

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

**Cr.A No.118-A of 2019.**

**JUDGMENT**

Date of hearing .....18.05.2022.....

Appellant (Noor-ur-Rehman) Mr. Ravez Akhtar,  
Advocate

Respondents (The State & another)  
The State By Mr. Mojahid Khan, AAG  
Complainant By Mr. Masood Azhar, Advocate

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**KAMRAN HAYAT MIANKHEL, J.-** Appellant, Noor ur

Rehman, was tried in case FIR No. 326 dated 04.10.2016 under Section 302 PPC registered against him at Police Station Saddar District Haripur for the *Qatl-i-Amd* of one Ayaz. When found guilty, he was convicted under Section 302 (c) PPC and sentenced to fourteen years rigorous imprisonment by the learned Additional Sessions Judge-V, Haripur vide judgment dated 25.03.2019. He was also directed to pay compensation of Rs.200,000/- to the legal heirs of the deceased and in default thereof to undergo six (06) months S.I with benefit of section 382-B Cr.P.C.

2. Brief facts of the case are that on 04.10.2016 complainant Abdul Razaq alongwith dead body of his son namely Ayaz reported the matter to police at Emergency Ward of District Headquarter Hospital, Haripur to the effect that his son is running a motorcycle workshop at Mohallah Akbar Shah, Serai

Nehmat Road and he has kept the pigeons in the house. At about 08:00 a.m. his pigeons flew away to the house of their neighbors and his son started search of his pigeons and reached at the house of neighbor Noor ur Rehman, who made fire at him. He was hit and fell down and succumbed to his injuries. On this information, the complainant went to the said house and shifted his son with the help of others to the hospital. He charged accused for commission of offence. The motive was stated to be entrance of deceased at the house of accused for search of his pigeons. The occurrence is stated to be witnessed by his other son Ishtiaq and the ibid case FIR was chalked out.

3. On completion of investigation, complete challan was put in court which indicted the accused for the offence, to which he pleaded not guilty. In order to prove its case, prosecution examined twelve (12) witnesses, whereafter statement of the accused was recorded, wherein he professed his innocence. The learned trial court, after conclusion of the trial, held the appellant guilty of the charge and while recording his conviction and sentenced him as mentioned above.

4. The learned counsel for appellant submitted that the burden of proof was on the prosecution to prove its case beyond any shadow of doubt but

statements of prosecution witnesses are full of contradictions of major nature regarding the mode and manner of alleged occurrence. The learned counsel further averred that the confessional statement so recorded does not confirm to the mandatory legal codal formalities as per High Court Rule and orders.

5. Learned counsel for respondent/complainant argued that prosecution has proved its case against the accused facing trial through trustworthy and unimpeachable and confidence inspiring evident.

6. Arguments heard and record perused with the able assistance of both the counsels.

7. Perusal of the record transpires that prosecution has produced twelve witnesses to prove its case. PW-2 is the statement of Muhammad Nazir ASI who on receiving the Murasila, sent through constable Rafique No. 381, chalked out FIR No. 326 dated 04.10.2016. Rashid Khan IHC appeared as PW-3 who is witness of recovery memo Ex PW-3/1 vide which the investigating officer took into possession bloodstained garments, having corresponding cut marks, of the deceased. The Shalwar P (1), Qamees P (2) of light blue colour, banyan P(3) of white colour were packed and sealed into parcel No.3 and one bottle having led bullet P (4) produced by the doctor and packed and sealed

into parcel No.4 by affixing 3/3 seals of 'AK' on them. He is also marginal witness of recovery memo Ex:PW3/1 vide which the accused led the police party to the spot and produced mobile of the deceased as well as his own mobile lying under pillow in his own house, which are P (5) & P (6) respectively vide recovery memo Ex:PW3/2. Dr. Tahir Aziz Chughtai SMO appeared as PW-4 and stated that on 04.10.2016 vide yearly No.61/2016, he conducted the autopsy on deceased Ayaz aged about 23 years and as per postmortem report the deceased received the following injuries:-

- “1. Firearm injury entry wound measuring  $\frac{1}{2}$  X  $\frac{1}{2}$  cm on medial side of right thigh 2” below to right groin. Bullet piece taken.
2. Firearm injury entry wound measuring  $\frac{1}{2}$  X  $\frac{1}{2}$  cm on media side of right thigh, 2” below of injury No. 1. Wound is skin deep.
3. Firearm injury exit wound measuring 1x1 inch on right thigh on lateral side, 10 inches below iliac crust. Wound of thigh fractured. Thorax opened. All wall and internal organs are intact and health, Abdomen opened. From walls to organ of generation all intact and healthy.”

PW-05 is the statement of Shafique ur Rehman who stated that on 5.10.2016 he was present in the village near the house of the accused. In the meantime, the local police brought the accused in the handcuffs who led the police party inside his house and pointed the place of

occurrence. Police prepared pointation memo Ex PW-5/1. Accused also took out and produced 12-bore shotgun, double barrel from a room used as pigeon cabin along with three live cartridges of 12-bore. The police sealed and packed the double barrel shotgun into parcel and also sealed three live cartridges into another parcel. They prepared recovery memo Ex PW-5/2 in his presence. PW-06 is the statement of Muhammad Amjad Khan who stated that in his presence during spot inspection IO secured blood from the place of dead body of deceased packed into parcel and sealed the same which is Ex P-5. The IO also took into possession a pair of chapples Ex P-6 belonging to deceased from the spot. IO also packed and sealed the same into parcel. IO prepared recovery memo of both the recoveries which is Ex PW-6/1. PW-7 is the statement of Abdul Hameed MHC, who stated on 10.10.2016, he vide receipt No. 133/21 Ex PW-7/1 sent parcel No. 1 containing bloodstain swabs, parcel No. 2 containing bloodstain Chapel and parcel No. 3 containing shalwar, Qamees and banyyan of deceased Ayaz to FSL and also vide receipt No. 134/21 Ex PW-7/2 parcel No.4 containing a sealed phial containing bullet led, parcel No. 5 containing shotgun double barrel and another parcel No. 6 containing empty of 12-bore sent to

Arms Expert through Lehrasab, who after depositing the same in the concerned laboratory and brought the receipt back and handed over to him, which he appended with Register NO. 21 of the PS. PW-8 is the statement of Lehrasab Khan LHC who stated that on 4.10.2016 he produced bloodstained clothes of deceased Ayaz comprising of Shalwar P(1), Qamees P(2) and Banyan while colour P(3), Shalwar having cut marks, which IO took into possession through recovery memo already exhibited as Ex PW-3/1, sealed and packed into parcel. Similarly, on 5.10.2016, IO took into possession two mobiles produced by the accused from the residential room of his house lying under the pillow of cot produced by the accused Noor ur Rehman vide recovery memo already exhibited as Ex PW-3/2. On 10.10.2016, Abdul Hameed Moharrir of the PS handed over to him various parcels of the present case for onward submission to FSL. He deposited the parcel containing blood of the deceased, clothes and pair of chapel of the deceased to the FSL vide receipt No. 133/21. He also handed over the parcel containing one phial having bullet led, other parcel containing empty of 12-bore and another parcel containing 12-bore double barrel for onwards submission to the Arms Expert, which he deposited in the office of Firearm

Experts vide receipt No. 134/21. PW-9 is the statement of Muhammad Jamil ASI, who stated that on 14.10.2016 the investigation of the present case was handed over to him, he proceeded to the spot and prepared site plan on the pointation of PW Ishtiaq Ahmed. Site plan is Ex PW-9/1. During spot inspection he took into possession the blood from the place shown for the presence of deceased Ayaz packed and sealed into parcel No.1. He also took into possession a pair of chapel of brown color of the deceased which was identified by brother of deceased, packed and sealed into parcel No. 2 and affixed the 3/3 seals with monogram of "AK". He prepared recovery memo to this effect which is already exhibited as Ex PW-6/1. He took into possession blood stained garments of the deceased produced by Lehrasab LHC comprising of shalwar, qameez and banyan, bloodstained containing corresponding marks of bullet P(1), P(2) and P(3) respectively. He sealed the same into parcel NO. 3 and also took into possession one phial containing, bullet lead P(4) produced by the Lehrasab LHC. He arrested the accused and issued card of his arrest Ex PW-9/3. Vide application Ex PW-9/4 he produced the accused for police custody. He made addition in the site plan after the pointation made by the accused and the addition made thereof is Ex PW-

9/19. PW-10 is the statement of Saima Asim, Senior Civil Judge/Judicial Magistrate who stated on 7.10.216 at about 11:30 am, the local police produced accused Noor ur Rehman and after complying with the provisions as contemplated u/s 164/364 Cr.P.C she recorded his confessional statement. Questionnaire is Ex PW-10/1, confessional statement is Ex PW10/2 and the certificate is Ex PW-10/3. PW-11 is the statement of Muhammad Ishtiaq, who is brother of the deceased stated that deceased Ayaz was his younger brother who has kept pigeons at his house. At about 11.45am/12:00 noon, they reached the house of Noor ur Rehman, his younger brother made voice to Noor ur Rehman and entered in his house. He also reached in the door of the house of accused. Accused Noor ur Rehman came out from the room holding a shotgun of 12-bore double barrel and made a fire on his brother which hit on the right thigh of his brother who fell down. PW-12 is statement of Abdur Razaq who is the complainant of the case stated that deceased Ayaz was his son, who was running a motorcycle repairing workshop at Sarai Nehmat Khan and further narrated the same facts as narrated by PW-11.

8. The main question before this court is that what would be proper sentence of self defence and



also whether in the circumstances of the present case accused has succeeded his right of self defence or not.

9. Adverting to the question that would be proper sentence, it is upto courts to consider on case to case basis as to which of the three clauses under section 302 PPC is applicable in view of the circumstances forming background of the offence. The question herein arose before apex Court in case titled The State Vs Muhammad Hanif and 05 others reported as **1992 SCMR 2047**, the question so devised for resolution was as under:-

“Whether the requirement of section 302 (c) PPC 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 PPC make it clear that there is no exception provided therein. What is provided as 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 be qisas, or whether it is qatl I amd liable to tazir.....Muhammad Hanif has taken a plea of grave and sudden provocation which is not available to him now as section 300 PPC has been substituted by a new section 300 PPC and the exceptions contained in the old section have been deleted. The definition of qatl i amd has been given in the new section 300 PPC. Any how it serves as the mitigating circumstance in favour of Muhammad Hanif. Another fact that he taken revenge of the murder of his brother

Khursheed is also an extenuating circumstance which goes in his favour. I find Muhammad Hanif guilty under section 302 (c) PPC 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 apex Court while deciding another titled Ali Muhammad vs Ali Muhammad and other **PLD 1996 Supreme Court 274** and held that the exception 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 convenience:-

“But keeping in view the majority view in Gul Hassan case **PLD 1989 Supreme Court 633**, there should be not doubt that the cases covered by the excpetions to the old section 300 PPC read with old section 304 thereof, are cases which were intended to be dealt with under clause c of the new section 302 of the PPC.”

In another case tilted Azmatullah vs the State reported as **2014 SCMR 1178**, the apex court discussed the exception 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 provision of section 302 (b) PPC or of section 302 (c) PPC. A bare perusal of the FIR, the statement made by the eyewitnesses before the learned trial court and finding 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 that the incident in issue had erupted all of a sudden without any premeditation whatsoever. The medical evidence shows that the deceased had received on blow of a churry on his chest whereas another blow was received by him on the out aspect of his left upper arm. The doctor conducting the postmortem 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 churry. These factors of the case squarely attract exception 4 contained in the erstwhile provisions of section 300 PPC. It has already been held by this court in the case of Ali Muhammad vs Ali Muhammad and another PLD 1996 Supreme Court 274 that the cases falling in the exception contained in the erstwhile provisions of section 300 PPC now attract the provision section 302 (c) PPC.”

10. The appellant has taken specific plea of self defence and even otherwise if accused has not taken plea of self defence in his statement recorded under section 342 Cr.P.C but if the circumstances of the case and the evidence so produced reflect that the accused acted in self defence the benefit can be extended to him. In this regard reliance is placed on the case titled Ghulam Farid vs The State reported as **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.”

11. Though the appellant acted in his defence but has exceeded that what was required for his defence. The accused should have warned the deceased through aerial shot instead of directly firing upon the deceased. No doubt the accused has not repeated and only one fire shot has been made which hit the deceased on his right thigh. It is also admitted that accused has divorced his wife and having no male issue and only two daughters with whom he was residing in his house. Complainant as well as the eyewitness PW-11 during course of cross examination admitted to be correct that there was no previous enmity between them meaning thereby that if the deceased had not entered in the house of accused no offence would have taken place. The record depicts that deceased has himself committed illegal tress pass in the house of accused. Appellant was living with his two daughters and the illegal tress pass of the deceased annoyed the accused/appellant and thus resulted in the present occurrence. Moreover, the fire was made at the non-

vital part of the deceased and after making firing from shotgun the accused has got three more live cartridges but he did not make any fire on the vital part of the deceased though the deceased was at the mercy of the accused for sufficient time. All the facts lead this court to the conclusion that the accused/appellant has exercised his right of self defence, therefore, in our view the sentence of fourteen years is excessive and sentence of 10 years will meet ends of justice in the circumstances of the case.

12. For what has been discussed above, this appeal is partially allowed and the impugned judgment of the learned trial court is modified to extent of ten years instead of fourteen years while rest of the judgment of the learned trial court is maintained.

Announced.  
18.05.2022.

**JUDGE**

**JUDGE**

Aftab PS/\*                      Hon'ble Mr. Justice Wiqar Ahmad  
   Hon'ble Mr. Justice Kamran Hayat Miankhel