JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR

(*Judicial Department*)

Cr. A No. 942-P/2023

Gul Shah Ali & another

Vs

The State &another

JUDGMENT

Date of hearing: **16.05.2024**

Appellants by: M/s. Astaghfirullah, Abid Hussain, Nasruminallah and Yaseen Ullah, Advocates.

The State by: Mr. Niaz Muhammad, Addl. AG.

Respondent No. 2/Complainant by: Mr.Mussawir Shah Mohmand, Advocate.

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SAHIBZADA ASADULLAH, J.- Through this single judgment, this court shall also decide the connected **Cr.A No. 950-P/2023** titled ***"Gul Shah Ali vs Haji Rafiq & others"*** as both the matters are arising out of one and the same judgment dated 12.05.2023 passed by the learned Sessions Judge, Mohmand delivered in case FIR No. 68 dated 25.07.2021 under sections 302/324/34/427/337-F(vi)/34/337-F(vi)/34/336/34/337-Q PPC at police station Ekkaghund, District Mohmand, whereby the

appellants Gul Shah Ali and Ghous Ali were convicted and sentenced as under:

Under section 302(b) PPC to imprisonment for life and to pay compensation of Rs.5,00,000/- (five lac) each to be paid to the legal heirs of the deceased within the meaning of section 544-A Cr.PC and in default of payment, they shall further suffer six months simple imprisonment.

Under section 324/34 PPC (on three counts) for attempting at the lives of PW Haji Rafiq, Adil and Tanzeemullah to imprisonment for ten years and to pay a fine of Rs.1,00,000/- (one lac) each and in default of payment, they shall further suffer three months simple imprisonment.

Under section 337-F(vi)/34 PPC for causing jurh ghair-jaifah Munaqqilah to Haji Rafiq to imprisonment for five years as Tazir and to pay daman of Rs.1,00,000/- (one lac) each.

Under section 337-F(vi)/34 PPC for causing jurh ghair-jaifah

Munaqqilah to PW Adil to imprisonment for five years as Tazir and to pay daman of Rs.1,00,000/- (one lac) each.

Under section 336/34 PPC for causing itlaf-i-salahiyyat-iudw to PW Tanzeemullah to imprisonment for ten years as Tazir and to pay Arsh equivalent to the value of Diyat in light of section 337-Q PPC each.

Under section 427/34 to simple imprisonment for one month each and to pay a fine of Rs.5,000/- (five thousand) each. in default to suffer 10 days SI. Benefit of section 382-B Cr.PC was extended in favor of the appellants. All the sentences so awarded shall run concurrently.

2. Facts forming the background of the instant case FIR No. 68 are that on 25.07.2021 complainant Haji Rafiq son of Siyal Jan reported the matter in the causality Lady Reading Hospital, Peshawar to the effect that he alongwith his brother Tanzeemullah and relative Adil and Muhammad Imran were proceeding on their motorcycles towards

Shahkas Khyber Police Training Center, the complainant was present alongwith the deceased on his 125 Honda motorcycle whereas, his brother Tanzeemullah was present on his motorcycle driven by Adil; that when they reached to the place of occurrence, accused Gul Shah Ali, Ghous Ali and Hussain, were present on the road side duly armed with deadly weapons; that the accused on seeing them, started firing at them as a result of which the complainant party received firearm injuries; that Imran succumbed to his injuries while on the way to the hospital; that motive behind the occurrence is previous blood feud; that the occurrence was witnessed by the complainant and other injured; that from the firing of accused, the motorcycle was also damaged; that the accused petitioners were charged for the commission of the offence hence, the present FIR.

3. Facts in brief of the **Cr.A No. 950-P/2023** titled ***"Gul Shah Ali vs Haji Rafiq & others"*** are that in the incident the appellant Gul Shah Ali also received firearm injuries therefore, Abdullah Jan ASI alongwith another police official went to Khyber Teaching

Hospital, Peshawar where the appellant Gul Shah Ali reported the matter to the effect that he was proceeding on his 70 CC motorcycle from his village towards the house of his sister Mst. Wara wife of Abdullah situated at Bai Kor; that he was duly armed with Kalashnikov; that when he reached to the place of occurrence, Haji Rafiq boarding a motorcycle with Imran and Tanzeemullah with Adil, all duly armed with their respective firearms, came there and started firing at him as a result of which he received firearm injuries on his body; that he also resorted to firing; that motive behind the occurrence is previous blood feud; that the accused have received money for his killing; that the occurrence was witnessed by other persons present at the place of occurrence; that the accused were charged for the commission of offence hence, the daily diary No. 20 dated 25.07.2021.

4. After completion of investigation, complete challan was put in court. Provisions of section 265-C CrPC were complied with. As there are two set of accused one i.e. Gul Shah Ali and Ghous Ali and the other i.e. Adil, Haji Rafiq and Tanzeemullah therefore, the learned

trial court charge sheeted them separately to which both set of accused pleaded not guilty and claimed trial. In order to prove its claim, the prosecution produced and examined as many as 18 witnesses. After closure of prosecution evidence, statements of both set of accused were recorded under section 342 CrPC, wherein both set of accused posed innocence, however, neither they wished to be examined on Oath as required under section 340 (2) Cr.PC, nor wanted to produce evidence in defence. The learned trial Court, after full-fledged trial acquitted one set of accused i.e. Haji Rafiq, Adil and Tanzeemullah whereas, the other set of accused i.e. Gul Shah Ali and Ghous Ali were convicted and sentenced vide the impugned judgment, hence, these appeals.

5. Arguments of learned counsel for the parties and learned AAG representing the State were heard and record scanned through with their valuable assistance.

6. The heart wrenching incident claimed the life of one, leaving behind three injured from the side of the complainant, whereas, the appellant himself received a firearm injury. The injured were collected from

the spot and were hurriedly shifted to the hospitals. The complainant and the injured of the instant case were taken to Lady Reading Hospital, Peshawar whereas, the appellant being injured was brought to Khyber Teaching Hospital (KTH), Peshawar. The complainant reported the matter to one Abdullah Jan ASI, who dictated the same to Sajjad Khan ASI. The injury sheets of the injured were prepared and the injured were examined by the doctor. After medical examination the doctor prepared the medico-legal certificates of the injured. Though the deceased Muhammad Imran was brought to the hospital where he was found dead, but the concerned police officials shifted his dead body to RHC Ekka Ghund, his injury sheet and inquest report were prepared. The dead body was shifted for postmortem examination.

7. As in the incident the appellant also received a firearm injury, so he reported the matter in the hospital to the same police officials, to whom report of the instant case was made. The information of the appellant was collected in the shape of daily diary No. 20. As the appellant was injured, so his injury sheet was prepared, was examined by the doctor and

his medico-legal certificate was prepared. The appellant while reporting the matter explained the manner in which the incident occurred and he charged the complainant of the instant case, the injured eye witnesses and the deceased for firing at him. The investigating officer after receiving copies of both the reports, visited the spot and prepared the site plan. While inspecting spot in the instant case, the investigating officer collected blood through cotton from the respective places of the injured and the deceased. During spot inspection, 07 empties of 7.62 bore were collected from the spot. The same were sent to the firearms expert to ascertain that from how many weapons the same were fired. A report was received telling that the same were fired from different weapons.

8. As the appellant had also reported the matter in shape of DD No. 20, so the investigating officer also prepared another site plan and he also collected blood from a place where the appellant was shown lying in injured condition. During investigation brother of deceased Muhammad Imran, produced a motorcycle belonging to the deceased and the

same was taken into possession on 27.07.2021. As the injured appellant was also riding on motorcycle at the time of incident, so the same was also taken into possession. The appellant was arrested in the hospital whereas, his co-accused went into hiding. As one of the co-accused i.e. Ghous Ali was undergoing his training in Shahkas Training Center, so he was arrested by the police from the place of his training and in that respect his card of arrest was prepared. The custody of the appellant was requested by the local police, but as the appellant had received a firearm injury, so he could not be shifted from hospital to the police station, so his custody was declined, however, directions were issued, by the learned judicial magistrate, to place him in the hospital, under detention, till he recovers. When the condition of the appellant improved, he was produced before the judicial magistrate, but the appellant could not be remanded in police custody, as he was not fully recovered. The appellant was sent to the judicial lock-up. As the complainant and the injured eye witnesses were arrested in DD No. 20, so the accused from both sides faced the trial and on conclusion of the trial the

learned trial court was pleased to acquit the accused charged for the injuries caused to the appellant whereas, the appellant alongwith his co-accused were convicted and sentenced vide the impugned judgment.

9. The learned trial court on conclusion of the trial held the appellants responsible for the tragic incident, whereas, the accused charged for the injuries caused to the appellant earned acquittal. This court is to see as to what led the trial court to conclude the matter in that manner and that whether the reasons given find support from record of the case and that whether the learned judge succeeded in appreciating the collected evidence and the statements of the witnesses. As admittedly, the appellant also received a firearm injury in the same episode, so this court is to see that whether the learned trial court was justified to acquit one set of accused and to convict the appellants, but on what basis. Record tells that the injured of both the cases were hurriedly shifted to the hospitals and both the sides reported the matter to the local police who visited the hospitals. As the time of occurrence, the place of occurrence and the

time of report are one and the same, so this court is to see as to who was responsible for the tragic incident, who initiated and that who is the worst sufferer. Though the impugned judgment contains the detailed reasons, but in our understanding it failed to appreciate the attending circumstances of the present case and it failed to give plausible reasons for the acquittal of the accused charged by the appellant. In order to appreciate the individual liability of both the parties we deem it essential to scan through the record and we deem it appropriate to re-assess the evidence on file, so in that eventuality we would be in a position to fix the liabilities and we would be in a position to appreciate the approach of the learned trial court. We are confident in holding that the appellant received a firearm injury in the same transaction, so his presence on the spot at the stated time is neither doubtful nor disputed. Even the report of the appellant leaves no ambiguity that the appellant accepted his part in the incident, but in a different manner. We are anxious to know that how the incident occurred and that in what manner. Had the appellant suppressed the

firing he made, then the matter was easy to appreciate and it was more easy for the courts to fix the liabilities but, as the appellant did not suppress the damage caused to the opponents, so the complexity of the case has dramatically changed and in the changed circumstances the approach must be dynamic and pragmatic. We are intending to re-appreciate the record of the case and we are inclined to re-consider the role played by the either side, so that the guilty could be punished and the innocent could be rescued.

10. The points for determination before this court are as to whether the incident occurred in the mode, manner and at the stated time; as to whether the witnesses were present on the spot and, that they did not conceal the material facts; as to whether the witnesses remained consistent in respect of the incident and, that the matter was reported at the stated time and in the stated manner; as to whether the report of the appellant in the shape of daily diary No. 20 is sufficient to hold the injured witnesses responsible for the injuries caused to him; as to who was the aggressor and who was aggressed upon; as to whether

the appellant was left with the only choice to retaliate for saving his life; as to whether the appellant acted in self defence, if so, what benefit would accrue to him and, as to whether the prosecution succeeded in bringing home guilt against the appellants.

11. In order to appreciate the essence of the matter we deem it essential to take into consideration the reports of the parties and the statements of the witnesses of both the cases. As admittedly, the presence of the appellant is established on record and as the eye witnesses received injuries in the episode, so their presence on the spot is neither disputed nor doubtful. Once this court comes to the conclusion that both the parties i.e. appellant and the injured of the instant case were present on the spot, then it is obligatory for this court to determine the manner in which the incident occurred and to determine the manner in which the appellant also received the firearm injury. In order to resolve the controversy, we deem it essential to go through the statements of the complainant, the injured eye witness, the scribe alongwith the investigating officer. The complainant was examined as PW-12, who

explained that how they reached to the place of incident and that how the incident occurred. The complainant did not disclose that in the episode the appellant also received a firearm injury, collected from the spot and was shifted to the hospital. In order to appreciate the conduct of the complainant we deem it essential to take into consideration both the reports. It is interesting to note that the complainant suppressed the injuries caused to the appellant and instead, while reporting the matter, he charged the appellant alongwith two others for the commission of the offence whereas, on the other hand the appellant in his report disclosed that on reaching to the place of incident he was fired at by the complainant and others and to save his life, he also resorted to firing. He further explained that after receiving firearm injury he fell on the ground, and was shifted to the hospital by the people of locality. The appellant explained the circumstances, he did not conceal the injuries caused to the other side and he disclosed that the tragic incident occurred because of previous blood feud between the parties. Both the reports left no ambiguity that soon after the

incident the injured from both the sides were shifted to the hospital and initially, the complainant reported the matter, their injury sheets were prepared, but the same police officials also visited the hospital where the appellant was admitted. It was one hour after the report of the complainant that the report of the appellant was penned down, and no ambiguity is left, that the delay of one hour between the two reports was explained by the witnesses. As after the report was made by the complainant, the injury sheets were prepared, so it took time to complete, and thereafter the same police officials visited the appellant in Khyber Teaching Hospital. The arrival of the injured appellant to the hospital was duly entered in the relevant register, the doctor who examined the appellant and the Incharge casualty Khyber Teaching Hospital also recorded their statements. The doctor was examined as PW- 9 who disclosed the time of arrival of the injured appellant and the time of his examination. She also disclosed that appellant received an entry wound on his right iliac fossa (RIF) with its exit on his buttock. Similarly, the police official who initially

prepared the injury sheet was examined as PW-11 who explained that on arrival of the injured, his initial injury sheet was prepared by him. The statements of these witnesses have confirmed the injury caused to the appellant and they also confirmed that the appellant was brought to the hospital within the shortest possible time. The quick succession of events leave no ambiguity in holding that the appellant had no time to consult and there was no consultation and deliberation on his part. It is pertinent to mention that after the complainant charged the appellant, the officials who visited the hospital arrested the appellant and prepared his card of arrest. At the same time when the appellant reported the matter, the complainant and injured of the present case were arrested and their cards of arrest were prepared. The appellant, Ghous Ali was arrested from Police Training Center, Shahkas, on the next day of the incident. The investigating officer visited the hospitals and collected record regarding treatment of the parties and the same was placed on file.

12. The nature of injury of the appellant can be assessed from the fact that

his physical custody was refused on the day of his arrest and even on the subsequent dates, when he got a little recovered. The order of judicial magistrate is placed on file which tells that the request of the investigating officer for the grant of custody was lastly declined, and the appellant was remanded to judicial lock-up because of his injury. As the deceased lost his life while enroute to the hospital, so he was brought to Lady Reading Hospital and from there was shifted to the concerned hospital for postmortem examination. The record tells that the matter was reported by both the parties without loss of time, so the factor of consultation and deliberation can easily be excluded. The moot question for determination for this court is that how the incident occurred, who was responsible for initiating the tragedy and that what role was played by the appellant. As both the parties reached to the place of incident and as both the parties received firearm injuries, so no ambiguity is left that both the parties were equally responsible for the tragic incident. As one of the party suppressed the injuries caused to the other, so the conduct of the complainant and all related, is not above

board. Had the appellant not received an injury that too on the most vital part of his body then the report of the complainant and the death of the deceased would have easily determined the fate of the appellant, but as while reporting the matter in the shape of DD No. 20 the appellant did not conceal the material facts and he admitted that as he was fired at, so to save his life, he also resorted to firing. The investigating officer while preparing the site plans also collected blood from the place away from the places of the injured of the instant case and he also explained that the place of the appellant was pointed by the people of locality. When the witness was questioned regarding the distance of the appellant from the complainant, he disclosed that the blood was recovered 100 meter away, from the places of the injured witnesses. If, the statement of the investigating officer is taken to be correct, then at the same time we would accept the statement of the appellant regarding the firing made at him, by the complainant party. As the respective places were pointed out by the people, more particularly, the place of the appellant, so no ambiguity is left that the

incident was witnessed by the villagers, but their statements could not be recorded for the reasons best known to the investigating officer. When admittedly, the appellant received a serious injury, and when the matter was promptly reported, so we are confident in holding that the appellant told the whole truth, but the complainant suppressed the material facts. The injury of the appellant is the determining factor and that would determine the role played by the appellant. There is no denial to this fact that both of the parties were not residing near the place of incident, but their arrival to the spot is a circumstance which has increased the anxiety of this court and we are anxious to resolve the same. The appellant in his report stated that he left for the house of his sister and that he was armed with a Kalashnikov. He also admitted that on reaching to the place of incident, the complainant party came on two motorcycles and started firing at him. In the same breath the appellant admitted his role of firing and in our understanding he reported what he observed and he disclosed the roles played by both the parties. When the place was not common to the parties, then this

court is to see that who was the aggressor and who was aggressed upon. As record is silent that who was present on the spot and who arrived thereafter, so the factum of aggression cannot be determined and even the witnesses failed to convince. When such is the state of affairs, then this court is under the obligation to assess the roles played by both the parties, on the basis of available record, and on the basis of injuries caused and received. The motorcycles of the deceased and the complainant were produced after few days of the incident and the same also confirmed the manner in which the incident occurred. Though the learned trial court burdened the appellants with the injuries caused to the complainant and his companions, yet, it failed to give justiciable reasons for the same. The learned trial court was highly swayed with the damage caused to the complainant party, but it failed to appreciate the injuries received by the appellant and it failed to take into consideration the report of the appellant. Had the learned trial court appreciated the evidence of both the parties, then in our understanding instead of rushing to acquit and rushing to convict, it would have

done complete justice to the parties. We could not come across the reasons which distinguished the case of the appellants from that of the complainant and even while acquitting the complainant and others the learned trial court failed to advance sufficient and necessary reasons. The suppression of facts by the complainant in his report is a circumstance which cannot be ignored and it by itself is sufficient to question the credibility of the complainant and others.

13. The attending circumstances of the present case invite the attention of this court to sections 96, 97, 100 and 102 of the Pakistan Penal Code, 1860 ('The Act'). We cannot ignore the intent of the legislature while making these sections part of the book. As the legislature was conscious of the like circumstances, so it took measures to protect the one, who faces the like situation. The wisdom behind was to extend the right to protect one's self from an act of aggression and from an activity which towards the end would claim his life. Section 97 of the Act, is unambiguous and it explains that to act in self defence would not be an offence. For ease of

reference, the relevant section is reproduced, which reads as follows:

> **97. Right of private defence of the body and of property:** - *Every person has a right, subject to the restrictions contained in Section 99, to defend; First: His own body, and the body of any other person, against any offence affecting the human body;*
>
> *Secondly: The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.*

The matter does not end here, rather the Code has further explained in section 100, the limits to act in self defence, so for ease of reference section 100 is reproduced, which reads as follows:

> **"When the right of private defence of the body extends to causing death:** *The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other*

harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely: -

First: Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly: Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly: An assault with the intention of committing rape;

Fourthly: An assault with the intention of gratifying unnatural lust.

Fifthly: An assault with the intention of kidnapping or abduction.

Sixthly: An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

The combined reading of the above sections leave no ambiguity that the appellant acted in self defence and the injury caused to him was on the vital part of his body, so in our understanding the appellant was deserving the extended concession, but the learned trial court failed to consider the most essential, and the most crucial aspect of this case. Similar circumstances came before the apex court and the same were answered, in case titled **titled Abdul Rashid Vs Nazir Hussain and 5 OTHERS (1971 S C M R 284), in the following manner: -**

> *"Although, the injuries on the persons of Nazir Hussain and Noor Muhammad were suppressed by the prosecution, this came to light because they had voluntarily appeared for examination before the same doctor who had held the post-mortem examination of the dead body of Mehraj Din. However, the injury No. 1 which was a contused wound " x1/8" x1" deep extending upwards under the skin on the back of the head sustained by Nazir Hussain is on a vital part of the body, although it did not cause any grievous hurt. Such injury on the vital part of the body must have*

caused a reason able apprehension in the mind of Nazir Hussain that his life was in danger *or his body in risk of grievous hurt. Accordingly, he had the right of private defence of his person which, under section 100 of the Penal Code, extended to the causing of death of Mehraj Din."*

14. Though the attention of this court was invited to the statement of accused recorded under section 342 Cr.PC where, the appellant denied to have fired over the complainant party, but that alone will not be sufficient, as on the very day of the occurrence the appellant reported the matter and he explained the circumstances in which the incident occurred. The appellant from the very beginning accepted the firing over the complainant and others, but at the same time he explained the circumstances which compelled him to retaliate, if not then he would have been killed. In our understanding the appellant travelled with honesty and he did not suppress the injuries caused to the opponents. As in this case, right from the beginning the appellant accepted the firing made by him, but he also explained the circumstances which put

him in the situation. In our understanding the courts of law, even by itself, can deduce the circumstances which put an accused to fire and from those circumstances the courts can presume that had he not fired, then his death was certain. As in this particular case, the appellant in his report explained the circumstances and even the investigating officer confirmed the same while preparing the site plans, so we are confident in holding that the appellant faced a situation where the only option left was to fire. This view is further substantiated by a celebrated judgment from the Indian jurisdiction reported as ***"Munshi Ram and others Vs. Delhi Administration*** **(AIR 1968 SC 702l.** 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 august Supreme Court of India held that:

> ***"It is well settled that even an accused, does not plead self defence' it is open to the court to consider such a plead 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."

15. The learned trial court fell into error while fixing the liabilities. Had it appreciated the essence of the matter, then there was hardly an occasion to reach to such a conclusion, the conclusion which is in conflict with the law on the subject. As the complainant and others were equally responsible for the tragic incident and, as many as four persons chased the appellant Gul Shah Ali, fired at him, so there was no option but to retaliate. The appellant succeeded in rescuing himself, but he could not succeed to avoid the danger and, as such, he received an injury on the most vital part of the body. Though his seat of injury confirms his presence on the spot, but it explains that what he did, was done only to exercise his right of self defence. We are confident in holding that the learned trial court failed to appreciate this essential aspect of the case, so while appreciating the same, this court holds that the appellants deserve the same

concession as was extended to the respondents. The instant criminal is allowed, the impugned is set aside and the appellants are acquitted of the charge levelled against them. They be released forthwith, if not required to be detained in any other criminal case.

16. Now diverting to **Cr.A No. 950-P/2023** titled ***"Gul Shah Ali vs Haji Rafiq & others"*** through which the appellant Gul Shah Ali has impugned before us the judgment of the learned trial court to the extent of acquittal of respondents/accused Haji Rafiq, Tanzeemullah and Adil, suffice it to say that both the parties received firearm injuries, both the parties were hurriedly shifted to the hospital in injured condition, more particularly, the deceased Muhammad Imran lost his life in the same episode, so no ambiguity is left that the presence of the injured witnesses and the injured appellant is established on record, that too when the appellant reported the matter in the shape of daily diary No. 20 on the same day. As the injured appellant i.e. Gul Shah Ali reported the matter and did not conceal the material facts, so no ambiguity is left that these

were the respondents, who concealed the material facts from the investigating agency and from the learned trial court, as well. As the appellant received a fire arm injury on the vital part of his body and as from the other side one lost his life and three received serious injuries, so this is the uncertainty of events which led the learned trial court to decide the matter in that manner. As the appellant Gul Shah Ali and Ghous Ali are acquitted of the charge, that too, on the basis of suppression of facts and that there remained an uncertainty as to who was the aggressor and who was aggressed upon, so the benefit of the same has rightly been extended to the respondents. The instant criminal appeal is lacking substance, the same is dismissed as such.

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

Announced
16.05.2024

Chief Justice

JUDGE

Muhammad Fiaz *D.B* Hon'ble Mr. Justice Ishtiaq Ibrahim, HCJ
Hon'ble Mr. Justice Sahibzada Asadullah, J