

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No. 279-M of 2014.

With

Murder Reference No.11-M/2014

JUDGMENT

Date of hearing.....24.01.2018.....

Appellant: (Hazrat Ali) by Sahibzada Asadullah, Advocate.

Respondents/State: (Muhammad Ali) by Mian Arshad Jan,
AAG, assisted by Mr. Rashid Ali Khan,
Advocate, learned counsel for the
complainant.



QALANDAR ALI KHAN, J- This single judgment shall dispose of both the criminal appeal No.279-M/2014 and murder reference No.11-M/2014, as both the criminal appeal and murder reference pertain to the same case vide FIR No.455 dated 13.12.2006 under

sections 302/34 PPC Police Station, Saidu Sharif, Swat.

2. The aforementioned FIR was registered on the basis of *murasila* sent to the Police Station by scribe of the *murasila* , Zar Bakht Khan ASI, Police Station Mingora, who was reportedly busy in the investigation of a case of Police Station, Mingora, under sections 324/34 PPC in the casualty of Saidu Sharif Hospital, where complainant, Muhammad Ali, reported to him that he alongwith his brothers Anwar Ali, Rehmat Ali and Suliman son of Rahamdil were present in the casualty of Saidu Sharif Hospital where they had brought injured Farhad Ali, Hamayun and Gohar Ali, when the appellant, Hazrat Ali son of Jamshed armed with 30 bore pistol, Rahat Ali son of Hazrat Ali and Jamshed residents of Mankanbagh armed with Kalashnikovs came there to the casualty of Saidu Sharif Hospital, and Hazrat Ali, the appellant, opened fire on his brother Anwar Ali with pistol, causing firearm injuries on different parts of his body, thereby causing instantaneous death of his brother, Anwar Ali. The accused made good their escape after the occurrence. The motive for commission of the

offence was cited as the earlier attempt at their lives by firing of the accused, Hazrat Ali, Jamshed, Rahat Ali and Javed in the Continental Plaza, Makanbagh, causing firearm injuries to Farhad Ali, Hamayun and Gohar Ali. The occurrence was stated to have been witnessed by his brother Rehmat Ali and Suliman son of Rahamdil, Saifullah Khan son of Nadar Khan and Afsar Ali son of Sher Afzal residents of Aman Kot/Rahim Abad and other scores of people present on the spot at the time of occurrence. All the three aforementioned accused were charged in the FIR by the complainant.

3. The Post Mortem report of deceased Anwar Ali (EX.PW4/1) revealed the following;

“A young man with clean shaved wearing black *Shalwar Qamese*, tea colour coat, grey colour *Jarsy*, black *Pajama* and black *banyan*.

1. Entry wound 05 above inf angle at Rt scapula 8mm in size. This bullet recovered from Lt side 6 above the Lt iliac crest 1 Lat to spine.
2. Entry wound 1 above the mid clavicle Rt side. Exit 3-1/2 above from Lt iliac crest and 3 Lat to midline.

3. Entry medial side of the Rt knee. Bullet recovered 4 below the pattala.

The lat Edge of the vertebrae at the level of bullet recovered was fractured.”

The probable time that elapsed between injury and death, according to the medical officer, was less than 06 hours and between death and Post Mortem one hour, approximately.

4. The I.O started investigation with proceeding to the spot, inspecting the spot and securing blood from the place assigned to the deceased in the site plan, and also recovering two empty shells of 30 bore from point 'A' in the site plan, shown close to point-3, assigned to the appellant. The co-accused, Jamshed, was arrested on the day of occurrence i.e. 13.12.2006, whereas the appellant as well as co-accused Rahat Ali remained at large and were proceeded against under sections 204 and 87 Cr.P.C; and, challan was submitted against them under section 512 Cr.P.C, simultaneously, at the time of submission of complete challan against the arrested accused, Jamshed. The IO also placed on file a copy of FIR No.2525 dated 13.12.2006 under sections 324/34 PPC Police Station

Mingora, Swat, pertaining to the occurrence which allegedly took place earlier in the Continental Plaza, referred to in the instant FIR No.455 of the even date. The blood secured from the spot through cotton and blood stained garments of the deceased, handed over to the IO by the complainant, were sent for chemical analysis to the FSL, and result there-from was received in the affirmative. The I.O also took into possession a tube light from outside the X-ray room on 18.12.2006. A phial containing two spent bullets recovered from the dead body by the Medical Officer was also taken into possession by the I.O on 27.12.2006. After collection of the aforesaid evidence by the I.O, and completion of investigation, complete challan was submitted to the trial Court, where accused Jamshed was formally charged under section 302/34 PPC, leading to commencement of trial and recording of prosecution evidence; including statements of the complainant; eyewitness, Saifullah Khan; Medical Officer who conducted Post Mortem examination of the deceased; the Investigation Officer and other formal official witnesses; where-after the

prosecution closed its evidence; and statement of the accused was recorded under section 342 Cr.P.C.

5. Thereafter, the learned trial Court/Additional Sessions Judge/Izafi Zilla Qazi-III, Swat, heard arguments of learned counsel for both the sides and learned APP; and acquitted the accused facing trial, while declaring both the absconding accused i.e. the appellant and Rahat Ali as proclaimed offenders vide judgment/order dated 18.06.2011. The order of acquittal of the co-accused i.e. Jamshed was not assailed before the appellate forum, therefore, his acquittal order in the case attained finality.

6. Likewise, the absconding accused, Rahat Ali son of the appellant, was formally arrested on 20.02.2013, after he secured ad-interim pre-arrest bail. After submission of challan against him to the trial Court, and conclusion of trial, he was also acquitted of the charges by the learned Additional Sessions Judge-III/Izafi Zilla Qazi, Swat, vide judgment/order dated 30.01.2013; which was, though, assailed through appeal before this Court; but the appeal was dismissed vide judgment/order of this Court dated

23.10.2013. Therefore, his acquittal in the case also attained finality.

7. The appellant, Hazrat Ali, was formally arrested in the case on 20.02.2013, after he also secured ad-interim pre-arrest bail, and challan was submitted against him, leading to framing of formal charge under sections 302/34 PPC, to which he pleaded not guilty and claimed trial. During trial, a total of 11 PWs were examined, including the complainant (PW-1), the eyewitness Saifullah Khan (PW-9), the I.O (PW-8) and the medical officer (PW-4), who conducted post mortem examination, besides other official witnesses; where-after, the prosecution closed its evidence; and statement of the appellant/accused was recorded under section 342 Cr.P.C, wherein he pleaded innocence, but declined to be examined on Oath under section 340 (2) Cr.P.C or produce defence evidence. Thereafter, the learned trial Court/Additional Sessions Judge/Izafi Zilla Qazi-II, Swat, heard arguments of both the sides and rendered the impugned judgment/order dated 25.11.2014, whereby, the appellant/accused was convicted under section 302 (b) PPC and sentenced to the penalty of death as

Ta'zir for causing the death of Anwar Ali, and also made him liable to pay compensation under section 544-A Cr.P.C to the tune of Rs: 20,00,000/-(two million) to the legal heirs of deceased Anwar Ali, with direction that the compensation shall be recoverable from him as arrears of land revenue, but owing to want of property, the appellant/accused shall further suffer S.I for 06 months; hence the instant appeal.

8. Arguments of learned counsel for the convict-appellant, and learned AAG assisted by learned counsel for the complainant heard; and record perused.

9. In the FIR three persons of the same family, father Jamshed, his son, the appellant Hazrat Ali, and son of the appellant, Rahat Ali, were charged by the complainant, Muhammad Ali, for the *Qatl-i-amd* of his brother Anwar Ali, in the furtherance of common intention of all the three accused named in the FIR. The two co-accused, namely, Jamshed and his grandson Rahat Ali have already been acquitted of the charges by the learned trial Court vide judgment dated 18.06.2011, in respect of co-accused Jamshed, and vide judgment dated 30.01.2013 relating to co-accused

Rahat Ali. The judgment of the learned trial Court dated 30.01.2013 in regard of co-accused Rahat Ali was assailed by the complainant, but the appeal was dismissed by this Court in *limine* vide judgment/order dated 23.10.2013. No doubt, the role assigned to the appellant is a bit different from the two acquitted co-accused, as the appellant was charged for effective firing with his pistol and causing the death of deceased Anwar Ali, while the acquitted two co-accused were charged for their armed presence on the spot while sharing common intention of *Qatl-i-amd* of the deceased with the appellant; but the fact remains that the same evidence of the prosecution was disbelieved with regard to sharing of common intention of all the three accused, and when there is nothing on the record to suggest that the murder was premeditated, the same evidence is to be closely scrutinized while determining effective role of *Qatl-i-amd* of the deceased imputed to the appellant.

10. It is an admitted fact that the parties were not even known to each other before the alleged commission of offence of attempt at the lives of the complainant, Muhammad Ali, and his companions,

Farhad Ali, Gohar Ali, Hamayun, Rehmat Ali, Anwar Ali and Suliman in Continental Plaza, allegedly, by the appellant, Hazrat Ali, Rahat Ali and Jamshed earlier at 18:30 hours vide FIR No.2525 dated 13.12.2006, Police Station, Mingora, Swat. Even motive for the commission of the offence, admittedly, developed in the Continental Plaza when *Chowkidar* of the Plaza, namely, Javed son of Karam Ali stared at the complainant, and exchange of hot words with him led to grappling with the complainant, resulting in alleged firing by the appellant and other two co-accused in the said case as well as in the instant case. It may not be out of place that there are some very important and critical aspect of the case, which are, indeed, noteworthy for just and proper decision of the case. Firstly, the motive for commission of both the offence i.e. attempt at the life of the complainant and others in the first case and even *Qatl-i-amd* of deceased Anwar Ali in the second murder case under section 302 PPC is the same i.e. staring by *Chowkidar* of the Continental Plaza at the complainant, exchange of hot words between them, their grappling with each other and attempt at the life of complainant and his

companions by all the same three accused named in both the FIRs, meaning thereby that there was no fresh motive for commission of *Qatl-i-amd* of brother of the complainant namely Anwar Ali, because in both the cases victims as well as accused are the same; and, in between, no reaction or revenge for the first occurrence is attributed to the complainant side to provide a motive to the accused party to enact such a grave offence of murder, where in the first episode they had allegedly resorted to firing on the non vital parts of bodies of the injured-victims. Secondly, the complainant in both the cases i.e. Muhammad Ali escaped unhurt in both the cases, although motive in both the cases is attributed to him. Thirdly, in both the cases the complainant party fell victim to the alleged aggression of the three accused, belonging to the same family, and there is nothing on the record to indicate any loss suffered by the accused, even in the first case of attempt at the lives of the complainant and his companions so as to discern even a remote motive on the part of the accused to enact the second more grave offence of *Qatl-i-amd* of deceased Anwar Ali, that too, after taking the risk of commission of the

offence in the midst of not only of a sizable number of police personnel but also staff of the hospital, patients and other attendants.

11. As state above, the complainant did not receive a single scratch during the commission of both the offences, and presence of the other eyewitness namely Saifullah Khan son of Nadar Khan (PW-9) is also not proved beyond doubt, as there is nothing on the record to show as to how he got information about the first occurrence and how and when he reached the casualty in order to be present at the time of lodging report by the complainant to the police about the first occurrence, and then remained present there during the second occurrence, resulting in the murder of Anwar Ali deceased, but also remaining unhurt like the complainant, despite alleged several fire shots by the appellant, causing three entry wounds on the body of the deceased. In any case, he can at best be regarded as chance witness. It is an admitted fact that the hospital is a busy place, and not only guarded at several points by the police, but hospital staff, patients and attendants of the patients remain present in the hospital, particularly at the casualty side, round the

clock. There are three gates leading from the main Saidu Mingora road to the casualty ward, one is the main gate at the road side, then another gate for parking etc and a third gate in front of the casualty ward; but it is strange and beyond imagination that the appellant and other co-accused armed with Kalashnikovs were neither noticed at any of the above stated points nor large number of police officers witnessed the occurrence despite their presence at the scene of occurrence at the relevant time. It is, indeed, unbelievable; and, otherwise, can be regarded serious lapse on the part of the police to have not made the security more vigilant after the first occurrence of firing in the Continental Plaza, causing firearm injuries to the companions of the complainant, who were, then, brought to the casualty of Saidu Sharif Hospital. It is also something beyond comprehension that even if not noticed at the time of entering the hospital, all the three accused, astonishingly, escaped notice of everyone present there in the casualty of the hospital, after commission of the offence, while carrying their weapons, including Kalashnikovs by the two co-accused. The explanation to all these unlikely

situations was furnished by the I.O Mir Abdullah Inspector (PW-8) who stated that he did not record statements of other persons present there as they were not ready to depose falsely in favour of baseless report of the complainant. There is also another noticeable contradiction in his statement with regard to his presence in the casualty of Saidu Sharif Hospital at the time of occurrence, because he stated in his statement before the Court that copy of FIR and *murasila* were received by him in the casualty of the hospital and further that he reached casualty of the hospital after receiving information about the occurrence in the casualty of Saidu Sharif Hospital after 07:00 PM, whereas the occurrence reportedly took place at 19:10 hours i.e. 07:10 PM. The absence of names of complainant and the other eyewitnesses in both the inquest and P.M reports would bring their alleged presence on the spot at the time of occurrence under serious doubt especially when best available evidence of police officers, Hospital staff and people present on the spot at the time of occurrence was withheld.

12. The Post Mortem report shows all the three entry wounds on the upper side of the body of the deceased, while the corresponding exit wounds on the lower part of the body; thus, according to the Medical Officer (PW-4), suggesting bullets travelling from the upper side of the body to the lower part and that entry wound No.1 was not on hard surface of the body so as to give rise to the presumption that the bullet might have change its course after hitting hard surface of the body. He positively responded to the suggestion that if both the assailant and victim were in standing condition, such like wounds could not be caused. The prosecution case, on the other hand, is that both the appellant and the deceased were in standing position at the time of occurrence. Even if argument of the prosecution to the effect of the deceased falling on his knees after receiving the first bullet fired by the appellant is accepted, the location of all the three exit wounds on the lower part of body of the deceased would falsify the said presumption.

13. Notwithstanding several explanations furnished on the part of the prosecution regarding the presence of sufficient light at the time of occurrence so

as to facilitate identification of the actual culprit, the fact remains that no source of light was either mentioned in the FIR or in the site plan, despite the occurrence having taken place at 07:10 PM in the month of December, probably at *Esha* time; and the belated taking into possession of the tube light by the I.O on 18.12.2006, would hardly be of any help to the case of prosecution, which had initially and all along been claiming commission of the offence in the daylight. Having said that promptly lodged FIR and abscondance of the appellant could hardly overshadow discrepancies and improvements in the prosecution case.

14. In the circumstances, stated here-in-above, there was hardly any incriminating evidence to warrant conviction of the appellant, and award of capital punishment to him, rather case of the prosecution was replete with sufficient doubts and contradictions, warranting acquittal of the appellant.

15. As such, the appeal is accepted, and the impugned judgment of the learned trial Court/Additional Sessions Judge/Izafi Zilla Qazi, Swat, dated 25.11.2014, together with conviction of the

appellant and sentences awarded to him, vide the impugned judgment, are set aside. Consequently, the appellant is acquitted of the charges levelled against him; and be set at liberty, forthwith, if not required in any other case.

16. The murder reference No.11-M/2014, forwarded by the learned trial Court under section 374 Cr.P.C is, accordingly, answered in the negative.

Announced.
Dt. 24.01.2018

J U D G E

J U D G E

****M.Iqbal****

***(D.B) Hon'ble Mr. Justice Rooh-ul-Amin Khan.
Hon'ble Mr. Justice Qalandar Ali Khan.***