

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A.No.166-P of 2019 with Murder
Reference No.6 of 2019.

Date of hearing: 25.11.2021.

Mr.Jamal Khattak, advocate for the appellant.

Mr.Niaz Muhammad, AAG for the State.

Syed Shakeel Khan Gillani, advocate for the respondent/complainant.

JUDGMENT

LAL JAN KHATTAK, J.- Appellant

Muhammad Aqil has appealed to this court against the judgment dated 22.02.2019 delivered by the learned Additional Sessions Judge-XIII, Peshawar in case FIR No.352 dated 17.05.2014 under section 302 PPC registered against him at Police Station Daudzai, Peshawar, whereby upon conviction under section 302 (b) PPC, he has been sentenced to death as Tazir with compensation of Rs.5,00,000/- payable to legal heirs of the deceased in terms of section 544-A Cr.P.C. There is also a Murder Reference before this court sent by the learned trial court under section 374 Cr.P.C.

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2. Brief facts of the case are that on 17.05.2014, deceased Gul Wali, the then injured, himself reported to ASI Shah Wali (PW-3) in the casualty of Lady Reading Hospital, Peshawar to the effect that on the day of occurrence he and his brother Shan Wali (PW-5) were proceeding towards mosque for offering prayer and when they reached on crime spot there his brother-in-law i.e. appellant Muhammad Aqil was present who, on seeing him, fired at him with *Aslaha Atisheen* as a result of which he was hit on the right side and back of his abdomen. Motive for the offence, as given in the FIR (Ex.PW3/1), was annoyance of the appellant on the desertion of his wife, namely, Mst.Zeenat Bibi, who was staying in the house of the deceased. It is worth to mention that the complainant later on succumbed to his injuries on 29.05.2014 and consequently the section of law was changed from 324 PPC to 302 PPC by the Investigation Officer.



3. After completion of investigation, the case was put in court for trial, which indicted the appellant for commission of the offence to which he pleaded not guilty and claimed

trial. Prosecution in order to substantiate its case produced and examined 15 witnesses in all whereafter statement of the accused was recorded wherein he professed his innocence. The learned trial court, after conclusion of the trial, found the appellant guilty of the charge and while recording his conviction sentenced him as mentioned above which he has assailed through the instant appeal whereas the learned trial court has sent Murder Reference for confirmation or otherwise of the sentence.

4. Arguments heard and record gone through.

5. Prosecution evidence in the case consists of ocular account furnished by PW-5, statement made by the deceased in the shape of FIR (Ex.PW3/1), recovery of bloodstained earth from the place of occurrence through Ex.PC, recovery of pistol from the appellant (Ex.PW7/2), site plan (Ex.PB) and motive to the occurrence.

6. The ocular account regarding the main occurrence was furnished by PW-5, namely, Shah Wali, brother of the deceased, who while deposing before the court stated that on the day of occurrence he and his

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deceased brother were proceeding towards the mosque for offering their *maghrib* prayer. The deceased was going ahead of him and when they reached near the clinic of Dr. Atif, there the appellant was found present who started firing at his brother as a result of which he was hit and seriously injured whereafter he was taken to the hospital by him with the help of co-villagers where he i.e. the then injured reported the matter to the police. Motive for the occurrence given by PW-5 was that the appellant was annoyed over the desertion of his wife who at the relevant time was put in his house being his sister.

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7. PW-5 is sole eyewitness to the occurrence and also brother of the deceased. No doubt, conviction of an accused can be recorded on the basis of a solitary eye version account furnished by a closely related eyewitness but before such account is relied upon, the court must see whether the evidence given in the court by the closely related witness is corroborated by the circumstantial evidence of the case and by the conduct shown by the eyewitness stated to be present on the spot

at the time of occurrence. If seen in the context of the above, in our considered opinion, the testimony given by PW-5 gets no independent corroboration from the circumstantial aspects of the case.

8. First of all, we doubt the very presence of PW-5 on the spot at the time of firing at the deceased. It reflects from the record that the motive to commit the crime by the appellant was common towards the deceased and PW-5 as well and when motive of an assailant is common towards the targeted person and the eyewitness and both of them are found together by the accused then for selecting the one and sparing the other, the lucky person i.e. the one who escaped unhurt or spared must give some account that what led for his not being targeted by the common enemy. Though in his court statement, PW-5 has stated that at the time of firing the deceased was proceeding ahead of him and in the site plan (Ex.PB) too, the witness has been shown behind the victim but worth noticing aspect of the case is that in the case *murasila* (Ex.PW3/1) the then injured has not stated that while going to the mosque he

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was ahead of his brother. No doubt, it is not necessary that each and every detail is to be provided in the FIR but when the prosecution evidence consists of sole eyewitness, who is also closely related to the victim, then, in such circumstance, the necessary detail becomes necessary so that it could corroborate presence of the sole eyewitness on the spot at the time of occurrence. Assuming that the deceased was ahead of the eyewitness but even then the distance between the appellant and the eyewitness, as per the site plan, is 22 feet which was not a long distance for the appellant to spare the eyewitness. True that it is not necessary for the assailant to have achieved all his targets he has in his mind but when he comes fully prepared on the spot to accomplish his mission then for doing half of it the spared one must explain that why he was let off which is not the case in hand. Remaining unhurt of PW-5 would show that at the time of firing at his brother he was not present on the spot, therefore, his evidence cannot be relied upon for the safe administration of justice.

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9. After discarding presence of PW-5 on the spot at the time of occurrence, we now move to have a look at the report which was lodged by the deceased when he was brought in injured condition to the hospital. Though as per the *murasila* (Ex.PW3/1), the deceased has mentioned therein presence of PW-5 with him on the spot at the time of occurrence and nominated the appellant for his firing at him but there is no endorsement on it by the doctor, who had initially examined him, that at the time of making report its maker was oriented in time and space. Unless some opinion is given by the doctor present in casualty ward of the hospital qua fitness of the critically injured person to lodge the report, no legal worth is to be given to the bare contents of the report that the complainant was conscious well to report the matter to police. We also cannot lose sight of the fact that on the extreme left corner of the *murasila* there appears one cell phone number as 0344-9097115 and the name of one Hussain Ahmad and according to PW-3, said Hussain Ahmad was neither eyewitness to the occurrence nor there is any material on the case file to

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show that he was relative of the deceased. Non-presence of PW-5 on the spot at the time of occurrence, as held above, writing of cell phone No.0344-9097115 and name of Hussain Ahmad on the case *murasila* has led us to believe that the deceased was taken from the spot by people of the area and brought to the hospital for treatment.

10. Another pronounced aspect of the case is that Mst.Zeenat Bibi (PW-6) had provided her written statement to the Investigation Officer which he treated as her 161 Cr.P.C. statement and produced the same before the court as Ex.PW11/4. It is worth to mention that in her referred statement PW-6 Mst.Zeenat Bibi has stated that on 17.05.2014, appellant Muhammad Aqil had come to their house, started abusing and also fired at her brother Gul Wali i.e. the deceased with which he was critically injured and in unconscious condition was taken to the hospital. Ibid aspect of the case also caused cracks in the prosecution case as to its accuracy. Though PW-6 has denied any such statement given to Investigation Officer of the case but as giving of such statement has been admitted

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by PW-11 in his court statement, therefore, denial of PW-6 qua her above 161 Cr.P.C. statement is of no help to her and the prosecution as well. Further important aspect of the case is that the marginal witnesses to the site plan (Ex.PB) have not been produced by the prosecution and as such venue of the spot too is not proved to corroborate what has been alleged in the FIR and deposed before the court by PW-5.

11. True that on the night of occurrence, the appellant was arrested by PW-7 alongwith a pistol of .30 bore and the appellant has pleaded his guilt in the case under section 15 of the Khyber Pakhtunkhwa Arms Act, 2013 but pleading of guilt and his such conviction on no count could be made a ground to record his conviction in the instant case as it is well settled that each and every criminal case is to be decided on its own facts and further as no empties were recovered from the spot (Ex.PB), therefore, on this score too the recovery of pistol and conviction of the appellant in the referred situation is of little help to the prosecution.

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12. Thorough and careful examination of the case record would show that the learned trial court has not appreciated the case evidence in its true perspective. The deductions and conclusions drawn by the learned trial court for recording the appellant's conviction are not borne out from the case evidence for which the impugned judgment cannot be sustained.

13. For what has been discussed above, this appeal is allowed, conviction and sentence recorded by the learned Additional Sessions Judge-XIII, Peshawar vide impugned judgment dated 22.02.2019 are set aside and consequently the appellant is acquitted of the charge levelled against him. He be released forthwith if not required or wanted to be detained in any other case.

14. The Murder Reference sent by the learned trial court for its confirmation is answered in the negative.


JUDGE


JUDGE

Announced on.

16.12.2021.