from spot to the

ambulance and through ambulance to Khyber Medical College, but he did not, which suggests his absence from the spot at the stated time. The scribe prepared the inquest report, we went through the same, and found that tampering was made in the time of death, but the scribe could not explain that what for the alteration was made. If, the dead body was hurriedly shifted to the hospital from the spot and if the matter was reported soon after arrival of the police to the spot, then in the relevant column of inquest report the word clotted (منجمد) should have not been used, as the report was made promptly, and the blood must have been collected in liquid form. We cannot forget that the complainant while reporting the matter disclosed that the accused/ appellant fired at them, but the investigating officer collected one empty of .30 bore from inside the field and no other empty was found on the spot. The complainant in his court statement further explained that the appellant made 3/4 fire shots, if, we take his statement as correct, then instead of one empty, the investigating officer would have recovered may more empties, from the spot. The

attending circumstances of the present case do tell that the incident went un-witnessed and that the complainant and the local police after receiving information reached to the spot. On one hand, the purpose of presence has not been explained, whereas on the other nothing was taken into possession which could tell that at the time of incident the unfortunate deceased was busy in working in the field. The investigating officer was asked as to whether he took into possession agricultural instruments, but he denied and stated that nothing was taken into possession, nor produced by the complainant. The record is silent as for what purpose the deceased and the complainant went to the spot and the investigating officer failed to collect any independent evidence in that regard. Even the investigating officer did not take pain to place on file the revenue record explaining the ownership and possession of the property. When a single empty was collected from the spot, when the dead body was removed from inside the field and when the complainant did not accompany the dead body of the deceased from spot to the

hospital, then we are left with no other option, but to hold that preliminary investigation was conducted in the present case. The matter was reported to the local police on the spot and that no efforts were made to shift the dead body to the police station, which in fact indicates that the complainant was not present on the spot and he accompanied the police to the spot after receiving information regarding the tragic incident. Reliance is placed on case titled **Sardar Bibi and another Vs Munir Ahmad and others**” (2017 SCMR 344), which reads as follows:-

“Although occurrence took place at 2:00 a.m. and police station was at a distance of 9 kilometer but report had been lodged not at the police station rather at the spot at about 6:00 a.m. which gave inference that FIR had been lodged after deliberation and consultation. The complainant also admitted during cross-examination that police recorded his statement after the spot inspection. He further deposed that police remained at the spot till 9:30 a.m. and after their departure, he went to police station and told the name of accused again in the police station and his thumb impression was obtained on his statement in the police station, whereas according to, prosecution the

complaint/fard bayan was prepared at the spot. Subsequent statement of complainant in the police station after 9:30 a.m. further confirms the deliberation and consultation on the part of complainant and the police.

11. The complainant in his Court statement explained that his cousins i.e. Noor Zaman and Shah Zaman, brought police to the spot, but interestingly, these witnesses were not examined. These witnesses also identified the dead body of the deceased before the police at the time of report and before the doctor at the time of postmortem examination, but they were not produced. We cannot ignore the status of these witnesses, as according to the complainant, he informed these witnesses and in turn they accompanied the police to the spot. When the report was made on the spot and when the complainant did not visit the police station, then the witnesses should have been produced, as they could disclose the manner in which the complainant informed them and the manner in which they went after the police and the police accompanied them to the spot. As the most important witnesses were not produced, so an

inference can be drawn that they were not ready to support the false claim of the complainant, so an adverse inference can be drawn. As the complainant and his cousins were hailing from the same village, so arrival of the witnesses soon after the incident, that too, in the company of the local police can be interpreted in no other manner, but that the complainant also accompanied them from his village to the spot, after receiving information of the tragic death of the deceased. The time between injury and death is given as immediate, between death and postmortem as to two to six hours, whereas the postmortem was conducted at 07:00 p.m. The delayed postmortem examination has increased the anxiety of this Court and this Court can presume that the incident did not occur at the stated time.

12. The complainant is the sole eyewitness, and while relying upon the statement of single eyewitness, much care is needed. As on one hand the complainant is the son of the deceased, whereas on the other the report was made on the spot, so this Court is under the obligation to

search for independent corroboration. True that it is the quality of evidence and not the quantity that would determine the guilt an accused and equally true that it is for the prosecution to decide that which witness should be produced, but at the same time it must convince that the witness was trustworthy and confidence inspiring. We are conscious of the fact that if a single eyewitness inspires confidence, then the same alone is sufficient for holding an accused guilty, but the Courts of law must be careful while relying upon the same and the prosecution must collect independent evidence for its corroboration. We are benefited from the judgment of the apex Court reported as “**Ibrar Hussain and another Vs. The State**” (2020 SCMR 1850), which reads as follows:-

“With prosecution's multiple failures on motive, consequential recoveries, aggravated by a suspect source of light and delayed postmortem, solitary statement of a chance witness, may not be relied without potential risk of error as the circumstances cumulatively suggest a scenario other than what meets the eye. It would be unsafe to maintain the convictions

13. As admittedly the matter was reported on the spot and as admittedly the dead body was not shifted to the hospital till arrival of the local police, so the same has seriously questioned the presence of the complainant on the spot at the stated time. The complainant did not receive a single firearm injury, despite the fact that he was also fired at. Had the appellant the intention to kill, then he would have easily killed the complainant, but the circumstances suggest the absence of the complainant from the spot at the time of occurrence.

14. The medical evidence is in conflict with the ocular account, as the deceased received a firearm injury on front of his neck, in the mid line, 7 cm above the sternal notch, 7 cm below the chin, whereas its exit was found as 1.5 x 1.5 cm left side back of shoulder, 12 cm from midline, 8 cm below the top of shoulder. As admittedly, the bullet travelled from up to downward, so if the statement of the complainant is taken to be correct, then the deceased should have received an injury with a parallel exit, but the case is otherwise. The conflict between the medical

evidence and ocular account has damaged the prosecution case beyond repair. True that medical evidence is confirmatory in nature, but equally true that when the eyewitness account lacks confidence and when the prosecution case is based on the statement of a single eyewitness, then the conflict between the two would benefit the accused. As is held in case titled **Najaf Ali shah Vs The State (2021 SCMR 736)**, wherein it is held that:-

“The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused.”

15. The motive was stated to be an altercation between the appellant and deceased few days before, but neither the complainant could explain the cause of altercation, nor he could explain that where and at what time the altercation took place. Even the investigating officer failed to collect any

evidence in that respect. True that weakness or absence of motive would hardly be a circumstance for the acquittal of an accused, but equally true that when motive is the sole cause of killing and when the prosecution fails to establish the same, then it can lead to the acquittal of the accused. As admittedly, the prosecution failed to prove the motive, so its failure has created dents in the prosecution case. As is held in the case of **“Muhammad Ilyas Vs Ishfaq alias Munshi and others (2022 YLR 1620)**, it was held that:

“It is well settled that once a motive is set up it is imperative for the prosecution to prove the same. On failure whereof adverse inference can be dawn against the prosecution. Reference is made to the cases of Muhammad Khan v. Zakir Hussain PLD 1995 SC 590 and Hakim Ali v .The State 1971 SCMR 432.”

16. It is interesting to note that after few hours of the incident the appellant surrendered to the local police. The timely surrender of the appellant to the local police speaks of his bonafide. Had he been guilty, then instead of approaching the local police the appellant would have gone into hiding, but his volunteered arrest cannot be overlooked,

that too, when the complainant could not convince his presence on the spot.

17. The cumulative effect of what has been stated above, leads this court to an irresistible conclusion that the prosecution failed to bring home guilt against the appellant and that the learned trial court while handing down the impugned judgment misdirected itself, both in law and on facts, hence, the same calls for interference. The instant criminal appeal is allowed and the appellant is acquitted of the charge leveled against him. He be released forthwith, if not required to be detained in any other criminal case.

CHIEF JUSTICE

Announced.
Dt.29/05/2024.

J U D G E

**HON'BLE MR.JUSTICE ISHTIAQ IBRAHIM CJ &
HON'BLE MR.JUSTICE SAHIBZADA ASADULLAH.**