

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR**

(Judicial Department)

Criminal Appeal No.559-P of 2020

**Mujib Rehman s/o Jaffar Khan r/o Wacha Dara, Tehsil Sadda,
District Kurram.**

(Appellant)

Versus

- 1. Saeed Khan s/o Abdul Hadi caste Lisyani r/o Wacha
Darra Upper Kurram.**
- 2. The State through Advocate General, Khyber
Pakhtunkhwa, Peshawar.**

(Respondents)

JUDGMENT

Date of hearing: 05.10.2023.

M/s Muhammad Ijaz Mohmand and Qaiser Hussain (Pajjagi),
Advocates, for the appellant.

Mr. Muhammad Nisar Khan, AAG, for the State.

Mr. Afroz Ahmad, Advocate, for the complainant.

ISHTIAQ IBRAHIM, J.- Mujib Rehman, appellant, has
filed this criminal appeal u/s 410 Cr.P.C against the
judgment dated 09.07.2020 of the learned Additional
Sessions Judge-I, Kurram, in case F.I.R No.133/PNT-
II/2018 dated 08.10.2018 registered under section 302 PPC,
Police Station Central Kurram, whereby, the appellant was
convicted under section 302 (b) PPC and sentence to

undergo life imprisonment with a fine of Rs.200,000/- to be paid to the legal heirs of the deceased as compensation within the meanings of section 544-A Cr.P.C or in default to undergo 06 months SI. Benefit of section 382-B Cr.P.C was extended in favour of the convict-appellant.

2. The prosecution case as per First Information Report (Ex.PA) is that Abid Hussain Moharrir Badama received information that at 09:00 AM in the morning accused Mujib had killed Ahmed Khan by firing at him. Upon the information, he immediately rushed to the place of occurrence where accused had made confined his own children and was saying that if anybody came to arrest him, he will kill his own children. PNT-II was apprised of this situation. The Then Tehsildar and Subidar Major also came to the spot. The house of the accused was surrounded and he was asked to surrender, in the meantime, accused came out from his house along with his children. The accused was immediately overpowered and the children were taken into custody and handed over to brother of accused.

3. On 08.10.2018, case was registered against the accused. Meanwhile, Federally Administered Tribal Area (FATA) was merged with the province of Khyber

Pakhtunkhwa through 25th Amendment and regular Courts were established and all the pending cases under FCR were transferred to their respective Courts of competent jurisdiction.

4. The accused was summoned from jail. Accused was produced in custody and provisions of section 265-C Cr.P.C were complied with. Formal charge against accused was framed to which he pleaded not guilty and claimed trial. The prosecution was directed to produce its evidence. In support of its case, prosecution produced and examined five (05) witnesses.

5. After prosecution closed its evidence, statement of the accused was recorded under section 342 Cr.P.C Having heard arguments of learned DPP for the State assisted by learned counsel for the complainant and learned defence counsel, the learned trial Court/Additional Sessions Judge-I, Kurram, rendered the impugned judgment dated 09.07.2020, whereby, appellant was convicted and sentenced as mentioned in the first paragraph of this judgment; hence this criminal appeal for his acquittal by convict-appellant.

6. Arguments heard and record of the case was perused.

7. Before advertng to the merits of the case we would like to meet the legal objections raised by learned counsel for the appellant as he articulated before us that investigation in the case was not conducted properly and there are major irregularities and illegalities in the investigation of the case. He also submitted that cause of death of the deceased has not been established by the prosecution by not holding the post-mortem examination, therefore, on this score alone the appellant is entitled to be acquitted.

8. True that there are certain lapses on the part of the investigation/prosecution for the obvious reason that the occurrence in this case had taken place on 08.10.2018 while the 25th Amendment was brought into the Constitution of the Islamic Republic of Pakistan, 1973, on 31st May, 2018 and the Frontier Crimes Regulation, 1901 (“FCR”) was repealed. The occurrence in the present case took place during the transitional period when the FATA Interim Governance Regulation, 2018 (**FIGR, 2018**) was promulgated vide notification dated 29.05.2018. Even that


FATA Interim Governance Regulation, 2018, was declared ultra vires of the Constitution of Islamic Republic of Pakistan, 1973, by this Court in (W.P No.3098-P/2018) titled **"Ali Azim Afridi Vs. Federation of Pakistan and others", decided on 30.10.2018.** The judgment of this Court was maintained by the Apex Court in case of **"NATIONAL COMMISSION OF STATUS OF WOMEN through Chairperson and others Vs. GOVERNMENT OF PAKISTAN through Secretary Law and Justice and others"** (PLD 2019 Supreme Court 218). Owing to this state of pandemonium proper investigation in the present case could not be carried out and rightly so when the Law Enforcing Agencies were not clear that as to what would be the forum and what would be the standard of investigation and evidence required in such like offences. If we look at record, the entire proceedings have been carried out by Muharrir and Political Naib Tehsildar as if they were acting under the erstwhile FCR, therefore, we will not attend this submission of the learned counsel for the appellant that the case has not been investigated properly and strictly in accordance with the cases which are being investigated in down districts. Even otherwise by now it has been settled that lapses in the investigation

would not vitiate the trial. In case of **"MUHAMMAD ASHRAF KHAN TAREEN Vs. THE STATE"** (1995 PCr.LJ 313 [Peshawar]), this Court has gone even to the extent that if there is any illegality even what to say of irregularity, would not vitiate the entire process of trial. The judgment of this Court was upheld by the Apex Court in case of **"MUHAMMAD ASHRAF KHAN TAREEN and another Vs. THE STATE and another"** (1996 SCMR 1747 [Supreme Court of Pakistan]).

9. The other objection taken by the learned counsel for the appellant that no medical evidence is available on the record to establish cause of death of the deceased. As discussed above, the occurrence had taken place on 08.10.2018 and the customary law was invogue, therefore, death of the deceased otherwise has been proved through the testimonies of the witnesses and legally speaking under section 174(3) of the Code of Criminal Procedure, 1898, leaves it to the discretion of the Investigating Officer whether he wants to hold medical examination of a deceased or not. For convenience section 174(3) Cr.P.C is reproduced here asunder:

"174(3) When there is any doubt regarding the cause of death, or when for any other reason the police

officer considers it expedient so to do, he shall, subject to such rules as the Provincial Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Provincial Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless."




Reliance is placed on the unreported judgment of this Court in case of "SIKANDAR Vs. The State" (Criminal Appeal No.215/2003), wherein, it is held that;

"The contention of the learned counsel for the appellant that the cause of death, in the absence of the postmortem report, cannot be accepted/confirmed. The injury sheet and inquest report prepared by the Investigating Officer, the testimonies of eyewitnesses and recovery of empties from the spot and all other circumstantial evidence had established that the firearms injuries sustained by him on account of appellant's firing directly caused the death of the deceased. Through postmortem examination only the cause of death could be ascertained but it could not identify the person who had actually killed the deceased and in the present case the postmortem examination of the deceased was totally irrelevant and immaterial because of the availability of direct evidence as to the cause of death of the deceased"

The judgment of this Court was maintained by the Apex Court in case of "SIKANDAR Vs. THE STATE and

another" (2006 SCMR 1786 [Supreme Court of Pakistan], wherein it is held that;

"The medical evidence is not substitute of direct evidence rather is only a source of corroboration in respect of nature and seat of injury, kind of weapon used, the duration between the injury and death and may confirm the ocular account to a limited extent but cannot establish the identity of the accused or connect him with the commission of offence, therefore, if the charge of murder is otherwise proved through the direct evidence, the absence of medical evidence may not be fatal."



10. Now adverting to the merits of the case. Mst. Yasmeen Bibi complainant/eyewitness charged appellant, namely, Mujib Rehman (her real brother) for the murder of her deceased son Ahmed Khan. Mst. Yasmeen Bibi eyewitness/complainant appeared before the Court and recorded her statement as PW-III. She stated that on the day of occurrence i.e. 08.10.2018 at about 07:00 hours at morning when her son left out for School and closed the main gate of their house, she heard crying and shouting of her son, she came out of her house, accused fired at the deceased with 12 bore, as result of which he was hit and fell down and she immediately took him in her lap who succumbed to the injuries and died in her lap. She stated

that at the time of occurrence her father-in-law Abdul Hadi (PW-IV) and his brother, namely, Hamish Gul (PW-V) came to the spot and also spotted accused with weapons at the spot. She stated that after the occurrence the accused rushed to his house. After some time, Political Administration reached to the spot and she charged the accused for the murder of her son. Abdul Hadi, father-in-law of the complainant/eyewitness and grandfather of deceased recorded his statement as PW-IV while Haji Hamish Gul, who is brother of Abdul Hadi, recorded his statement as PW-V. The statement of the eyewitness/complainant/PW-III was affirmed by PW-IV and PW-V, who stated that they had come to the spot after report of fire shorts and there they observed the accused while decamping towards his house having 12-bore riffle in his hand. Both the PWs stated that they informed the police station, who came to the spot and arrested the accused from his house. The witnesses fully supported the version of the complainant/eyewitness. The testimony of complainant/eyewitness and other PWs are unanimous on all material particulars. They have with stood the test of cross examination and nothing favorable to the appellant

has been elicited from them. Moreover, the appellant has been directly charged in a promptly lodged report by the complainant/eyewitness for *qatl-i-amd* of her son, who was real nephew of the appellant, was student of Iqra Public School Sadda. After the commission of offence, accused took refuge in his own house and was arrested from there by the local authorities. This fact is available in the statement of PW-I Abid Hussain and PNT II Musadiq Hussain. The occurrence had taken place in front of house of the complainant/eyewitness; therefore, her presence at spot is natural. The presence of other two PWs, namely, Abdul Hadi (father-in-law of complainant) and Hamish Gul, his brother, on the spot are also natural.

11. More-so, the case is that of a single accused, where the substitution is a rare phenomenon. The parties are closely related, therefore, no possibility of substitution is there in this case. Nothing is available on record that the appellant has been substituted for the real culprit by the complainant/eyewitness. The complainant/eyewitness (PW-III) was subjected to test of cross examination, but no material contradictions came to surface to cast doubt on the prosecution version. Reference in this regard is made to the

case titled **“Muhammad Iqbal V/s. The State”** (PLD 2001 S.C 222) wherein it is held that:-

“Moreover we failed to persuade ourselves to hold that the accused was substituted by the complainant party because in the cases of murder falling under section 302, P.P.C. substitution of an accused who is actually involved in the commission of the crime is a rare phenomena in this country particularly in an incident in which single accused was involved by nominating him in the F.I.R. from the very beginning. So much so if the parties are inter se related to each other, therefore, due to close kinship it is very hard to accept the theory of substitution”.

12. In view of above, the prosecution has proved the guilt of the appellant through cogent and confidence inspiring ocular/direct evidence. The learned trial Court has rightly awarded the conviction and sentence to the appellant which needs no interference by this Court and the conviction and sentence awarded to the appellant is maintained and the appeal is dismissed. Benefit of section 382-B Cr.P.C is extended to the convict-appellant.

Announced
05.10.2023



SENIOR PUISNE JUDGE



JUDGE