

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH

(Judicial Department)

Cr.A No.86-D of 2018

Ihsanullah alias Ahsan Ali Sunny Vs
The state etc

J U D G M E N T

Date of hearing _____ 17-09-2019 _____

Appellant (s) by: *m/s:- Farooq, Akhtar Khan, S. Tehseen*
Blamdar & Muhammad Kamran Baloch, Adv:s.

Respondent *By m/s:- Ehsanul-Haq Malik Adv:*
& Ilyas Ahmad Damani Adv: for the State.
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SAHIBZADA ASADULLAH, J.- Through this

single judgment we intend to dispose of instant

g Criminal appeal as well as *Cr. Revision No.11-D of*

2018, titled Tariq Nawaz Vs Ehsanullah and

Criminal Revision petition No.07-D of 2019, titled

"The State Vs. Ehsanullah", being arisen out of one

and same judgment dated 30/11/2018.

2. Ehsanullah alias Ahsan Ali Sunny, the appellant/convict through present criminal appeal preferred under section 410 Cr.P.C has impugned the judgment dated 30/11/2018, passed by the learned Additional Sessions Judge-VI, D.I.Khan, whereby he was convicted and sentenced in case FIR No.1260 dated 22/12/2015, under section 302 PPC, registered at Police station Cantt. D.I.Khan, the details whereof are as under:-

- i. *U/S 302(b) PPC, he was convicted and sentenced for Qatl-e-Amd of Kamran Zafar to imprisonment for life with compensation of Rs.2,00,000 (rupees two lac) payable to the legal heirs of the deceased as provided U/S 544-A Cr.P.C, or to undergo further six months S.I in default thereof.*
- ii. *Benefit of Section 382-B Cr.P.C is also extended to the convict/ appellant.*

3. The complainant Tariq Iabal has also filed a criminal revision No. 11-D of 2018 against the

convict / appellant Ehsanullah alias Ahsan Ali Sunny, while other Cr. Revision No.07-D/2019 has been moved by the State against the appellant/convict for enhancement of his conviction.

4. According to the prosecution version as disclosed in the F.I.R Ex:PW-2/1, lodged by the complainant Tariq Iqbal in the emergency room of civil Hospital D.I.Khan are that on the eventful day, he was present in his house when received a phone call that Kamran has been fired at and has been shifted to the hospital in injured condition; that he rushed to the hospital where found his brother dead due to fire arm injury. He came to know that Ehsan Alik alias Sunny, i.e appellant/accused came to their house, where his brother Kamran and PW Muhammad Umar were standing outside the house in the street. Appellant/accused called his brother Kamran, and he accordingly started walking with him and when reached at the corner of the street, the appellant took

out of his pistol and fired at his brother Kanran, who got injured and later on succumbed to his injuries.

Hence FIR (ibid).

5. After completion of investigation, complete challan was submitted before the trial court against appellant/accused Ehsanullah and the trial commenced.

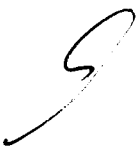
6. In order to prove its case, prosecution examined as many as (11) witnesses. After closure of the prosecution evidence, statement of appellant/accused Ehsanullah was recorded under section 342 Cr.P.C, wherein he professed innocence. He neither wished to be examined on oath, as required under section 340 (2)Cr.P.C. nor opted to produce defence evidence. After hearing the prosecutor and defence, learned trial court convicted and sentenced appellant/ accused, as mentioned earlier, hence the instant appeal.

7. It is the contention of learned counsel for the convict/ appellant that the impugned judgment is the result of misreading and non-reading of the evidence; that the testimony of the PWs are full of contradictions and discrepancies; that the ocular account is inconsistent with the medical evidence as well as circumstantial evidence and the site plan; that motive set up by the prosecution is false, un-natural and the motive advanced by the complainant was neither explained nor proved; that the learned trial Court by not advertng to the facts and circumstances of the case has erred in law and therefore, the impugned judgment is liable to reversal. Lastly, he argued that the occurrence has not taken place in the mode and manner as disclosed by the prosecution.

8. As against that AAG assisted by learned counsel for the complainant argued that the prosecution has fully established the guilt of the appellant through cogent, coherent and confidence

inspiring ocular account supported by circumstantial evidence in the shape of recovery of blood from the venue of occurrence and as well through medical evidence and thus he has rightly been convicted by the learned trial Court.

9. In support of the criminal revision, learned counsel for the complainant contended that the prosecution has proved the guilt of the appellant up to the hilt and hence in the attending circumstances of the case, he was liable for maximum sentence provided for the offence.

 **10.** We have considered the submissions of learned counsel for the parties, AAG for the state and gone through the record of the case.

11. The tragic incident was reported in the Civil Hospital, Dera, by the complainant which was pen down by Fazal Hussain SI (PW-11) through murasila (Ex.PW 1/1). In the report, the

complainant stated that he was telephonically informed that the deceased alongwith Muhammad Umer was present in front of his house that the accused called him who followed, the accused pulled out his pistol and fired at him; that the deceased, then injured was taken to the hospital by Muhammad Umer (PW-10) but before reaching hospital the deceased breathed his last. The motive advanced was that a day prior the deceased entered into marriage with one Mst. Samina, the aunt of the appellant and the accused was unhappy with the marriage.

12. The incident occurred at 1.00 p.m whereas the report is made at 2.00 p.m by the complainant despite the fact that the hospital is situated in close proximity and the deceased was rushed there and then by the eye witness Muhammad Umer. The subsequent events in the hospital raise suspicion regarding the presence of

Muhammad Umer (PW-10) on the spot at the time of occurrence and his arrival to the hospital with the dead body, it is admitted on record that the hospital has its reporting centre, naturally the police officials are present for the purpose to enter the reports, surprisingly PW-10 who is not only the eye witness of the occurrence but also brother-in-law of the deceased, when asked to lodge report he did not and waited till the complainant arrived. This witness when cross-examined he laid it open that that after 30 minutes of arrival of the dead body to the hospital, the complainant reached and the report was made. This witness did not say that it was PW-10, who informed the complainant with details of the incident and even the complainant did not mention as to who informed him. This conduct of the witness and the complainant leaves us nowhere but to hold that the incident is un-witnessed and the report was made after consultation. Both the

witnesses openly contradicts each other regarding their presence in the hospital, the time they received the dead body after post mortem and the time they left the hospital, The eye witness contented that he left for home after thirty minutes of the report when yet the post mortem was not finalized, he further stated that the IO recorded his 161 statement in the hospital and then in the house of deceased Kamran Zafar at 3.00 p.m. The complainant who appeared as PW-9, when examined stated that PW-10 was present with him from the time of report till 4.00/5.00 p.m when the dead body was received after the post mortem examination. PW-10 Muhammad Umer went on to say that after recording his 161 Cr.P.C statement by the investigating officer at 3.00 p.m in the house of the deceased, he never met again the police officials especially the Investigating officer, if so, the

question arises that on whose pointation, the site plan was prepared, is still a mystery.

13- The doctor who was examined as PW-5, this witness when cross-examined stated that it was 2.00 p.m when the dead body was produced by the police, he did not say that it was PW Muhammad Umer who brought the dead body to the hospital. The status of said Muhammad Umer as independent witness vanishes when he did not opt for report as the dead body reaches to the hospital and even in the column meant for identification whether this is the post Mortem report or the inquest report, he figures nowhere. All, whether these are the police officials or the private witnesses struggled hard to make the prosecution case a success even if at the cost of an innocent person.

14- Though the trial court was heavily influenced that it was a case of single accused and substitution a rare phenomena but it is not the

universal truth, the courts are to see each case according to its own peculiar circumstances. Yes, single accused is charged but will it alone be sufficient for conviction that too, on a capital charge, if we hold it "yes", then result will be dangerous and drastic.

15- The prosecution case is full of dents and a conscious attempt was made to make it a success admittedly, the hospital has its own reporting center where police are present round the clock but neither the report was made to them nor they tried to enter the arrival of the dead body to the hospital. We are astonished to see that the scribe, Fazal Hussain SI (PW-11) when came to the witness box made an open departure from what the complainant and eye witness had said. This is admitted on record that the casualty has its police and they are only to examine and report when the dead bodies are brought to the hospital. It was at

1.30 p.m when the dead body was brought to the hospital then why the need was felt to import Fazal Hussain SI, who infact was an ASHO attached to the PS, as a scribe and why per Fazal Hussain statement, the dead body was initially taken to the casualty police who made entry in the hospital at 1.50 p.m, and why those police are not witnesses to the proceedings. The structure created by the prosecution received further jolts when the scribe stated that he did not draft the murasila, he frankly admitted that neither the injury sheet nor the inquest report was prepared by him. He candidly admitted that the time of occurrence in murasila is tampered and he found over writing there, he went on to say that even the name of the accused was cut and corrected. When this is the attitude, character and integrity of the witnesses, then what presumption can be drawn and no court will feel hesitation but to hold that preliminary investigation was conducted.

The overall situation gives an open impression that the eye witness and complainant were procured and consultation and deliberation was made to charge the accused, cannot be ruled out. In case titled Abdul Jabbar Vs the State (2019 SCMR 129), it has been held that:-

“ It is the settled principle of law that once a single loophole is observed in case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eyewitnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused. At the cost of alteration, it has been observed by us that, in a case where the learned appellate court, after reappraisal of entire evidence available on record, has reached the conclusion that there is unexplained delay in holding the FIR, the presence of eyewitnesses is not established, there are irreparable dents in the case of prosecution; the recovery is ineffective and is of no consequence; the ocular account is belied by the medical evidence; the motive behind the occurrence is far from

the being proved and almost non-existent, the said court fell in gross error in maintaining the conviction of the appellants particularly on a capital charge. In these circumstances and after an independent evaluation of evidence available on record, we have no manner of doubt in our minds that the prosecution has not been able to prove its case against the appellants beyond reasonable doubt”.

16- The record indicates that the house of PW Muhammad Umer has not been shown in the site plan and the presence of this witness at the given time does not seem natural as his house is away from the place of occurrence. The mode and manner of occurrence casts shadow over the veracity of this witness. The motive was introduced by this witness as the unhappiness of the accused on the marriage of deceased with Mst. Samina a day prior to the occurrence, Samina is the aunt of the accused and the age of the accused was 18/19 years whereas that of the deceased was 36 years, what

relation the accused could have with his aunt that too when their ages were the ages of respect for each other and again the age of the accused and the deceased cannot welcome such motive and such dispute, the motive advanced was neither explained nor proved and yet again why the prosecution did not produce Mst. Samina, had she been produced, her production would have turned the tale, but she was not produced as she was not ready to support the false charge.

17- The prosecution stressed that after the occurrence, the accused decamped and remained fugitive till his arrest on 01-03-2017 but this fact alone is not sufficient to bring conviction on capital charge.

18- The mode, manner and time of occurrence is shrouded in mystery. The conduct of Muhammad Umer is not natural, rather abnormal and the way he presented the story, is not plausible,

had he been present on the spot, he would have easily over powered the accused as the accused according to the site plan, was in the catching distance, he surprised us that he put the dead body in Quingqi/Rikshaw but who helped him in transporting the dead body to the hospital, is not known and till date they are undisclosed. He admits his relation with the deceased being brother in law but he could not prove his presence on the spot at the relevant time.



19- The discussion made above leads us to an inescapable conclusion that the prosecution had failed to prove its case against the accused/appellant beyond reasonable doubt. This appeal is, therefore, allowed. The conviction and sentence of the appellant recorded by the learned trial court is set aside and 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.

20- The connected Cr. Revision No. 11-D of 2018, filed by complainant Tariq Iqbal and Cr. Revision No.07-D of 2019, filed by the State, against the appellant are dismissed.

21- These are the detailed reasons of my short order of even date.

Announced.
17-09-2019


JUDGE

JUDGE

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