

JUDGMENT SHEET
IN THE HIGH COURT OF BALOCHISTAN, CIRCUIT
BENCH SIBI.

Criminal Jail Appeal No.(S) 84 of 2021

(Case ID No.100207400367)
Muhammad Rahim v The State
And

Murder Reference No.(S) 03 of 2021

(Case ID No.100207400389)
The State v Muhammad Rahim

J U D G M E N T

Date of hearing: 25.05.2023 Date of announcement:
For appellant: Mr. Barkat Ali Khaskaili, Advocate.
For complainant: Mr. Muhammad Amir Junejo, Advocate.
For state: Mr. Jameel Akhtar Gajani, APG.

Rozi Khan Barrech, J: The appellant, namely Muhammad Rahim, son of Hazoor Bakhsh, had allegedly committed the murder of Mir Muhammad, brother of the complainant Sher Muhammad, son of Ali Muhammad, on 10.12.2020 at 5:30 PM near Mazar Dip Bari Shakh Manjho Shori, District Nasirabad by way of firing. For the commission of the said offence he was booked in FIR No. 77/2020, registered at PS Manjhu Shori, District Naseerabad on 10.12.2020 at 6:00 pm. After a regular trial, the appellant was convicted vide judgment dated 03.05.2021 (herein “**impugned judgment**”) passed by learned Additional Sessions Judge, Naseerabad at Dera Murad Jamali (“**trial court**”) of the charge under section 302-b PPC and on was sentenced to death with direction to pay Rs.400,000/- (Rupees Five Lac) under Section 544-A Cr.P.C to the heirs of the deceased Mir Muhammad. In default of payment of the compensation amount of

Rs.400,000/- (Rupees Five Lac), the accused/appellant was to further suffer simple imprisonment for a period of Six (06) Months. The benefit of Section 382-B Cr.P.C was also extended in favour of the appellant.

Besides the instant appeal, the Murder Reference No. (S) 03 of 2021 has also been sent by the trial court for confirmation or otherwise of the death sentence awarded to the appellant. Both the cases are being decided through this single judgment.

2. We have heard the learned counsel for the appellant, and learned APG, and have gone through the record with their valuable assistance.

3. The whole prosecution case revolves around the statements of Sher Muhammad (PW-1), who is the complainant as well as an eyewitness of the case, and Abdul Majeed (PW-2), who is also an eyewitness of the alleged occurrence. PW-1 is the brother of the deceased, and PW-2 is the cousin of the deceased, therefore, for the safe administration of justice, their evidence will have to be appreciated with care and caution.

4. No doubt, the evidence of the related witnesses cannot be discarded on the ground of its being related to the victim, but if it is found that the testimony of the related witness got no corroboration from attending circumstances of the case or the conduct shown by them at the time of occurrence or just thereafter as such, which cannot be expected from a prudent person, then under such circumstances the evidence furnished by related witnesses cannot be easily discarded.

5. We have observed that the deceased Mir Muhammad met with unnatural death near Mazar Dip Bari Shakh Manjho Shori at road, and according to the complainant and eyewitness on 10.12.2020, they (the complainant/PW-1 and PW-2) were returning home from Bala Shakh. The accused persons Muhammad Rahim and his nephew Israr were standing there being equipped with firearms, and one unknown accused person was standing near the motorcycle, who he could identify if confronted. The accused persons made firing upon the deceased Mir Muhammad, who received bullet injuries and fell down on the ground. When the accused persons saw the people coming towards the place of occurrence, they ran away from the spot. The complainant stated in his statement that he left the dead body at the spot and went to the police station to lodge the report. The motive behind the occurrence was that before two weeks from the date of occurrence, due to a domestic dispute, the accused, Muhammad Rahim, had given the threat to the deceased.

6. The pivotal question to be determined by us is whether the alleged eyewitnesses were present at the place of occurrence at the relevant time and had witnessed the tragedy as claimed by them and whether their conduct is acceptable to a common prudence? In an attempt to unearth the answer to this crucial question, we have minutely examined their statements and found that though they stated to be present at the scene of occurrence at the relevant time and to have witnessed the tragedy, but the prosecution side has absolutely failed to justify their own conduct at the spot.

7. The complainant/PW-1 stated before the trial court that after receiving injuries, he left the dead body on the spot and went to the police station for lodging of the FIR. According to the statement of Sajid Ali, Head Constable (PW-4), he along with other police officials, reached at the place of occurrence at 6:30 pm, where the dead body of the deceased was lying. He further stated in his statement that they sent the dead body of the deceased to the hospital at 7:45 pm. The dead body of the deceased was received by Rural Health Center Hospital Manjho Shori at 7:45 pm, which was brought by Constable Muhammad Ibrahim, according to the medical certificate (Ex.P/3-A) which was issued by Dr. Soomer Khan, Medical Officer (PW-3).

8. The alleged occurrence took place at 5:30 pm, and the dead body was received at the hospital at 7:45 pm, meaning thereby that the dead body of the deceased was lying on the spot from 5:30 pm till 7:45 pm who had received firearm injury on the right side of the chest, however still he was not taken to the hospital. It is hard to believe and is against human conduct that who had received a firearm entry wound kept bleeding on the spot for such a long period and was brought to the hospital subsequently. The dead body of the deceased was brought to the hospital by Constable Muhammad Ibrahim, and the complainant and eyewitness were not with the deceased at the hospital. This fact also proves that both the above witnesses, namely Sher Muhammad and Abdul Majeed, were not present, had they been present, they necessarily would have

taken the deceased to the hospital. It was human conduct that first tried to shift the injured to hospital in order to provide medical treatment. From the conduct of the witnesses, it could be judged that they were not present at the spot.

9. We have also noted that the complainant/PW-1 during his statement before the court, stated that they were riding on the motorcycle and were coming towards Bari Shakh, and there the accused/appellant and absconding accused, and one unknown accused person were standing who made firing, upon the deceased. The complainant stated during cross-examination that the deceased, Mir Muhammad, was riding the motorcycle and that he and Abdul Majeed were sitting on the rear seat of the motorcycle. The motorcycle was going slowly. He further stated during cross-examination that the accused and absconding accused made firing upon them from a distance of 2/3 steps. He further stated during cross-examination that neither any bullet hit the motorcycle neither did he, nor Abdul Majeed receive any injury at the time of firing. He further stated during cross-examination that the appellant made 5/6 fires and absconding accused Israr made 2/3 fires. The investigation officer Ali Sher SI/SHO (PW-6) took seven bullet empties of a T.T pistol into possession through a recovery memo in the presence of a witness namely Sajid Ali, Head Constable (PW-4). Under such circumstances, which were narrated by the above PWs after indiscriminate firing, there was no chance of the above PWs to escape unhurt, and also, there was every possibility that the

deceased received multiple bullet injuries, but the picture is quite different from the presumption and expectation as suggested by the circumstances when the deceased had only received one bullet injury on his person while by the above PWs escaped unhurt.

10. We have also noted with grave concern that it was claimed by the complainant and the eyewitness that they were miraculously saved in the midst of firing. Blessing them with such incredible consideration and showing them such favour is implausible and opposed to the natural behavior of any accused. It is all the more illogical than being perceptive of the fact that if the witnesses were left alive, they would depose against the accused; even then, the appellant and co-accused did not cause any injury to them. Such behavior runs counter to natural human conduct and behavior on part of the accused. Article 129 of the Qanun-e-Shahadat Order, 1984 allows the courts to presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events and human conduct in relation to the facts of the particular case. We thus trust the existence of this fact, by virtue of the Article 129 of the Qanun-e-Shahadat Order, 1984, that the conduct of the assailants, as deposed to by the witnesses, namely Sher Muhammad (PW-1) and Abdul Majeed (PW-2), as opposed to the common course of natural events and human conduct. Hence, we are holding that both Sher Muhammad (PW-1) and Abdul Majeed (PW-2) were not present at the place of occurrence at the time of occurrence and did not witness the

occurrence. Reliance is placed on the cases of Tariq Mehmood v. The State and others (2019 SCMR 1170), Mst. Rukhsana Begum and others v. Sajjad and others (2017 SCMR 596), Rohtas Khan v. The State (2010 SCMR 566), and Muhammad Farooq and another v. The State (2006 SCMR 1707).

11. The record tells that the complainant and his cousin Abdul Majeed had given no reason to visit Bala Shakh on the motorcycle, and it was not a routine to visit Bala Shakh; we deem it appropriate to appreciate this particular aspect of the case in light of the collected evidence, so to understand that presence of the complainant/PW-1 and PW-2 with the deceased at the stated time was a natural phenomenon. We are to look for independent evidence in this respect, as we are conscious of the fact that if complainant/PW-1 and PW-2 fail to convince us in that respect, then in that eventuality, their status will transform to that of chance witnesses.

12. The site plan of the occurrence was prepared at the instigation of the complainant, wherein the dead body of the deceased is shown at point No.1, according to which the dead body was lying on the roadside. For the sake of argument, if it is presumed that when the complainant and PW-2, and the deceased were going on a motorcycle on a metaled road, the accused made firing upon them, then it was possible that the dead body was lying in the middle of the road. Neither the motorcycle of the deceased was taken into possession by the police nor produced before the trial court.

Similarly, the clothes of PW-1 and PW-2 are also not besmeared with the blood of the deceased. It negates that the deceased was not riding the motorcycle at the time and on the day of the incident.

13. We have also noted that according to the site plan (Ex-P/6-B) as prepared by the investigation officer Ali Sher SI/SHO (PW-6), near and around the place of occurrence, there were shops and houses constructed. The complainant/PW-1 also stated that people of the locality gathered near the place of occurrence. During cross-examination, he further admitted that 30/40 people came to the spot. None of those who had their houses and shops near the place of occurrence joined the investigation of the case and also did not appear before the trial court to support the prosecution case. The prosecution was under a bounden duty to produce the witnesses who were the residents of the place of occurrence. Article 129 of the Qanun-e-Shahadat, 1984 provides that if any evidence available with the parties is not produced, then it shall be presumed that had that evidence been produced the same would have been gone against the party producing the same.

14. The ocular account is in conflict with the medical evidence. Sher Muhammad (PW-1) and Abdul Majeed (PW-2) stated in their statements that the accused made indiscriminate firing upon the deceased who received bullet injuries; however, according to the medical certificate (Ex.P/3-A), the deceased received only one firearm injury. Both the above PWs also failed to mention that the deceased had also received a lacerated wound on the left backside

of the head, two lacerated wounds on the back of the upper head area with the above injuries, which injuries were mentioned as injury No.2, and injury No.3 by Dr. Soomer Khan Medical Officer (PW-3) in the medical certificate (Ex.P/3-A) he observed "*2. one lacerated wound 1/2 or 1 cm in length skin deep and 3. two lacerated wounds of 2 cm in length skin deep on the back of the head*" of the deceased.

15. There is no explanation of the presence of injuries No.2 and 3 observed by Dr. Soomer Khan (PW-3) on the dead body of the deceased in the statement of both the above witnesses, namely Sher Muhammad (PW-1) and Abdul Majeed (PW-2).

16. The contradiction in the ocular account of the occurrence as narrated by PW-1 and PW-2 and the medical evidence furnished by Dr. Soomer Khan (PW-3) clearly establish that the prosecution has miserably failed to prove the charge against the appellant.

17. So far as the recovery of the crime weapon, i.e., the T.T pistol, affected on pointation of the appellant, is concerned, allegedly, the occurrence took place on 10.12.2020, and the appellant was arrested on 11.12.2020. It was alleged by Head Constable Sajid Ali (PW-4) that on 19.12.2020, the appellant made the disclosure during the investigation that he could recover the crime weapon. On the said disclosure, the appellant was taken to his house, and there, the accused recovered one T.T pistol lying in a box inside a residential room, and the same was taken into possession through a recovery memo in the presence of witnesses.

The investigation officer Ali Sher SI/SHO (PW-6) stated in his statement that on 19.12.2020, the alleged pistol was recovered from the house of the accused on his pointation. All the above witnesses did not state a single word about where the said house of the accused was situated. Even otherwise, the pistol was not recovered from the physical possession of the appellant, and the same was recovered allegedly from a house where the women, folk, and children were also residing. However, it has not come on record that, factually the said house belonged to the appellant. This aspect of the matter caused reasonable doubt in the prosecution case. Even otherwise, no private witness was associated at the time of alleged recovery.

18. It is stated earlier that the alleged occurrence took place on 10.12.2020, and on the same date, seven crime empties of T.T pistol were also taken into possession by the investigation officer through recovery memo in the presence of witnesses, whereas the crime weapon, i.e., T.T pistol was recovered allegedly on the pointation of the appellant on 19.12.2020. The prosecution produced a positive report of the Firearms Expert (Ex.P/6-A), according to which the Firearms Expert received parcel No.2 of crime empties of a .30 bore pistol and parcel No.4 of the crime weapon, i.e. T.T pistol .03 bore on 11.01.2020 with a delay of twenty-two days after recovery of crime weapon and after a delay of thirty-two days of recovery of crime empties from the place of occurrence. The crime empties recovered from the place of occurrence and the crime weapon recovered on the

alleged pointation of the appellant were sent together to the Firearms Expert, but the same has been found in violation of the verdict of the Hon'ble Supreme Court, and this court held that the recovered empties should not be retained by the police for a wait of recovery of crime weapon. Rather it has categorically been held that sending the empties together with the crime weapon to the ballistic expert makes the entire process suspicious and highly doubtful. In this case, it is obligatory upon the investigation officer to have sent the seven crime empties recovered from the place of occurrence as soon as possible without delay to FSL and without waiting for recovery of the crime weapon. More so, it is apparent from the record that the crime empties were secured from the crime scene on 10.12.2020 on the day of the murder of the deceased, but the same were retained in possession, whereas the crime weapon was allegedly recovered on 19.12.2020, whereafter the empties and alleged crime weapon were sent together to the FSL for ballistic analysis, which has diminished its evidentiary value because it gives rise to manipulation and padding. Therefore, the Firearms Expert report in this regard is inconsequential to the prosecution case. Reliance is placed in the case titled as Nazir Ahmed v The State (2016 SCMR 1628), Ali Sher and others v The State (2008 SCMR 707) and Israr Ali v The State (2007 SCMR 525). In the case of Muhammad Ashraf v The State (2019 SCMR 652) the Hon'ble Supreme Court observed as under:

" After scrutiny of evidence, it has been observed by us that no such corroboration is

available on record because the empties secured from the spot and the .30 bore pistol allegedly recovered from the possession of appellant at the time of his arrest were sent to the office of FSL on the same day i.e. on 21.03.2002 after the arrest of appellant on 23.01.2002. In these circumstances, the report of FSL cannot be relied and is legally inconsequential."

19. Apart from that the prosecution has failed to establish safe custody of the recovered empties from the place of occurrence and the T.T pistol and their safe transmission to the Forensic Science Laboratory. It has not been explained by the prosecution that the weapons and empties were retained by whom during the investigation period. For the sake of argument, if it is assumed that the case property was lying in the Malkhana of the police station, then no report/entry of the Malkhana nor any witness was produced to corroborate the version of the prosecution. The law is well-settled by now that the prosecution is under a legal obligation to prove the safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory.

20. Now, the only piece of evidence left with the prosecution is the evidence of motive. The motive of the occurrence, as stated by the witnesses, was the alleged threat given by the appellant to the deceased before two weeks after the occurrence on the basis of a domestic dispute. The prosecution has failed to produce any

corroborative piece of evidence with the statement of PW-1 and PW-2 in respect of any domestic dispute between the deceased and the appellant. Even both the said witnesses did not state a single word in their statement about any relationship of the deceased with the appellant. No documentary prove in the shape of an FIR in respect of the alleged threat given by the appellant to the deceased has been produced by the prosecution. No other independent witness was produced by the prosecution in respect of the alleged threat. In this way, the prosecution has miserably failed to prove the motive part of the occurrence. Although, the prosecution is not under obligation to establish the motive in every murder case but it is also well-settled principle of criminal jurisprudence that if the prosecution sets up a motive but fails to prove it, then it is the prosecution who has to suffer, and not the accused. Reliance is placed upon the cases titled as "Muhammad Ilyas and another v. Ameer Ali and another" (2020 SCMR 305), "Liaqat Ali and another v. The State and others" (2021 SCMR 780), "Najaf Ali Shah v. The State" (2021 SCMR 736) and "Khalid Mehmood and others v. The State and others" (2021 SCMR 810).

21. From the facts and circumstances narrated above, we are persuaded to hold that conviction passed by the trial court against the appellant in the circumstances is against all canons of law recognized for the safe dispensation of criminal justice. As per dictates of law benefit of every doubt is to be extended in favour of the accused. Resultantly while setting aside the conviction and sentence recorded

by the trial court in terms of judgment dated 03.05.2021 passed in case Sessions No. 07/2021, Crl. Appeal No.(S) 84/2021 filed by the appellant is allowed as a consequence whereof he is acquitted of the charge in FIR No. 77/2020 PS Manjhoo Shori, District Naseerabad. The appellant Muhammad Rahim, son of Hazoor Bakhsh, is ordered to be released forthwith if not required in any other case.

The Murder Reference No. (S) 03/2021 is answered in negative.

Date of announcement:

Judge

Judge