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

JCr.A No. 233-M/2016
With Murder Reference No. 08-M/2016

Sultanat Khan s/o Abdul Sattar r/o Pandyar, Lahore, Tehsil Besham, District Shangla.

(Appellant)

Versus

1) ***The State***
2) ***Rashid Ahmad s/o Sultanat Khan r/o Pandyar, Lahore, Tehsil Besham, District Shangla.***

(Respondents)

Present: ***Mr. Razaullah, Advocate for the appellant.***

Mr. Rafiq Ahmad, Assistant Advocate General for State.

Complainant Rashid Ahmad in person.

Date of hearing: **28.11.2017**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Appellant Sultanat Khan was tried by learned Sessions Judge/Zilla Qazi, Shangla at Camp Court Swat for the offences under Sections 302/324/337-F(iii) P.P.C vide F.I.R No. 424 dated 20.10.2014 registered at Police Station Besham, District Shangla and vide judgment dated 12.11.2016 he was convicted and sentenced as under.

(1) **Death sentence under Section 302(b) P.P.C for the murder of Mst. Rahat**

Bibi with payment of Rs.200,000/- as compensation u/s 544-A, Cr.P.C to LRs of the deceased according to their *shari* shares or in default to suffer further one year imprisonment.

(2) Rigorous imprisonment for three years u/s 324 P.P.C for attempting at the life of complainant Rashid Ahmad with fine of Rs.50,000/- and in case of default to undergo further six months S.I.

(3) Imprisonment for one year under Section 337-F(iii) P.P.C for causing injuries to complainant with fine of Rs.30,000/- or in default to further undergo three months S.I.

The sentences were ordered to run concurrently and benefit of Section 382-B, Cr.P.C was extended to appellant/convict.

The appellant has challenged his conviction and sentence through this appeal whereas the learned trial Court has sent the connected Murder Reference No.08-M/2016 for confirmation of the death sentence. Both the matters are being disposed of through this single judgment.

2. The report was lodged on 24.10.2014 at 08:45 hours by complainant Rashid Ahmad (PW-4) present in Emergency Ward of Civil Hospital Besham with the dead body of his wife Mst. Rahat Bibi. According to the report, the complainant alongwith his

brothers were residing with his father Sultanat Khan (appellant) in the same house. There was a dispute over the residential house and other property between the father and sons. The complainant had erected walls of under construction cattle-shed near the house. It was alleged that on the night before the occurrence the appellant demolished the wall of the cattle-shed and at the morning of the day of occurrence when the complainant and his wife Mst. Rahat Bibi (deceased) saw the demolished wall the former asked the appellant that why he had done so on which the appellant got enraged, picked up the Kalashnikov and fired at both of them as a result the complainant sustained injury on his right shoulder whereas Mst. Rahat Bibi was hit on different parts of her body and died on the spot. The occurrence was stated to have been witnessed by his brother Shabir Ahmad and other neighbours. A dispute over the property was mentioned as motive of the occurrence.

3. S.H.O Habib Shah Khan (PW-7) recorded the report in shape of Murasila Ex.PA/1 and sent the same to police station as special report on the basis of which Muhammad Hassan No. 65 (PW-3) registered formal F.I.R (Ex.PA). The S.H.O prepared the inquest report Ex.PW-7/2 and injury sheets Ex.PW-7/1 and Ex.PW-7/3 of the deceased and injured complainant respectively. The injured was medically examined by Dr. Bahr-e-Karam S.M.O (PW-2) on the same day at 08:00 A.M and gave his report Ex.PW-2/1 with the following observations.

> **"A minor bleeding wound situated on right shoulder. The bullet tangentially passed over right shoulder and the differentiation between entry and exit wound is not possible. The burnt skin around the wounds indicates that the wound is caused by bullet. Simple FAI".**

Similarly, post-mortem on the deceased was conducted by Lady Dr. Noon Saha WMO (PW-9). She recorded the detail of injuries on the dead body in her report Ex.PM which is as under:

"No ligature mark seen. Pale looking, rigor mortis not developed, wearing Mahroon velvet Shilwar Qamees.

1. **One entry wound on front of right chest just above breast, small with regular margins, tattooing present. Exit wound: large wound with irregular margins on lower back.**
2. **Entry wound: small wound on front of left leg with regular margin and black tattooing mark.**

   Exit wound: large irregular destructive wound on post side of left leg. Tibia is fractured.
3. **Entry and exit wounds on left index finger on distal phalanges.**

   Cause of Death: Hypovolumia secondary to blood loss 2. Injury to vital organs lungs and spinal cord and abdominal viscera.

4. The S.H.O also made raid on the house of the appellant and recovered the crime weapon i.e Kalashnikov No. 4308 from his residential room which was taken into possession vide recovery memo Ex.PW-1/1 attested by Umar Hayat (PW-1) and Manzoor Ahmad (abandoned). He prepared the site-plan of recovery which is Ex.PW-7/4 and also arrested the appellant in injured condition.

5. Investigation in the case was conducted by Humayun Khan S.I (PW-8). He prepared site-plan Ex.PB on pointation of the complainant on the same day. He also secured

from the place of occurrence blood-stained sand and earth vide recovery memo Ex.PW-6/1, six empty shells and seven live rounds both of 7.62 bore vide recovery memo Ex.PW-6/2 and blood-stained garments of the deceased and injured complainant vide recovery memo Ex.PW-6/3. The above mentioned recovery memos were attested by Naeemullah (PW-6) and Israr (abandoned). The I.O made photographs of the place of occurrence which are available on record as Ex.PW-8/6 to Ex.PW-8/8 while the photographs of blood-stained garments are Ex.PW-8/9. The blood-stained earth and garments as well as the crime weapon alongwith empties were sent to F.S.L vide applications Ex.PW-8/4 and Ex.PW-8/5 respectively. The positive F.S.L reports in this regard have been placed on record as Ex.PK and Ex.PZ.

6. The appellant was formally arrested in injured condition on 21.10.2014 while he was brought back from Abbotabad Medical Complex. It is noteworthy that he had

also lodged a report on 20.10.2014 which was recorded vide Daily Diary No. 11 on the same day which is available on record as Ex.PW-7/5 whereas his injury sheet is Ex.PW-7/7 with report of the doctor who examined him.

7. After completion of investigation, challan was submitted in Court where the appellant was tried in due course. After recording of prosecution evidence, the appellant was examined under Section 342, Cr.P.C wherein he pleaded innocence and denied all the allegations leveled against him by prosecution, however, he did not wish either to produce evidence in his defence or record his statement on oath. At conclusion of the trial, the learned trial Court found the appellant guilty of the charge and vide judgment dated 12.11.2016 sentenced him in the manner already mentioned in Para-1 of this Judgment. Hence, this appeal.

8. Learned counsel or the appellant, *inter alia*, contended that according to the medical report charring marks were present on

the body of the deceased who was shown at a distance of 16 feet from the appellant in the site-plan, therefore, the tattooing marks on the deceased as a result of firing of the appellant from such a long distance were not possible. He continued that in fact the deceased was hit by firing of her husband who was present very close to her i.e at distance of 3 feet per site-plan but this vital aspect of the case has not been considered by the learned trial Court. He next argued that there is no convincing and independent evidence against the appellant to connect him with the offences. He further argued that the statements of PWs, the site-plan and medical report are contradictory inter se on material points which have made the prosecution case doubtful but this aspect of the case got no attention of the learned trial Court. He maintained that nothing incriminating has been recovered from possession of the appellant and the alleged recovery of the crime weapon has been effected from the house wherein the appellant and his sons were jointly residing, therefore,

the same was wrongly attributed to the appellant, as such, this piece of evidence has no evidentiary value. Learned counsel added the appellant also lodged a report vide Madd No. 11 dated 20.10.2014 wherein he charged his sons including the complainant and two other persons for causing him injuries. He argued that the learned trial Court ignored this aspect of the case while awarding capital punishment to the appellant. Learned counsel concluded that the impugned judgment is against the law and evidence on record, therefore, needs to be set aside and outright acquittal be granted to the appellant in the interest of justice.

9. As against that learned A.A.G. vehemently supported the impugned conviction and sentence and contended that the direct as well circumstantial evidence available on the record against the appellant is trustworthy and reliable which proves the guilt of the appellant beyond any doubt. He further contended that the learned trial Court has appreciated the prosecution evidence

according to the settled principles leaving no room for interference by this Court, therefore, the judgment of the trial Court be maintained and this appeal be dismissed. It is pertinent to mention that complainant is present before the Court and he had already appeared before the learned Additional Registrar of this Court on 04.05.2017 and did not wish to engage a private counsel rather relied upon the arguments of learned A.A.G.

10. We have considered the submissions of learned counsel for the appellant and learned A.A.G. and gone through the record in light of their valuable assistance.

11. Admittedly, the appellant and complainant are father and son inter se while the deceased is wife of the complainant. After the death of the complainant's mother, the appellant remarried and from then onward the relations between the issues of the first wife and appellant became strained. On the night before the day of occurrence, as narrated by

complainant, the wall of his cattle-shed was demolished by the appellant which resulted into the present tragedy. The submissions of learned counsel for the appellant with regard to tattooing marks on the body of deceased and injured in view of the site-plan, would be immaterial in circumstances of the case as the relation between the parties is such that the contradictions in medical evidence and ocular account are of no benefit to the appellant and that's too for securing his acquittal. The complainant has himself sustained injuries in the same occurrence and his presence on the place of occurrence at the relevant time is very much established because both the parties were residing in the same crime house. The venue of occurrence and even the motive is admitted, so, we cannot subscribe to the submissions of learned counsel that the appellant is entitled to his outright acquittal.

12. The main question before this Court is what would be the proper sentence in the circumstances of the case when the appellant also lodged a report vide Daily

Diary No. 11 dated 20.10.2014 (Ex.PW-7/6) when he was arrested and was also medically examined and certain blunt injuries were found on his body sustained by him in the same occurrence. Moreso, the conduct of the appellant is also considerable as after the occurrence he was present in his house and when the police came his report was recorded and he was referred for medical treatment. The complainant party has suppressed the injuries sustained by the appellant and so is the Madd report (Ex.PW-7/6) of the appellant which is also silent about the casualties of the other side. Above are the crucial facts and circumstances of the case compelling us to reconsider conviction of the appellant under Section 302(b) P.P.C as well as the quantum of sentence awarded to him by the learned trial Court. The question whether conviction of the appellant under Section 302(b) P.P.C in the attending circumstances of the case is legally correct or not, before making any discussion on the point, let Section 302 P.P.C be replicated for the sake of convenience.

> **"302. Punishment of *qatll-i-amd*.** Whoever commits *qatl-i-amd* shall, subject to the provisions of this Chapter be;
>
> (a) Punished with death as *qisas*;
>
> (b) Punished with death or imprisonment for life as *ta'zir* having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or
>
> (c) Punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of *qisas* is not applicable".

Adverting to the question that what would be the proper sentence that should be awarded to the appellant in light of the above provisions and keeping in view the circumstances of the occurrence. It is upto the Courts to consider on case to case basis as to which of the three clauses under Section 302 P.P.C is applicable in view of the circumstances forming background of the offence. The question under consideration herein for the first time arose before the Hon'ble apex Court in the case titled *"The State V/s. Muhammad Hanif and 05 others"* ***(1992 SCMR 2047)***, the question so devised for resolution was as under.

> **"whether the requirement of section 302(c), P.P.C. has to be proved by the prosecution as a requirement of substantive law or has to be proved by the accused as an Exception?"**

The apex Court while making discussion in the context of the above question observed that:

> **"The exact words of section 302, P.P.C. make it clear that there is no Exception provided therein. What is provided is a substantive law and the prosecution has to prove every part of it i.e., whether it is a `Qatl-i-amd' liable to Qisas, whether it is `Qatl-i-amd' not liable to Qisas, or whether it is Qatl-i amd liable to Ta'zir--------Muhammad Hanif has taken the plea of grave and sudden provocation which is not available to him now as section 300, P.P.C. has been substituted by a new section 300, P.P.C. and the exceptions contained in the old section have been deleted. The definition of Qatl e-i-Amd has been given in the new section 300, P.P.C. Any how it serves as a mitigating circumstance in favour of Muhammad Hanif. Another fact that he has taken revenge of the murder of his brother Khurshid is also an extenuating circumstance which goes in his favour. I find Muhammad Hanif guilty under section 302(c), P.P.C. and award him ten years' rigorous imprisonment. Muhammad Hanif accused is also directed to pay. Rs.25,000 as Arsh to the heirs of the deceased, in default of the payment of the said amount, he shall further undergo rigorous imprisonment for two years."**

The Hon'ble apex Court, while deciding a case containing the same issue,

rendered another judgment in the case titled *"Ali Muhammad V. Ali Muhammad and another"* ***(PLD 1996 SC 274)*** and held that the exceptions available under the repealed chapter are now to be dealt with under Section 302 (c) PPC. The relevant para of the judgment is replicated for convinience:-

> **"But keeping in view the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the cases covered by the exceptions to the old section 300 PPC read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C".**

In the case titled *"Azmat Ullah V/s. The State"* ***(2014 SCMR 1178)*** the august Supreme Court discussed the exceptions to the erstwhile Section 300 PPC and observed as under:-

> **"Leave to appeal had been granted in this case to consider as to whether the circumstances of this case attract the provisions of Section 302(b) PPC or of section 302(c) PPC. A bare perusal of the F.I.R., the statements made by the eye-witnesses before the learned trial Court and the findings recorded by the learned Courts below clearly show that there was no background of any ill-will or bitterness between the appellant and his deceased brother and that the incident in issue had erupted all of a sudden without any premeditation whatsoever. The medical evidence**

shows that the deceased had received one blow of a *churri* on his chest whereas another blow was received by him on the outer aspect of his left upper arm. The doctor conducting the post-mortem of the dead body had categorically observed that both the injuries found on the dead body of the deceased could be a result of one blow of *churri.* These factors of the case squarely attract Exception 4 contained in the erstwhile provisions of Section 300, P.P.C. It has already been held by this Court in the case of Ali Muhammad V. Ali Muhammad and another (PLD 1996 SC 274) that the cases falling in the exceptions contained in the erstwhile provisions of section 300, PPC now, attract the provisions of section 302(c), P.P.C".

13. No doubt, the appellant has not taken the plea of self defence neither in his Madd report nor in his statement under Section 342, Cr.P.C but it is by now settled that if an accused have not specifically taken the plea of self-defence but the circumstance of the case and the prosecution evidence suggest that the accused has acted in his self-defence, its benefit can be extended to him. The record transpires that the appellant sustained multiple injuries mostly on his head in the same occurrence. He was medically examined by doctor and even he reported the matter to local police vide Madd No. 11. The

stamps of injuries on the person of the appellant who being alone at the relevant time in rivalry of his sons and the factor of suppression of real facts of the occurrence by both the sides are the circumstances suggesting the act of firing by the appellant to have been committed in exercise of his defence the benefit of which can be extended to him irrespective of the fact that he did not specifically take that plea during trial. Reliance is placed on *"Ghulam Farid V/s. The State" (2009 SCMR 929)* wherein it has been held that:-

> **"The appellant did not raise this plea during trial either in his statement under section 342, Cr.P.C. or at the time when the prosecution witnesses were subjected to cross-examination. There is no bar to raise such plea despite having not taken the said plea specifically during trial and the Court can infer the same from the evidence led during trial if the same is tenable. However, to justify such an inference in favour of the accused who stands convicted on a murder charge and sentenced to death, his conduct during the occurrence should fall within the parameters of right of private defence as codified in the Pakistan Penal Code".**

In the case titled *"Munshi Ram and others V/s. Delhi Administration" (AIR*

1968 SC 702), the question whether an accused can get benefit of the circumstances showing that he acted in his defence though he did not take that plea specifically, the Supreme Court of India held that:-

> **"It is well-settled that even if an accused does not plead self-defence, it is open to the court to consider such a plea if the same arises from the material on record ------. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record".**

The same view was followed in the case tiled *"Gottipulla Venkata Siva Subrayanam & ors vs. State of Andhra Pradesh & anr"* ***(AIR 1970 SC 1079)*** and certain leading principles were laid down during elaborate discussion on the point of private defence. The relevant part of the judgment is as under:-

> **"The fact that the plea of self-defence was not raised by accused No. 10 and that he had on the contrary pleaded *alibi* does not in our view, preclude the Court from giving to him the benefit of the right of private defence, if, on proper appraisal of the evidence and other relevant material on the record, the Court concludes that the circumstances in which he found himself at the relevant time gave him the right to use his gun in exercise of**

> **this right. When there is evidence proving that a person accused of killing or injuring another acted in the exercise of the right of private defence the Court would not be justified in ignoring that evidence and convicting the accused merely because the latter has set up a defence of *alibi* and set forth a plea different from the right of private defence. The analogy of estoppel or of the technical rules of civil pleadings is, in cases like the present, inappropriate and the Courts are expected to administer the law of private defence in a practical way with reasonable liberality so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive".**

14. We are conscious of the fact that though the appellant acted in his defence but has exceeded than what was required for his defence. This fact is evident from medico-legal reports of both the deceased and injured complainant according to which the complainant received one bullet on his shoulder whereas the deceased sustained multiple firearm injuries on her body. In the opinion of this Court, the act of firing by the appellant in his defence, discernible from circumstances of the case, as well as the relationship between the parties are the factors which can be considered for conviction of the appellant under section 302(c) P.P.C instead

of Section 302(b) P.P.C but since he has exceeded his right of self-defence, therefore, in our view the sentence of 14 years will meet the ends of justice in the circumstances of the case.

15. For what has been discussed above, this appeal is partially allowed, the impugned judgment dated 12.11.2016 rendered by the learned Sessions Judge/Zilla Qazi, Shangla Camp Court at Swat, in case F.I.R No. 424 dated 20.10.2014 under Sections 302/324 PPC registered at Police Station Bisham, District Shangla, is modified and consequently conviction of the appellant Sultanat Khan son of Abdul Sattar is converted from 302 (b) PPC to 302 (c) PPC and his sentence is reduced from death to 14 (fourteen) years rigorous imprisonment. The compensation of Rs.200,000/- imposed upon the appellant under Section 544-A, Cr.P.C as well as his conviction and sentences of imprisonment and fine under sections 324 & 337-F(iii) P.P.C shall remain intact. All the sentences shall run concurrently. Benefit of

Section 382-B, Cr.P.C is extended to the appellant. Murder Reference No.08-M/2016 is answered in ***Negative.*** The connected JCr.A No. 234-M/2016 is dismissed, conviction of the appellant under Section 13 A.O in case F.I.R No. 425 dated 20.10.2014 of Police Station Bisham is maintained, however, by means of discretion contained in Section 397, Cr.P.C, the sentence awarded to the appellant for the said offence shall run concurrently alongwith the sentences under Sections 302/324/337-F(iii) P.P.C with benefit of Section 382-B, Cr.P.C.

16. Above are the reasons of our short order of the even date.

Announced
28.11.2017

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