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

Cr.A No. 98-P of 2023

Muhammad Adnan
Vs
The State & another

Date of hearing: **15.06.2023.**

Appellant (s) by: M/s Bashir Ahmad Khan & Syed Abdul Fayaz, Advocates;

State by: Malik Haroon Iqbal, AAG.

Complt: by: M/s Shabbir Hussain Gigyani & Nadeem Khan Advocates.

JUDGMENT

SAHIBZADA ASADULLAH, J.- Through this single judgment, we shall also decide the connected **Cr.R bearing No.41-P/2023 titled "Muhammad Idrees Vs. Muhammad Adnan etc."** as not only both these matters arise from the same FIR bearing No.212 dated 02.05.2019 under sections 302/34 PPC of Police Station Sheikh Matoon District Mardan, but have also emanated from same judgment of the learned Additional Sessions Judge/Judge MCTC, Mardan dated 14.01.2023, whereby appellant Muhammad Adnan has been convicted and sentenced as under:-

> **"U/s 302 (b) PPC for life imprisonment as Tazir with fine of Rs.400,000/- (four lac) as compensation to be paid to the legal heirs of deceased under section 544-A Cr.P.C and recoverable as**

arrears of land revenue from the person and estate of convict or in default whereof to further suffer 06 months SI.
Benefit of Section 382-B Cr.P.C has been extended to appellant."

2. Brief but relevant facts of the instant case as per first information report are that on 02.05.2019 Said Ali Shah ASI on receipt of information arrived at the spot house, where the dead body of the deceased Mst. Rabia Bilqees was laying and complainant Muhammad Idrees s/o Muhammad Khan alongwith his son Muhammad Naveed and other inmates of his house were present with the dead body, who reported the matter to him that the marriage of the deceased Mst. Rabia Bilqees had taken place with the accused Muhammad Adnan some 8/9 years prior to the occurrence and she alongwith her husband was residing in a house situated near to his house. On the fateful day i.e. 02.05.2019 at 2200 hours, he alongwith his son Muhammad Naveed were busy in repairing the outer door of their house when suddenly, heard sound of hue and cry, upon which they rushed to the house of the accused, where apart from the spouses one Muhammad Imran, brother of the accused was also present armed with pistol and on seeing them the accused Adnan opened firing at his wife, as a result she got hit and died on the spot.

Apart from him (the complainant) the occurrence has witnessed by his son Muhammad Naveed. After the occurrence the accused decamped from the spot. Motive behind the occurrence was dispute over domestic affairs. They could do nothing being empty handed. He charged the above named accused for the murder of his sister, hence the present FIR.

3. On arrest of the appellant and completion of investigation, challan was submitted against the accused before the Court of competent jurisdiction, charge was framed to which he did not plead guilty and claimed trial. As such, the learned trial Court was pleased to direct the prosecution to produce its evidence. In order to prove its claim, prosecution produced and examined as many as 12 witnesses, whereafter statement of the accused was recorded, where he professed his innocence but did not opt to record his statement under section 340 (2) Cr.P.C. After conclusion of trial, the learned trial court found the appellant guilty of the charge and whilst recording his conviction, sentenced him as stated above, hence the instant criminal appeal.

4. We have heard learned counsel for the appellant, learned AAG, assisted by learned counsel for the complainant and with their able

assistance the record of the case was scanned through.

5. The unfortunate lady lost her life on receiving firearm injuries. The matter was reported by the complainant to the local police on the spot. The appellant alongwith his brother i.e. the acquitted co-accused, were charged for the murder of the deceased. The report was reduced in the shape of murasila by PW-2 Said Ali Shah ASI. The injury sheet and inquest report were prepared and the dead body was handed over to Rescue 1122 for shifting the same to the hospital. The investigating officer visited the spot and on pointation of the complainant prepared the site plan. During spot inspection the investigating officer collected blood stained piece, from the sheet of the bed, where the deceased was sitting at the time of occurrence and also took into possession an empty of .30 bore alongwith a spent bullet from the floor of the room. The accused were arrested and during investigation the co-accused Muhammad Imran produced .30 bore pistol to the investigating officer, declared the same as the weapon of offence and the same was taken into possession. The empties collected from the spot were sent to the Firearms Expert and also the spent bullet, wherefrom a report was received by

telling that the empty was that of .30 bore, but in respect of the spent bullet no definite opinion could be given. The accused were charge sheeted, trial commenced which ended in the conviction of the appellant and the acquittal of the co-accused.

6. The learned trial Court took into consideration the evidence on file and found the appellant responsible for the death of the deceased. True that the learned trial Court through a comprehensive judgment convicted and sentenced the appellant and equally true that the material aspects of the case were taken into consideration, but this Court is to see as to whether the approach of the learned trial Court was correct and was in accordance with law and also that the learned trial judge applied his judicial mind to the evidence on file and the statements of the witnesses. We are conscious of the fact that the incident occurred inside the house of the appellant and the relation between the appellant and the deceased was that of the husband and wife, so in such eventuality this Court is to see as to whether the appellant could be burdened with the liability to convince the circumstances, in which the death of the deceased occurred and as to whether in the like circumstances the only responsible person would be the appellant. We

deem it essential to scan through the record and to re-assess the already assessed evidence, so that miscarriage of justice could be avoided. As in the instant case apart from the liability of the husband/appellant, we have two eyewitnesses i.e. the complainant and his son, who deposed that the incident occurred in their immediate presence. When such is the state of affairs, then the foremost duty of this Court is to see as to whether it is the husband/appellant to convince the circumstances which led to the death of the deceased or these are the witnesses who are to prove that the killer is the appellant, as they claimed to be the witnesses of the incident. When the witnesses claimed their presence, then liability remains on the shoulders of the prosecution, and the witnesses must tell the manner in which the incident occurred and the witnesses must convince that it was the accused who killed the deceased. In case the witnesses do not succeed, then the Court can look into the matter by taking into consideration the available circumstances of the case and the liability, if any, of the husband, in that respect. As in the instant case the witnesses came forward and claimed that the incident occurred in their presence, so this Court

must be more conscious to ascertain the liability of the appellant, so to avoid miscarriage of justice

7. The points for determination before this Court are as to whether the incident occurred in the mode, manner and at the stated time and as to whether the complainant and the eyewitness succeeded in establishing their presence on the spot, as to whether there was altercation between the spouses on the night of the incident, as to whether the matter was reported in the mode, manner and at the stated time; as to whether the dead body was shifted to the hospital at the stated time and the report was made to the local police, as to whether the prosecution succeeded in convincing that it was the appellant who killed the deceased. There is no denial to the fact that the appellant is not the resident of the area where the incident occurred as he hails from village Mayar District Mardan and that it was his in-laws who gave him the house to reside. Admittedly, in the house in question no other person was residing, but only the husband and the wife. The site plan depicts that the house of the complainant is situated near to the house of the deceased intervening by a vacant plot. The complainant while reporting the matter disclosed that on the night of incident he and his son was busy in repair work, of the main gate of his

house; that in the meanwhile noise was heard from the house of the deceased and they came to the house, that no sooner did they enter the room, the appellant/accused fired at the deceased; that the deceased after receiving firearm injuries died on the spot; that the matter was reported to the local police on the spot; that the co-accused was also present with the appellant, duly armed with pistol; that after firing at the deceased the accused decamped from the spot. The eyewitness was examined as PW-4, who supported the stance of the complainant and he also disclosed that he verified the report of the complainant. The witnesses were put to the test of searching cross-examination, to test their veracity and their availability on the spot. As this was for the witnesses to convince of their presence on the spot, so for this particular purpose, we went through the statements of the complainant as well as of the eyewitness. The complainant in his cross-examination disclosed that on hearing noise they entered the room and the moment they entered the appellant fired at the deceased. This is surprising that the complainant improved his Court statement and disclosed that he and his son went to the house to compromise the situation, but he could not. This is for the prosecution to tell that on the night of

incident the complainant and the eyewitness was busy in doing the repair work, even the record is silent in that respect, but when the investigating officer was asked regarding this fact, he disclosed that the complainant and his son were repairing the gate of the house of the deceased. As the site plan was prepared on the instance of the complainant, so we went through the same, which depicts that the time of incident the deceased was sitting in the bed and that she was fired at. The peaceful sitting of the deceased in the bed at the time of quarrel is a circumstance that disturbs the judicial mind of this Court and the same belies the stance of the complainant. The presence of the complainant and the eyewitness is lacking confidence, as the complainant in his Court statement made dishonest improvements, while reporting the matter the complainant did not disclose that they heard the hot talks and they entered the house to bring the parties at ease, rather the factum of compromise was introduced by the complainant when he appeared before the trial Court. The complainant in his Court statement disclosed that the altercation between the two took two minutes and thereafter the appellant fired at the deceased. Had there been an altercation, then instead of waiting for arrival of the

complainant to ease the situation, the appellant would have killed the deceased at the earliest. When the altercation did not continue for a good length of time, then what brought the co-accused to the house and for what purpose. As admittedly the appellant is the resident of village Serai Mayar District Mardan, so naturally the co-accused would be living in his house at Mayar and his presence at the time of incident, is a factor which the prosecution could not explain. This is astonishing that if the death occurred because of timely altercation, then why the co-accused came duly armed and that why he facilitated the appellant in killing the deceased. Neither the complainant could bring on record evidence of sharing the intention, nor the investigating officer could collect evidence in that respect.

8. The site plan depicts that the unfortunate incident occurred inside the room, where the deceased was sitting on the bed at point No.1 and the appellant was standing at point No.2 whereas the co-accused at point No.3. The very site plan depicts that the complainant was standing at point No.4 and the eyewitness at point No.5. Had the accused/appellant killed the deceased in the presence of her real father, the father would not let

the accused go. The complainant and the witness were standing in front of the door of the room and they had the opportunity to close the door from outside, but neither resisted, nor made efforts to catch hold of the accused. Realizing the danger the complainant improved his statement, who disclosed that after firing the accused cornered them at gunpoint and because of fear they could not resist. The complainant further disclosed that as they were empty handed, so the accused succeeded in leaving the spot. The statement of the complainant does not appeal to a prudent mind, rather it was an attempt to convince that the appellant could not be overpowered, as they were duly armed. The arrival of the complainant and the eyewitness by the time when the accused fired at the deceased is a circumstance which does not appeal to a prudent mind and the witnesses are chance witnesses. The complainant was asked regarding the presence of the appellant in the house on the day of incident, who disclosed that right from the morning till evening he did not notice the presence of the appellant in the house. When the complainant was confirmed that right from the morning till evening the appellant was not available in the house, then what led to the altercation between the two and that at what time.

The eyewitness also appeared before the trial Court, who was examined and even he made dishonest improvements. The status of the witnesses and the manner in which they attracted to the spot are the circumstances which the prosecution failed to convince. The dishonest improvements have never been permitted by the Apex Court and such improvements discredit the credibility of a witness, whose testimony then can hardly be taken into consideration. As is held in case titled **"Muhammad Munsha Vs The State" (2018 SCMR 772)**, which reads as follows:-

> **"Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that whenever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses."**

9. The matter was reported on the spot when the local police arrived. It is interesting to note that the incident occurred at 22:00 hours, whereas the matter was reported at 23:30 hours to the local police when they attracted to the spot. It is

interesting to note that the scribe received information at 22:00 hours and reached to the spot within 10/15 minutes, but the report was made at 23:30 hours. This is for the prosecution to tell that when the police arrived to the spot at 22:15 hours, then why the report was delayed till 23:30. The scribe was examined as PW-2, who stated that during the days of occurrence he was attached to Police Station Sheikh Maltoon, Mardan; that on the night of occurrence he received information regarding the death of the deceased; that on receiving information he came to the spot house where the dead body was lying and the complainant alongwith the eyewitness was present; that the complainant reported the matter at 23:30 hours regarding the occurrence; that after drafting the murasila he prepared the injury sheet Ex.PW2/1 and inquest report Ex.PW2/2 and sent the dead body of the deceased to the hospital for postmortem examination. This witness was cross-examined where he disclosed that he received information at 22:00 hours and that he reached to the spot within 10/15 minutes, after receiving the information. The witness further disclosed that the report was made at 23:30 hours and it took some 20 (twenty) minutes in preparation of injury sheet and inquest report. The

witness further explained that after doing the needful the Ambulance was called and the dead body was sent to the hospital at 00:30 hours, from the spot. The statement of the witness has surprised us that when the information was received at 22:00 hours and that when he reached to the spot at 22:15 hours and when the complainant was available on the spot, then why the report was not made. This aspect of the case cannot be ignored, rather it has damaged the prosecution case beyond repair. When the statement of the scribe is taken into consideration it leaves no ambiguity that till reporting the matter the complainant was not sure regarding the involvement of the appellant in killing the deceased, rather it was after consultation and deliberation that the appellant and the co-accused were charged. The matter does end at here, rather the investigating officer succeeded in collecting a chit from the hospital where the time of arrival of the dead body was shown at 11:20 PM and the same was duly exhibited. This is for the prosecution to tell that when the report was made at 23:30 hours and when the dead body was sent to the hospital i.e. 00:30 hours, then how the dead body was received in the emergency ward of the Mardan Medical Complex at 11:20 PM. The doctor was examined as

PW-5 who stated that on 02.05.2019 at 11:30 PM the postmortem on the dead body of the deceased was conducted. The doctor was cross-examined on material aspects of the case where she disclosed that in the column of death the time of death mentioned as 10:15 PM and that she started the postmortem examination at 11:30 PM which took her 30 minutes to complete. When the scribe confirmed the availability of the dead body on the spot at 00:30 hours, then how the same was received in the emergency room of the hospital at 11:20 PM, then how the autopsy on the dead body of deceased was carried on at 11:30 PM. When the statement of the witnesses are taken into consideration no ambiguity is left that the witnesses tried to bring harmony in the time of report, the time the dead body was picked up and the time the postmortem examination was carried out, but they did not succeed to reconcile the same and their this attempt has damaged the prosecution.

10. We cannot forget that according to the scribe he received information, regarding the death of the deceased, at 22:00 hours and he reached to the spot at 22:15 hours and kept waiting till the matter was reported at 23:30 hours. It is interesting to note that why the matter was not reported when the

police arrived and when the complainant was available. The witnesses failed to answer that why the matter was not reported at the earliest and that what explanation they tendered. The record is silent regarding any explanation in that respect and even the record is silent that who informed the police and that why the dead body was not shifted to the hospital soon after the incident. The inordinate delay in reporting the matter can be interpreted in no other manner, but that the report was made after consultation and deliberation. Once it is established on record that the matter was willfully delayed to be reported, then no other inference can be drawn but that preliminary investigation was made, so that the attendance of the witnesses could be procured. Similar circumstances are held by the august court in case titled **"RIAZ and another Versus The STATE and another", (2022 P Cr. L J 1070),** which is reproduced herein below:-

> **"It appears that police recorded the report after conducting preliminary investigation and the complainant nominated the present appellants after consultation and deliberation. Our this apprehension is further substantiated by duration of death of two hours as mentioned by the doctor in the postmortem report. On calculating the said duration of death of the deceased from the time of postmortem i.e 12:50 p.m., the occurrence must have taken place at 10:50 a.m. which has dishonestly been suppressed by prosecution."**

11. The complainant could not convince that, when the acquitted co-accused instigated the appellant and that for what purpose, as admittedly the appellant was residing in the house of the complainant, situated near the house of the parents of the deceased and the co-accused was residing in his village at Serai Mayar District Mardan. Neither the complainant could tell that the co-accused was residing with the appellant in the same house, nor the investigating officer could bring on record anything in that respect. When the record is silent on this particular aspect of the case, this Court is inclined to hold that the appellant and the deceased were living alone in the spot house. This is for the witnesses to tell that how they came to know regarding the consultation between the accused and that what led the acquitted co-accused to help in killing the deceased, but the witnesses could not explain.

12. The doctor failed to tell that whether the deceased committed suicide or that she was killed. The attending circumstances of the present case, leads this Court nowhere, but to hold that the prosecution right from the beginning till the end, concealed the real facts. The suppression of facts on the part of the complainant is the circumstance

which helps the accused. It was submitted that when the doctor failed to observe charring marks, then no other inference can be drawn, but the one that it was the appellant who killed the deceased. Once the witnesses claimed their presence at the spot and once it was brought on record that the deceased lost her life in their immediate presence, then in that eventuality when the witnesses failed to establish their presence on the spot, then the appellant cannot be held responsible for the death of the deceased. The question that whether the deceased committed suicide or she was killed by the appellant will hardly succeed as once the prosecution evidence is disbelieved then the involvement of the appellant in the death of the decease could not be proved and when such is the state of affairs then the absence or presence of the charring marks would hardly matter. If we accept that there were no charring marks even then the appellant cannot be held responsible for the death of the deceased as to his extent the prosecution failed to prove its case. Once the prosecution failed to succeed then the burden never shifts to the appellant and the appellant is not supposed to explain the events which led to the death of the deceased. Had the witnesses not claimed the witness of occurrence,

then under all circumstances the appellant was responsible to prove his innocence, but it was the failure of the witnesses which absolved the appellant from his this liability. The attending circumstances of the present case leads this Court nowhere but to hold that the witnesses failed to convince the involvement of the appellant and the delayed report confirmed that the matter was reported after consultation and deliberation. As the prosecution failed to prove its case against the appellant, so in the attending circumstances of the present case the appellant was not suppose to convince regarding his innocence, as in this particular case the burden to prove his innocence was never shifted to the appellant, as it was the complainant who happily accepted the burden and then the witnesses were supposed to prove their case to the hilt against the appellant. The similar circumstance came before the Apex Court in case titled **"NAZIR AHMAD Versus The STATE", (2018 S C M R 787),** which reads as follows:-

> **"It has been argued by the learned Deputy Prosecutor-General, Punjab appearing for the State that the deceased in this case was a vulnerable dependent of the appellant and, thus, by virtue of the law declared by this Court in the cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) some part of the onus had shifted to the appellant to explain the**

> **circumstances in which his wife had died an unnatural death in his house during the fateful night which part of the onus had not been discharged by the appellant. We have attended to this aspect of the case with care and have found that when every other piece of evidence relied upon by the prosecution has been found by us to be utterly unreliable then the appellant could not be convicted for the alleged murder simply on the basis of a supposition. The principle enunciated in the above mentioned cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) was explained further in the cases of Nasrullah alias Nasro v. The State (2017 SCMR 724) and Asad Khan v. The State (PLD 2017 SC 681) wherein it had been clarified that the above mentioned shifting of some part of the onus to the accused may not be relevant in a case where the entire case of the prosecution itself is not reliable and where the prosecution fails to produce any believable evidence. It is trite that in all such cases the initial onus of proof always lies upon the prosecution and if the prosecution fails to adduce reliable evidence in support of its own case then the accused person cannot be convicted merely on the basis of lack of discharge of some part of the onus on him."**

13. The cumulative effect of what has been stated above, leads this Court nowhere but to hold that the prosecution could not succeed in bringing home guilt against the appellant and that the impugned judgment is suffering from errors and inherent defects, which calls for interference. Resultantly, we ***allow*** the instant criminal appeal and set aside the judgment impugned and acquit the appellant from the charges leveled against him. He is in custody,

be released forthwith if not required to be detained in any other case.

14. As the appeal against conviction has succeeded and the impugned judgment is set-aside which led to the acquittal of the appellant, so the instant criminal revision has lost its utility and the same is dismissed as such.

15. Though against the acquittal of the co-accused the connected criminal appeal bearing No.181-P/2023 has been instituted, but once the convict/appellant succeeded in making out a case for indulgence and once he has been acquitted of the charge, then the instant criminal appeal has lost its utility, the same is dismissed as such.

Announced
15.06.2023

Ihsan PS

JUDGE

JUDGE

(DB) Hon'ble Mr. Justice Ishtiaq Ibrahim & Hon'ble Mr. Justice Sahibzada Asadullah