

Judgment Sheet
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

Cr.A No.541-P of 2018

Naseer Ahmad
Vs
The State etc

JUDGMENT

For Appellant: Mr. Shabbir Hussain Gigyani Advocate

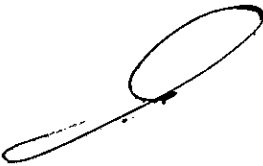
For Respondent: Muhammad Saeed Khan Advocate

For State: Muhammad Nisar Khan, Addl.A.G.

Date of hearing: 22.12.2022

SAHIBZADA ASADULLAH, J--- Appellant, Naseer Ahmad, was tried by the learned Additional Sessions Judge-II, Takht Bhai, District Mardan for the offence under section 302 PPC in case FIR No.113 dated 09.07.2015 registered with Police Station Saro Shah, District Mardan and vide judgment dated 05.05.2018, the appellant was convicted under section 302(b) PPC and sentenced him to life imprisonment as Tazir alongwith payment of Rs.3,00,000/- (Rupees Three Lac) as compensation under section 544-A Cr.P.C to the legal heirs of deceased or in default thereof, to undergo six months S.I. Benefit under section 382-B Cr.P.C was extended to the appellant. Being aggrieved, the appellant through the instant criminal appeal has assailed the above said judgment.

2. Brief facts of the case, as unfolded in the first



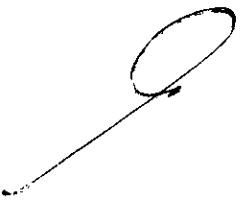
information report, are that the complainant Rahmat Ali on 09.07.2015 at 14:30 hours, brought his brother namely Afsar Ali in injured condition to Mardan Medical Complex, where he lodged a report to the effect that injured Afsar Ali alongwith his brother namely Niaz Ali went to the house of their cousin namely Naseer Ahmad for the recovery of their amount; that in the house of Naseer Ahmad, an oral altercation took place, as a result of which, Naseer Ahmad made firing at Afsar Ali through his pistol, due to which, he got hit and injured. The occurrence is stated to have been witnessed by Niaz Ali. The motive is alleged to be a money dispute between Afsar Ali and Naseer Ahmad. The report of the complainant was penned down in the shape of Murasila, which was sent to the PS for registration of the case. Initially, the FIR ExPA was registered under section 324 PPC, however, when the injured Afsar Ali subsequently succumbed to his injuries, then the section of law was altered from one under section 324 PPC to 302 PPC.

3. After completion of investigation and arrest of the accused / appellant, prosecution submitted complete challan, where at the commencement of trial, the prosecution produced and examined as many as 11 witnesses. On close of prosecution evidence, statement of appellant / accused was recorded under section 342 Cr.P.C, wherein he professed innocence and false implication, however, neither he opted to be examined on oath

as provided under section 340(2) Cr.P.C, nor wished to produce defence evidence. After hearing arguments, the learned trial Court vide the impugned judgment dated 05.05.2018, convicted and sentenced the accused / appellant as mentioned above. Hence, the instant appeal against the judgment of conviction.

4. We have heard learned counsel for the parties alongwith learned A.A.G representing the State at length and scanned through the record, with their valuable assistance.

5. In the unfortunate incident, the deceased, soon after receiving the firearm injuries, was shifted to Mardan Medical Complex and therefrom, to Lady Reading Hospital, Peshawar and while enroute to the hospital, he succumbed to his injuries. The matter was reported by the complainant to the local police, where the accused / appellant was charged for the murder of the deceased. The report was drafted in the shape of Murasila and thereafter, the injury sheet of the deceased then injured was prepared and was shifted to the doctor for medical examination. After examining the deceased then injured, the doctor prepared the medico legal certificate and referred the deceased then injured for specialized treatment, but he could not survive and as such, his dead body was brought back to the hospital, where the local police prepared his inquest report and the dead body was shifted to the doctor for postmortem examination. It is

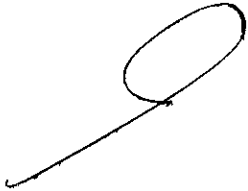


pertinent to mention that the accused / appellant also received injuries on his body, who was taken to the hospital in injured condition, where he also reported the matter to the local police vide daily diary No.35 of the even date, where he charged Gul Rahman and Niaz Ali for the injuries caused to him. After the FIR was registered against the accused / appellant, a raid was conducted by the local police at his house, where the weapon of offence i.e .30 bore pistol was taken into possession from his residential room and, as such, he was also booked under section 15 of the Khyber Pakhtunkhwa Arms Act, 2013 and was arrested as well. The investigating officer after receiving copy of the FIR, visited the spot and on pointation of the eye witness, prepared the site plan. During spot inspection, the investigating officer collected two empties of .30 bore from the place of incident and the same were sent to the firearms expert alongwith the recovered pistol for asking an opinion as to whether the empties were fired from the recovered pistol. The laboratory report was received in positive. The accused / appellant faced trial and ultimately, was convicted vide the impugned judgment.

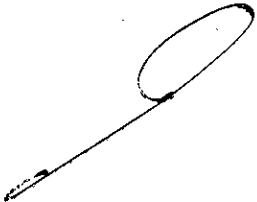
6. There is no denial to the fact that the incident occurred in the house of the accused, where on one hand, the deceased lost his life, whereas, he himself received injuries on his

body, but this Court is to ascertain as to whether the incident occurred in the mode, manner and at the stated time; as to whether the eye witness was present at the time of incident and as to whether the accused / appellant received injuries at the hands of his sister namely Mst. Dilfasan or at the hands of Gul Rahman and PW Niaz Ali. In order to appreciate this particular aspect of the case, we, on one hand, went through the judgment of the learned trial Court, whereas, on the other, the record of the case was scanned through. As on one hand, the relationship between the parties is too close, whereas, on the other, both the sides i.e. the deceased received firearm injuries which led to his death and the accused / appellant received blunt trauma, so this Court is to see as to who is responsible to what extent.

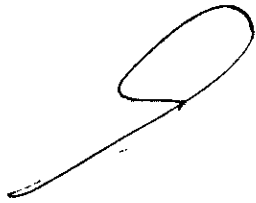
7. The complainant was examined as PW-07, who stated that on the day of incident, he was present in his grocery shop situated at Shakh No.6, when he received information regarding the incident; that when he reached to the place of incident, there he found the deceased then injured lying on a cot in the thoroughfare, with people of the locality present around; that the deceased then injured was shifted to the hospital in a motorcar and the matter was reported. This is admitted on record that the complainant is not the eye witness of the incident, rather it was on information he received from



PW Niaz Ali, that he rushed to the spot. This is astonishing to note that when this witness was cross examined, he did not mention the presence of Niaz Ali on the spot and even, he denied his presence in the hospital at the time of report. In order to appreciate this particular aspect of the case, we deem it essential to go through the statement of PW Niaz Ali, who was examined as PW-08. When the eye witness appeared before the trial Court, he stated that on the day of incident, he alongwith the deceased went to the house of the accused to recover an amount of Rs.31,000/- from the accused; that when they reached to the house, the accused was not present in the house and it was after some time, that he came to the house; that on demand, the amount was paid, but an altercation took place between the accused and the deceased; that the accused got infuriated and fired at the deceased with his .30 bore pistol; that after the occurrence, he informed the complainant, who rushed to the spot and took the deceased then injured to the hospital. This witness remained silent that through which source he informed the complainant regarding the incident and that it was he who narrated the events to the complainant. The statement of the complainant as well as that of the eye witness, when read in juxtaposition, no ambiguity is left that the eye witness never explained the incident to the complainant and admittedly, he did not accompany the

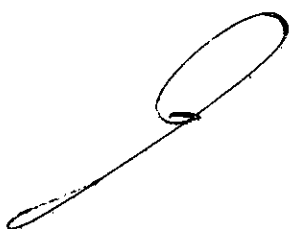


complainant to the hospital. This is for the complainant to tell that wherefrom he gathered the details of the incident, when admittedly, the eye witness did not narrate the incident in the manner it occurred. This is for the complainant to tell that why he did not ask the eye witness to accompany him to the hospital and this is for the eye witness to tell that when his real brother was lying critically injured, what precluded him to rush the deceased then injured to the hospital instead of waiting for arrival of the complainant. Though, the eye witness, in his cross examination, improved his statement by stating that when the deceased then injured was put in the motorcar, he himself hired another one and reached to the hospital. On one hand, the complainant does not support his statement in this respect, whereas, on the other, his presence in the hospital has totally been denied by the complainant as well as the scribe. If, for a while, we accept that the eye witness was present in the hospital, when the matter was reported, then instead of the complainant, he would have reported the matter, as it was he who witnessed the incident and not the complainant. The police officials, who were present in the hospital, at the time of arrival of the deceased then injured, denied the presence of the complainant in the hospital. Neither PW Niaz Ali verified the report of the complainant nor he came forward to report the matter. When



this is the state of affairs, we lurk no doubt in mind that the complainant was not present in the hospital at the time of report and even at the time when the deceased then injured was medically examined. The eye witness was cross examined on different aspects of the case, more particularly, regarding the shop he owns and his presence at the time of incident. The witness confirmed that he owns a shop near his house and that on the day of incident, he had also visited his shop. From the attending circumstances of the present case, we can draw an inference that either the deceased visited the house of the accused alone or that soon after the incident, PW Niaz Ali decamped from the spot.

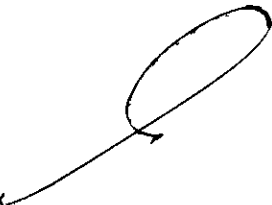
8. Another astonishing aspect of the case is the introduction of PW Dulfasan, as while preparing the site plan, her presence was not shown to the investigating officer and even the site plan is silent regarding the availability of her children at the time of incident. This is again astonishing that when PW Dulfasan appeared before the trial Court, she stated that on the day of incident, the deceased and PW Niaz Ali visited her house; that at the time of incident, her three sons and a daughter were present in the house, while she was busy in the kitchen; that in the meanwhile, the deceased i.e. her husband came to the house and the accused / appellant demanded the outstanding amount; that though, the amount



was paid by the deceased, but an altercation took place and the deceased warned them not to visit his house in future; that soon thereafter, the accused fired at the deceased, who fell down and she took a wooden plank and struck the accused on his head; that after the accused received injury on his head, he fell unconscious. This part of the statement of PW Dulfasan has twisted the prosecution story and as such, this Court is to see as to whether it was the report of the complainant or it was the report of the accused, which is nearer to the truth. As PW Niaz Ali is not the complainant of the matter and as he, in his cross examination, also supported the stance of PW Dulfasan and as the presence of the eye witness is not established from record, so in that eventuality, we are left with no option, but to touch the report made by the accused, which was penned down in the shape of daily diary No.35.

9. Though, the presence of the eye witness does not appeal to a prudent mind, as he displayed an unnatural conduct. Had the eye witness been present and had the deceased been fired at by the accused, then in the first available opportunity, he would try to catch hold of the accused and on the second, he would have rushed the deceased, who was lying in critical condition, to the hospital and would have reported the matter. Neither the eye witness

identified the dead body at the time when the report was made nor at the time when inquest report was prepared and the postmortem was conducted.



10. Whether the dispute between the parties was the outstanding amount or the cause of killing is unknown? In order to appreciate this particular aspect of the case, we would like to revisit the statement of the eye witness and that of PW Dulfasan. The eye witness remained consistent that it was an amount of Rs.31,000/-, which was to be paid by the accused to the deceased, as the deceased had fixed a UPS for the house of the accused, but PW Dulfasan explained the motive in a different manner. She stated that an amount of Rs.31,000/- was outstanding against the accused, as the deceased had fixed the UPS for her house and that an amount of Rs.55,000/- was outstanding against the accused, as her husband had purchased a motorcycle from the deceased and it was the accused to pay the outstanding amount. Neither the investigating officer nor the scribe, at the time of drafting the murasila, could recover the same amount from possession of the deceased and even the witnesses did not produce the amount so paid. When on one hand, the witnesses admitted that the amount was paid to the deceased then on the other, it was a must that either the same would have been produced or would have been collected, but the record is silent in that

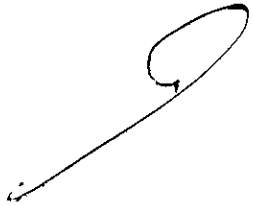
respect. When so, we lurk no doubt in mind that the cause of killing is shrouded in mystery.

11. True that the incident occurred inside the house of the accused and equally true that the deceased then injured was shifted from the house to the hospital, but the witnesses did not come forward with the whole truth. We cannot forget the conflict between the witnesses and their veracity regarding the occurrence, but it alone should not be the sole determining factor, as such, the benefit of the same cannot outrightly be extended to the accused / appellant.

12. As this case is with unique characteristics, so we are to appreciate both the aspects of the case i.e. the veracity of the witnesses and the physical circumstances of the case. If this Court reaches to a conclusion that the witnesses are not telling the whole truth, then this Court is to assess the physical circumstances of the present case, that too, in light of the report made by the accused / appellant in the shape of daily diary No.35. Keeping in view the close relationship between the parties i.e. sister of the deceased was married to the accused, so in that eventuality, substitution is a rare phenomenon and the presence of the deceased in the house of his sister at the relevant time is not unnatural. As the accused / appellant while reporting the matter to the local police, admitted the outstanding amount and he disclosed that his

father in law i.e. Gul Rahman and the eye witness had beaten him with fist and brick. Though, Mst. Dulfasan i.e. wife of the accused claimed the beating of her husband with a wooden plank, yet her husband i.e. the accused / appellant attributed the same to one Gul Rahman and the eye witness, so at this juncture, it is either the accused whose report is to prevail or it is PW Mst. Dulfasan whose statement is to be appreciated. When such is the state of affairs, this Court lurks no doubt in mind that the occurrence is shrouded in mystery and that both the sides came forward with the twisted facts. On one hand, the incident occurred inside the house of the accused, whereas, on the other, the laboratory report was received in positive, so we are confident in holding that it was the accused / appellant, who killed the deceased, but we are still struggling that what led to his death and this indecisiveness on part of the Court is a factor, which cannot be left untouched.

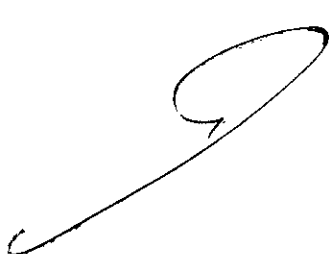
13. The moot question for determination is, as to what would have been the appropriate sentence in the attending circumstances of the case. The impugned judgment was scanned through, where the learned trial Court too failed to appreciate this particular aspect of the case. When the witnesses could not succeed in proving on record that the incident occurred in the manner as disclosed, then this Court



is left with the sole choice to collect from the record the real circumstances, which led to the death of the deceased. There is no dispute regarding the outstanding amount and both the parties admitted the same in unequivocal terms, but both the parties made willful attempts to either twist the story to his favour or to conceal the real facts. In order to reach to a just conclusion, we must revisit the report made by the accused / convict appellant in the shape of daily diary, the statement of Mst. Dulfasan and that of the eye witness. This is admitted on record that when the deceased alongwith the eye witness reached to the spot house, the atmosphere was calm and when the deceased entered the house, no commotion was noticed. It is further evident from the record that both the sides had no intention to aggravate the situation to that extent, as on one hand, the accused / appellant had got a UPS prepared / repaired and on the other, a complaint was raised that the same was not in working condition. When the amount was paid, there was hardly an occasion for the accused / appellant to kill the deceased, but the unfortunate parties entered in hot altercation, which aggravated the situation to an extent that on one hand, the unfortunate deceased lost his life, whereas, on the other, the accused / appellant received multiple injuries on his body. When an atmosphere of uncertainty prevails, when the witnesses came forward with twisted facts

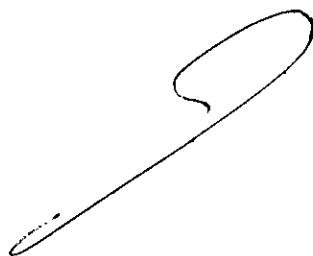
and when the parties involved in active concealment of the actual happenings, then this Court is left with the only option to take into consideration the quantum of sentence awarded. After appreciating the available record and the statements of the witnesses, this Court reaches to an inescapable conclusion that the learned trial Court has failed to appreciate the collected evidence and recorded statements and as such, while handing down the impugned judgment, misdirected itself both in law and on facts, which warrants interference. Wisdom could also be derived from the judgment of the Apex Court in Jail Petition No.355 of 2018 "Muhammad Abbas & Muhammad Ramzan Versus The State" wherein it was held that:

"However, so far as the quantum of punishment is concerned, we are of the view that the occurrence took place at the spur of the moment and there was no pre-meditation on the part of the petitioners. Admittedly, the occurrence took place in the house of the petitioners where the complainant party had brought a jirga for return of Mst. Shakeela, niece of the complainant, who was married with petitioner Muhammad Nawaz against the



will of her parents. A bare perusal of the record reveals that something happened immediately before the occurrence, which provoked the petitioners and they caused churri blows on the person of the deceased. On our specific query, learned Law Officer and learned counsel for the complainant could not deny the fact that the occurrence took place at the spur of the moment. Admittedly, both the petitioners did not repeat their act. There was no deep rooted enmity between the parties. In these circumstances, the learned High Court ought to have taken a lenient view. Consequently, we convict the petitioners under Section 302(c) PPC and sentence them to fourteen years RI each. The amount of fine and the sentence in default whereof shall remain intact."

14. Similarly, the situation has further been clarified by the Apex Court in the case of "Raza and another v. The State and others" (2020 SCMR 1185) wherein it is held that:



"10. As observed earlier, that the occurrence had taken place due to the act of the deceased, which enraged the mental faculty of the petitioner and under the impulses of the same the instant occurrence had taken place, the same is spelled out from the record and as such the benefit of the same is available for which so many circumstances are not required rather the glimpse of the same is always deemed sufficient, which has been established by the Superior Court from time to time.

11. For what has been discussed above, we are of the considered view that sentence inflicted upon the petitioner by learned Courts below under section 302(b), P.P.C. is not made out, therefore, keeping in view the facts narrated above, instant petition is converted into appeal and same is partially allowed and we convert the sentence from imprisonment for life under section 302(b), P.P.C. to

*imprisonment for 10 years under section
302(c), P.P.C.”*

15. We, therefore, partially allow this appeal by setting aside the conviction and sentence awarded under section 302(b) PPC and instead, convict the appellant under section 302(c) PPC to 10 years rigorous imprisonment. The compensation of Rs.3,00,000/- (Rupees Three Lac) as imposed upon the appellant under section 544-A Cr.P.C by the trial Court shall remain intact. Benefit under section 382-B Cr.P.C is extended to the appellant.

Announced
22.12.2022
(Ghafoor Zaman/Steno)

Date of sign:
30.12.2022


JUDGE


JUDGE

(D.B)
Hon'ble Mr. Justice Rooh-ul-Amin Khan
Hon'ble Mr. Justice Sahibzada Asadullah