

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr. A No.115-P/2018

Mir Akbar son of Mir Baz,
r/o Doobian Nowshera Kalan,
District Nowshera.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>Mr. Shabbir Hussain Gigyani, Advocate.</u>
For State :-	<u>Mr. Muhammad Nisar, AAG.</u>
For complainant :	<u>Mr. Zahir Shah Afridi, Advocate.</u>
Date of hearing:	<u>12.01.2022</u>

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This criminal appeal, filed by Mir Akbar, the appellant, is directed against the judgment dated 26.01.2018, passed by learned trial Court/Sessions Judge, Nowshera whereby he having been found the appellant guilty of committing murder of Raj Mali deceased convicted him under section 302(b) PPC and sentenced to undergo imprisonment for life and to pay rupees two lacs as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C., in case FIR No.598 dated 20.09.1995 under section 302 PPC, registered at Police Station Nowshera Kalan. Benefit of section 382-B Cr.P.C. has been extended to the appellant.

2. The prosecution's case as unfolded in First Information Report (FIR) is that on 20.09.1995, complainant

Muhammad Ikram (PW.1) along with Inam Akhtar (PW.2), in company of dead body of Raj Mali deceased reported to police that on the fateful day at 1700 hours when he reached near Masjid Dhobiyan, he noticed the appellant and the deceased exchanging hot words with each other which resulted into their grappling. During altercation, the appellant took out a pistol and fired at the deceased, resultantly, the deceased got hit and died on the spot. Motive behind the occurrence was a dispute over debt between the deceased and the appellant. Besides him, the occurrence is stated to have been witnessed by Inam Akhtar (PW.2) and Zareef Khan. Report of the complainant was recorded into the shape of Murasila by Shah Wali ASI, who also prepared injury sheet and inquest report of the deceased and referred his dead body to the mortuary for post mortem examination.

3. It is evident from the record that appellant is directly and singularly charged for murder of the deceased in the FIR. The occurrence had taken place on 20.09.1995 which had been reported on the same day/date. It is worthy to mention here that after completion of investigation, police as well as judicial files of the instant case were destroyed in the devastated flood in District Nowshera. The appellant was arrested on 29.04.2016 i.e. after a long period of more than twenty years. Thereafter the judicial as well as police record/files were re-constructed on the direction of the learned trial Court. On submission of challan against the appellant, the

For the Court

prosecution has examined seven witnesses. PW Shah Wali ASI scribe of the Murasila and Sultan Akbar SI (I.O) could not be examined on the ground that the latter was dead at the time of trial while the former was not traceable, therefore, Jehanzeb No.440 who was well conversant with the hand writing and signatures of both the above named witnesses was examined as PW.7, who verified the hand writing and signatures of both the above named PWs on various documents. Similarly, Dr. Aftab Alam was also not traceable, therefore, Dr. Tariq Shah, being well conversant with his hand writing and signature was examined as PW.6, who verified signature and hand writing of Dr. Aftab Alam on the post mortem report.

4. After arrest of the appellant by Murad Ali Khan ASI and completion of investigation, on the strength of reconstructed record, complete *challan* was submitted against the appellant before the learned trial court, where he was formally charge sheeted to which he pleaded not guilty and claimed trial, however he did not object the genuineness or veracity of any document. To prove its case, the prosecution examined as many as seven witnesses. After closure of the prosecution's evidence statement of the appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegation and professed his innocence. He, however, declined to be examined on oath under section 340(2) Cr.P.C. or to produce evidence in defence. On

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conclusion of trial, the learned trial court, after hearing both the sides convicted and sentenced the appellant as mentioned above, hence, this appeal.

5. Arguments of learned counsel for the parties heard and record perused.

6. It appears from record that occurrence in this case has taken place on 20.09.1995 at about 1700 hours near Dhobyan Masjid, which has been reported by complainant Muhammad Ikram (PW.1) with promptitude at 1730 hours. Ocular account of the incident has been furnished by complainant Muhammad Ikram and PW Inam Akhtar. The former while appearing as PW.1 reiterated the same story as set forth by him in his initial report. He once again charged the appellant for murder of the deceased on the day, date, time and place as alleged by him in the initial report. The latter while appearing as PW.2 deposed that on the fateful day he had visited the house of his uncle Muhammad Zarif. On the fateful day he along with his uncle Muhammad Zair was going to his shop and when reached the place of occurrence he noticed appellant Mir Akbar firing at Raj Mali deceased with a pistol, as a result, the deceased got hit and died on the spot. After the occurrence, the appellant decamped from the spot. They arranged a Cot in which they shifted dead body of the deceased to the hospital. Motive behind the occurrence was money dispute between the deceased and the appellant.

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7. Both the eyewitnesses have been subjected to cross-examination by the defence but nothing beneficial could be extracted from their mouths. They remained stuck to their stance and corroborated each other on all material aspects of the incident, such as the day, date, time and place of occurrence as well as the mode and manner in which the appellant committed the murder of the deceased. The eyewitnesses are also consistent on the motive part of the case. Being a broad day light occurrence and appellant already known to the eyewitnesses as they are co-villagers inter-se, question of mistaken identity does not arise. Similarly, the promptly lodged report within 30 minutes eliminates the possibility of consultation and deliberation on the part of the complainant in charging the appellant. The eyewitnesses have directly and singularly charged the appellant for murder of the deceased with a pistol. Nothing has been brought from their mouths in cross-examination so as to question their presence at the spot at the time of occurrence. Similarly, there exists no reason, much less plausible, to suggest false implication of the appellant by the eyewitnesses by substituting the real culprits.

8. The ocular account of the eyewitnesses is supported by medical evidence. In the post-mortem report, the following injuries were found on the dead body of the deceased by Dr. Aftab Alam:-

1. Entry wound 1x1 at left 10th posterior. Exit wound at 9th ribs outer line in the anterior auxiliary line.

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2. Entry wound on top of left side neck. Exit wound on the top of right side of neck.
3. Entry wound on the left side of neck. Exit wound on the right side of the neck.
4. Two exit and entry wounds on the right hand.

Opinion: According to his opinion the cause of death of the deceased was injuries to vital structure in the neck. Probable time between injury and death has been opined by him as "five minutes" and between death and Post mortem as "one hour".

From the above statement, it is manifest that the deceased has sustained three firearm entrance wounds with corresponding exits which resulted into his unnatural death. Besides, the unexplained ascendance of the petitioner for a long period since 20.09.1995 (date of registration of case) till 29.04.2016 (date of his arrest), is yet another circumstance which corroborates the ocular account of the prosecution's case. It is settled law that where ocular evidence is very clear, convincing and the role of the accused person in the crime stands clearly established, duly supported by medical evidence, shall be considered sufficient to prove the prosecution case whereas, the missing circumstantial evidence may be of no significance. In the case in hand, the ocular account of PW-1 and 2 that the appellant being sole accused in the case, had made fire shots on the deceased. Besides, both the above mentioned witnesses have proved their presence at the spot as their evidence are natural, reliable and does not

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suffer from any serious or material contradictions, therefore, it cannot be doubted at all.

9. On reappraisal of prosecution's evidence we have reached to an irresistible conclusion that the prosecution has proved the guilt of the appellant through cogent and confidence inspiring direct evidence. In this view of the matter the learned trial court has rightly held him guilty of the offence to which no exception can be taken. However, it is manifest from the FIR coupled with prosecution's evidence that the occurrence has taken place at the spur of moment. It is proved on record that initially, there was exchange of hot words between the deceased and the appellant, then an altercation/grappling during which course the appellant fired at the deceased, meaning thereby that the appellant had no premeditation and intention to do away with the deceased. Had there been any intention and premeditation then the appellant at the very first instance would have resorted to firing upon the deceased. The assailant has not taken undue advantage or acted in cruel manner. In such a situation, the cause of cruelty is not relevant, nor it is relevant that who offered the provocation. So far the wounds caused during the occurrence are concerned, suffice it to say that it is not decisive factor, rather what is important is that the occurrence must be sudden, pre-meditated and if the accused has acted in a fit of anger, then the accused would be entitled for benefit under section 302(c) PPC. Baring in mind the above principle


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coupled with the evidence of PW-1 and 2, it is manifest that any pre-meditation for committing murder of deceased is missing whereas, it is proved from the case of prosecution that the accused-appellant had made fire shots in the heat of passion. On cost of repetition, the entire prosecution evidence and facts narrated in the FIR would go to show that during sudden quarrel, the appellant drew his pistol and fired at the deceased. Though the deceased had received three fire arm inlet wounds at the hand of the accused-appellant but the number of injuries inflicted on the deceased would not and could not be decisive factor to decide that the assailant has acted in a cruel manner. In this view of the matter, we convert the conviction of the appellant from Section 302(b) PPC to section 302(c) PPC and reduce his sentence from life imprisonment to 08 years rigorous imprisonment. Remaining sentence of the appellant and benefit of section 382-B CrPC already extended to him by the learned trial Court shall remain intact in his favour.

Announced:

12.01.2022

M. Sraaj Afridi PS

Rooh ul Amin Khan
Senior Puisne Judge

JUDGE

**DB of Mr. Justice Rooh ul Amin Khan Hon'ble Senior Puisne Judge; and
Hon'ble Mr. Justice Ijaz Anwar.**