

Judgment Sheet

PESHAWAR HIGH COURT, ABBOTTABAD BENCH.

JUDICIAL DEPARTMENT

Cr. A No.260-A of 2018

JUDGMENT

Date of hearing.....08/12/2021.....

*Appellant(s)...(Shakeel Ahmad) by Mr. Wajih-ur-Rehman Khan Swati, Advocate
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*Respondent(s)...(The State etc) by M/S Sardar Muhammad Asif, Assistant
Advocate General, and Fida Bahadur, Advocate*

SHAKEEL AHMAD, J:- The convict-appellant, Shakeel Ahmad aged about 56/57 years, was tried by the learned Additional Sessions Judge-II, Mansehra, under section 302 read with section 337-F(i) PPC for causing murder of Muhammad Naeem son of Mehmood aged about 17/18 years and biting the eyewitness Ali Rehmat (PW-6) on 25th March, 2013 at 17.15 hours in his field near link road at village Degran in the area of Police Station City, Mansehra.

2. The learned trial Judge vide judgment dated 27th November, 2018 has convicted the appellant under section 302(b) PPC and sentenced him to imprisonment for life and a fine of Rs.200,000/- (Two lakh) to be paid to L.Rs. of the deceased as

compensation in terms of section 544-A Cr.P.C, in default thereof, to undergo further simple imprisonment for six months. Under 337-F(i) PPC for biting and causing '*damihah*' to Ali Rehman (PW-6), he was ordered to pay Rs.5,000/- as '*Daman*'. In default thereof, he was held to be dealt with under section 337-Y PPC. Benefit of section 382-B Cr.P.C was extended to the appellant.

3. The appellant has challenged his conviction and sentence through the present appeal. Mehmood (PW-5) on whose report FIR was lodged and being also the father of the deceased, was also not satisfied with the sentence awarded by the learned trial Judge to the convicted accused, he has, therefore, filed revision petition No.50-A of 2018 for the enhancement of the sentence awarded to the accused. We propose to dispose of the appeal and the revision petition by this single judgment.

4. The prosecution version is based on the information furnished to complainant Mehmood (PW-5) by Ali Rehmat (PW-6) recorded by Muhammad Munir (PW-11) in shape of Murasila Ex.PW 5/1 on 25th March, 2013 at 18.45 P.M on the basis of which FIR Ex.PA was recorded at P.S City, Mansehra, is as follows:-

“He stated before the police that on the relevant day, his sons namely Ali Rehmat (PW-6) and Muhammad Naeem (now decd) went to link Road village Degran for grazing their goats, at about 17.45 hours, his son Ali Rehmat came running and informed him that accused Shakeel son of Dost Muhammad forbade his son Naeem (deceased) from grazing the goats, and committed his murder by means of firearm. Pursuant to this information, he alongwith his brother Ali Rehmat came to the crime scene and found his son Naeem in injured condition, they took him but he succumbed to his injuries on the way to hospital. He also caused injury to his son Ali Rehmat by biting on his right arm. The occurrence was witnessed by his son Ali Rehmat. The motive as set up in the crime report was grazing of goats in the field of the accused.”

5. Dr. Bin Yameen (PW-8) conducted autopsy of Muhammad Naeem (deceased) vide postmortem report Ex.PW 8/1 and found rounded bleeding wound about 2 to 3 mm in diameter on left flank (inlet). Irregular bleeding wound about 5 to 6 mm in diameter on right flank (exit), A bleeding rounded wound about 2 to 3 mm diameter in the posterior size of left arms about 3 to 4 inches above left wrist

joint (inlet). A rounded bleeding wound about 2 to 3 mm diameter on interior side of left arm about 3 to 4 inches above left wrist joint (Exit). He also endorsed the inquest report as Ex.PW 8/2. He opined that deceased died due to heavy bleeding which resulted in damage of left kidney and intra abdominal blood vessels.

Dr. Saeed Ullah (PW-12) examined Ali Rehmat (PW-6) on 25.03.2013 at 08.30 P.M and found bruise on his right upper forearm with swelling and sign of teeth with tenderness and red in colour.

Dr. Munawar Ali Awan (PW-10) examined accused Shakeel Ahmad on 26.03.2013 at 1.00 PM and found following injuries on his body.

1. Scratch mark on the outer surface of the left ear with a bruise on the inner surface of left ear with clotted blood present.
2. Scratch mark on the right ear with clotted blood present.
3. 3 chest tenderness on the left side positive.
4. No evidence o nasal trauma and nasal bleed.

6. After registration of case, investigation was entrusted to Gul Muhammad (PW-13), the then Sub-Inspector of Police Station City, Mansehra. He went after accused to his house, but he was missing. In this respect, he prepared search memo Ex.PW 13/1. He visited the crime scene and prepared site plan Ex.PW 13/2 on the pointation of eyewitness Ali

Rehmat (PW-6), recovered blood stained earth (Ex.P-4) and two empties of 30 bore (Ex.P-5) from the venue of crime, took into possession the last wearing of the deceased (Ex.P-2 and Ex.P-3) having corresponding cut marks vide recovery memo Ex.PW 3/1 and sealed into parcel. He also prepared list of L.Rs of the deceased Ex.PW 13/3, arrested the accused on 26.03.2013 vide card of arrest Ex.PW 13/4. He sent the blood stained earth/sand and the garments of the deceased for chemical analysis to the FSL vide application Ex.PW 13/5. He prepared the injury sheet Ex.PW 13/6 of the accused, who was injured and got him medically examined by the doctor. He obtained one day police custody of the accused from the Judicial Magistrate vide application Ex.PW 13/7. He recovered an unlicensed 30 bore pistol (Ex.P-1) on the pointation of accused from a cattle shed belonging to him vide recovery memo Ex.PW 2/1 and drafted Murasila for registration of case and also prepared recovery sketch Ex.PW 13/8 and also prepared pointation memo Ex.PW 13/9 of the spot on the pointation of accused. He sent 30 bore pistol alongwith empties to the FSL vide application Ex.PW 13/10. He produced the accused before the Judicial Magistrate for recording his

confessional statement vide application Ex.PW 13/11 but he refused to confess his guilt. He also placed on record reports of FSL as Ex.PW 13/12 and Ex.PW 13/13. He recorded the statements of the P.Ws under section 161 Cr.P.C. After completion of investigation challan was submitted against the appellant by Amjad Hussain Khan SHO on 29.03.2013.

7. Ali Rehmat (PW-6) who is eyewitness of the occurrence narrated almost the same story as incorporated in the FIR. In addition to the above, formal witnesses, namely, Muhammad Saleem, Noor Islam, Hazrat Bilal, Sherbaz, Ghulam Mustafa, Zahoor Ahmad, Muhammad Munir and Muhammad Khushal were also produced. Muhammad Anwar ASI, Rehmat Wali Constable, Mohiuddin were given up being unnecessary.

8. The plea of the appellant, as transpires from his statement under section 342 Cr.P.C is that of denial simpliciter. He pleaded that he has falsely been involved in the case and that crime pistol Ex.P-1 was not recovered at his instance. No evidence, however, in defence has been led by the appellant.

9. It transpires from the above resume facts of the case that the prosecution case against the

appellant is based on the statement of PW-5 complainant, ocular account furnished by PW-6, postmortem report Ex.PW 8/1, inquest report Ex.PW 8/2, medico-legal report of appellant Shakeel Ahmad Ex.PW 10/1, medico-legal report of Ali Rehmat (PW-6) Ex.PW 12/1, site plan Ex.PW 13/2, recovery of crime empties Ex.P-5, blood stained earth Ex.P-4, recovery of crime pistol Ex.P-1 at the pointation of accused and its matching report Ex.PW 13/3 and motive.

10. We have heard learned counsel for the parties at length and examined the record of this case carefully.

11. The learned counsel representing the appellant argued that it is an un-witnessed crime. He next argued that the occurrence has not taken place in the mode and manner as described by the prosecution. He further argued that nothing incriminating article was recovered at the pointation of the accused. He lastly argued that the prosecution case is pregnant with doubts against the accused. In alternative, he argued that this is a case of sudden provocation and went on to say that the offence, if any, would fall under section 302(c) PPC and not under section 302 (b) PPC.

12. Conversely, the learned counsel appearing on behalf of the complainant and learned AAG representing the State jointly argued that eyewitness namely Ali Rehmat fully supported the prosecution case. They next contended that the crime weapon was recovered at the pointation of the accused and it was matched with the crime empties recovered from the spot which fully connects the accused with the crime. They further argued that the occurrence took place in a broad day light which rules out the possibility of false implication. They added that recovery of crime empties and blood stained earth fully established the venue of crime. Regarding motive they contended that it has been proved. They lastly argued that the prosecution case is free from doubt and the accused deserves normal penalty of death. Adverting to alternative argument of the learned counsel for the appellant, they contended that it is not a case of sudden provocation and that the case does not fall under section 302 (c) PPC and prayed for dismissal of appeal and acceptance of revision petition.

13. We have given due consideration to the submissions, and examined the evidence available on the record and found that ocular account of the

incident furnished by Ali Rehmat (PW-6) who is brother of the deceased Muhammad Naeem, according to him, he and his deceased brother had taken the goats to the spot for grazing. His name is mentioned as eyewitness of the occurrence in the initial report recorded in shape of Murasila Ex.PW 5/1. His evidence is in consonance with the probability and materially fits in with the circumstances of the case. He has stood the test of cross-examination, but nothing favourable to the accused could be extracted from his mouth. He has no previous enmity whatsoever, with the appellant and there is no material contradictions, discrepancy, omission or improvement in his statement. No doubt, he is brother of the deceased but we need not to say that mere relationship is no ground to disbelieve his evidence as argued by the learned counsel for the appellant unless it is proved that he is inimical and falsely deposed against the appellant and that he has not seen the occurrence with his own eyes. He has specifically deposed the reason of going to the spot with his brother by stating that both of them had taken their goats to the spot for grazing. Admittedly, the occurrence took place at 17.15 hours in a broad day light, the accused was

previously known to him, which rules out the possibility of false implication, particularly when there is no previous enmity between the parties. So far as the statement of complainant (PW-5) is concerned, it needs no detailed discussion as his statement is based on the statement furnished to him by his son, namely, Ali Rehmat.

14. No doubt, there is a delay of one hour and forty five minutes in lodging the report. In our view it is not fatal to the prosecution case. Admittedly, the occurrence took place in the field of mountainous area and police station is 3/4 kilometers away from the place of occurrence. It is an admitted fact that after the occurrence the eyewitness came to his father disclosed the incident to him, thereafter, they came to the spot took the deceased to the hospital, but on the way to hospital he succumbed to his injuries and the report was lodged in the Emergency Ward of KATH. Under these circumstances, some delay, if any, in lodging the report is of no help to the accused. Presence of the eyewitness Ali Rehmat (PW-6) on the spot is also established from the fact that he sustained teeth bite injury on his right arm caused by the accused/appellant. Moreso, appellant also sustained scratches during scuffle, which are

reflected from medico-legal report Ex.PW 12/1 and Ex.PW 10/1, respectively.

15. We do not see any conflict between the ocular evidence and the medical evidence. The medical evidence furnishes corroboration to the ocular account furnished by PW-6 to this extent that injuries on the body of the deceased was caused by means of firearm as alleged in the crime report Ex.PW 5/1 and the eyewitness.

16. So far as recovery of crime pistol Ex.P-1 is concerned, the recovery admittedly, took place from the cattle shed of the accused that too at his pointation on the following day of his arrest i.e. 27.03.2013, which was in exclusive knowledge of the accused and place of recovery also belonged to him. It was sent to FSL alongwith crime empties recovered from the crime scene and its report was received in positive, which was utilized by prosecution as a corroborative piece of evidence.

17. Now adverting to plea of sudden provocation and alternative prayer of the learned counsel for the appellant regarding his conviction and sentence under section 302 (c) PPC instead of Section 302(b) PPC. This argument of the learned counsel for the appellant equally has no force, because it is evident

from the record that the accused came to the spot duly armed with 30 bore pistol, forbade the deceased from grazing goats, took out his pistol and fired at the deceased which hit him.

18. So far as the provocation is concerned, it consists of mainly on three elements, the act of provocation, the loss of self-control both actual and reasonable and the retaliation proportionate to the provocation. It is further observed that there are five conditions for bringing the case of an accused within the ambit of provocation, which are:

- (i) the deceased must have given provocation to the accused,
- (ii) The provocation must be grave,
- (iii) The provocation must be sudden,
- (iv) The offender by reasons of the said provocation should have been deprived of his power of self-control and killed the deceased during the continuance of the deprivation of power of control,
- (v) The offender must have caused, the death of a person, who gave provocation.

19. In the present case, we have minutely examined the evidence produced before the learned trial Court and found that there is nothing on the record to show that the appellant was provoked. The

appellant did not take any such plea in the cross-examination to the witnesses nor in his statement recorded under section 342, Cr.P.C. If such plea is taken, the accused is required under Article 121 of the Qanoon-e-Shahadat Order, 1984, to have proved the said plea. If no such proof is led by the accused then the Court has to presume the absence of such circumstances. However, if from the facts of the case, a case of provocation appears to have been made out then the above conditions are required to be satisfied before applying the said principle. In this respect, reference may be made to the most celebrated judgment of Hon'ble Supreme Court of Pakistan, reported as '**Malik Muhammad Mumtaz Qadri Vs. The State and others**' (PLD 2016 Supreme Court-17), wherein it was held as under:-

“---S. 302 (c), proviso---Qanun-e-Shahadat (10 of 1984), Art. 121--- Qati-i-amd, justification for---Grave and sudden provocation---proof---Where an accused person wanted the court to believe that some words or actions of the victim had provoked him and on the basis of such provocation he had killed the victim then in all such cases the court was to presume the absence of the circumstances being asserted by the accused person in support of his plea and it was for the accused person to prove through positive and legally admissible evidence that some provocation was actually offered to him by the victim and such provocation was grave and sudden.”

From the evidence, it is clear that the appellant forbade the deceased from grazing goats in the field and thereafter, he took out his pistol and committed his murder. There is nothing on the record to suggest that the action of the deceased or Ali Rehmat PW-6 had provoked the appellant. It is evident from the record that when PW-6 Ali Rehmat attempted to intervene and save the Muhammad Naeem (now deceased) from committing his murder, the appellant resisted and scuffled with him and caused injury on his right arm by biting him.

20. As discussed above, neither the deceased nor the eye-witness did anything which could have provoked the appellant for killing the deceased. As such, the appellant had no reason or occasion to kill the deceased Muhammad Naeem. There is no possibility of existence of sudden and grave provocation or self defence at the time of occurrence.

21. After giving due deliberation and contemplation, the material available on the record, we are of the considered opinion that the case of the appellant falls under section 302(b) PPC and not under Section 302(c) PPC.

22. Adverting to the quantum of sentence, we observe that there was no background of any previous enmity between the parties. The incident took place on a petty matter i.e. grazing of cattle in the field of the accused, it was not a premeditated murder. Such factors cumulatively make out a case for mitigation and under these circumstances the accused deserves the lesser penalty of the life imprisonment instead of death.

23. The impugned judgment passed by the learned trial Court is based on proper appreciation of evidence and no misreading or non-reading of the evidence could be pointed out, therefore, the same is maintained. Resultantly, this appeal fails and is hereby dismissed. The criminal revision petition filed by the complainant for enhancement of sentence awarded to the appellant in the peculiar facts and circumstances also stands dismissed.

Announced.
Dt.08.12.2021.

/M.Saleem*/ps

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(DB) Mr. Justice Mohammad Ibrahim Khan and Mr. Justice Shakeel Ahmad