

**JUDGEMENT SHEET**  
**IN THE PESHAWAR HIGH COURT,**  
**BANNU BENCH**  
*(Judicial Department)*

Cr.A.No.63-B/2014

**JUDGMENT**

Date of hearing.....11.4.2017.....

Appellant-petitioner: **By Muhammad Rashid Khan Dirma**

**Khel, Advocate.**

Respondent: **State By Shahid Hameed Qureshi, A.A.G along**  
**with Shah Hussain Khan, Advocate.**

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**MUHAMMAD AYUB KHAN, J.-** This criminal appeal is directed against the judgment dated 21.4.2014 of learned Additional Sessions Judge-II, Bannu, delivered in case FIR No.608 dated 21.11.2012 registered under Sections 302/324/34 PPC at Police Station Saddar, Bannu, whereby appellant Shamroz Khan has been convicted and sentenced as under:-

***Under Section 302(c) PPC.---To undergo fourteen (14) years R.I alongwith compensation of Rs.2,00,000/- (Rupees two lac), to be paid to the legal heirs of the deceased in terms of Section 544-A Cr.PC, or in default thereof, to undergo six months S.I.***

***Benefit of Section 382-B Cr.PC has been extended to him.***

2. Since the complainant has also filed Cr.Rev.No.18-B/2014 for the enhancement of sentence and the amount of compensation under Section 544-A Cr.PC, both these matters, being the outcome of one and same trial, are to be disposed of by way of this single judgment.

3. The prosecution case is that on 21.11.2012 at 0805 hours, complainant Nasibullah (PW-10) brought the dead body of his brother Asmatullah to Civil Hospital, Bannu and reported to the local police that on the eventful day at morning time he alongwith Asmatullah started from the *chowk* of village and when reached near their house, the appellant armed with Kalashnikov and co-accused Latif armed with pistol were already present there. It was about 0700 hours, when they reached near them, both the accused started firing with their respective weapons at them. Due to the firing of accused, Asmatullah got hit, fell down and succumbed to the injuries on the way to the hospital while the complainant escaped unhurt. After the occurrence both the accused decamped from the spot. Motive for the occurrence was stated to be a scuffle taken place between the

parties two days prior to the occurrence. Report of the complainant was recorded in the shape of *murasila* Ex.PW-1/1 by Muhammad Ishaq ASI (PW-11). He also prepared injury sheet Ex.PW-11/2 and inquest report Ex.PW-11/3 of the deceased and shifted his dead body to the mortuary under the escort of Constable Rast Ali No.1752 for postmortem examination and sent the *murasila* to Police Station on the basis of which FIR Ex.PA was registered against the appellant and his acquitted co-accused Latif Khan.

4. Dr. Qazi Niaz-ud-Din, Medical Officer (PW-1), conducted autopsy on the dead body of the deceased on 21.11.2012 at 09:45 a.m. and found the following injuries on his person:-

1. One firearm entry wound 1/4" x 1/4" on the posterior medial surface of the upper part of left thigh.
2. One firearm exit wound on the antero lateral surface of the upper part of the left thigh 1/2" x 1/2".
3. One firearm graze wound on the back of the right thigh just below the lower border of the right buttock 1" x 1".

Thorax: Left femoral artery of the blood vessels was injured (blood vessels were injured at the site of injuries).

Muscles, bones and joints: Muscles were injured at the site of injuries.

Opinion: According to the opinion of Medical Officer, deceased died due to firearm injuries to left femoral blood vessels leading to excessive bleeding and death.

Probable time between injuries and death has been given as 30 minutes to one hour while between death and postmortem as 02 to 03 hours.

5. Shahbaz Khan S.I (PW-12) proceeded to the spot and prepared site plan Ex.PW-12/1 on the pointation of complainant. During spot inspection, he secured bloodstained earth from the place of deceased and took into possession two empties of Kalakov (Ex.P-1) giving fresh smell of discharge vide recovery memo Ex.PW-2/1. He also took into possession bloodstained shirt (P-2) and shalwar (P-3) belonging to deceased vide recovery memo Ex.PW-2/2. Vide recovery memo Ex.PW-2/3 he also took into possession one Kalakov bearing No.81/803667 with fitted magazine (Ex.P-5) recovered from the accused Shamroz in case FIR No.610. On 21.11.2012, the SHO arrested accused Shamroz. He produced the accused before the

Court and obtained two days police custody vide his application Ex.PW-12/2. On 24.11.2012, he produced the accused before the Court where his confessional statement was recorded. He placed on file the FSL and serologist report in respect of bloodstained articles as Ex.PW-12/6. He also placed on file the FSL report in respect of two empties and weapon of offence as Ex.PW-12/7.

6. On receipt of challan by learned trial Court, the appellant and co-accused Latif Khan were formally charge sheeted but they did not plead guilty and claimed trial. To bring home the guilt of the accused, prosecution produced as many as thirteen (13) PWs. After closure of prosecution evidence, statements of accused were recorded under Section 342 Cr.PC wherein they refuted the allegations levelled against them. However, they neither wished to be examined on Oath as required under Section 340(2) Cr.PC nor wanted to produce evidence in their defence and thus, the trial culminated into acquittal of co-accused Latif Khan and conviction of the appellant, who was sentenced as above, hence, he filed Cr.A.No.63-B/2014 while the complainant filed Cr.Rev.No.18-B/2014.

7. Learned counsel for the appellant argued that the appellant is innocent and has been falsely roped in the case; that the complainant has charged the appellant alongwith his co-accused Latif Khan but during investigation co-accused was found innocent and he was acquitted and the appeal against his acquittal has already been dismissed by this Court, therefore, on the basis of same set of evidence, the appellant also deserves acquittal as the statement of the complainant is not confidence inspiring; that the impugned judgment is the result of mis-appreciation and non-appreciation of evidence available on record; that the learned trial Court has not appreciated the evidence in its true perspective and thus has arrived at a wrong conclusion in the shape of impugned judgment; that the prosecution case is full of doubts and conviction cannot be based on such sketchy and shaky evidence; that the recoveries were planted against the appellant and dubiously procured; that confessional statement of the appellant is neither true nor voluntary being retracted before commencement of the trial. Thus, he requested that the impugned judgment be set aside and the appellant be acquitted of the charge levelled against him.

**8.** On the contrary, learned Addl: A.G. for the State assisted by private counsel for the complainant argued that the complainant directly charged the appellant for effective role of firing at his deceased brother Asmatullah. The recovery of crime weapon from the appellant and the positive report of empties recovered from the spot fully connect him with the commission of offence. They further argued that after arrest of the appellant, he recorded confessional statement before the competent Court of law wherein he admitted the commission of offence, therefore, he does not deserve any leniency and requested for enhancement of sentence awarded to the appellant.

**9.** We have heard the arguments of learned counsel for the parties as well as learned Addl: A.G. for the State and have gone through the record with their able assistance.

**10.** The appellant was arrested on 21.12.2012. On 24.11.2012, he was produced before the learned Judicial Magistrate-VI, Bannu (PW-9), where he confessed his guilt by mentioning in detail the reason of murder of the deceased as below:-

بیان کرتا ہوں کہ میری عمر تقریباً 24 سال ہے ۔ تاریخ پیدائش 1985 ہے۔ میں بڑے گاڑیوں کا مکینک ہوں اور ظہور مستری کے ساتھ ان کے گیراج پر کام کرتا ہوں۔ رات کو یعنی وقوعہ سے پہلے علاقہ منڈان اپنے دوستوں کے ہاں سے برائے حفاظت لائسنس دار کالاکوف لایا۔ صبح مسجد میں اذان دی، نماز پڑھی اور مولوی صاحب سے درس و اعظ سنا۔ پھر اپنے دوست شاہد جو دیہہ خود میں رہائش رکھتا ہے کے ہاں گیا۔ تقریباً نماز قضا کا وقت تھا کہ راستے میں مسجد کے ساتھ عصمت اللہ کھڑا تھا۔ دکان سے سگریٹ خریدی اور اپنے گھر کی طرف روانہ ہوا۔ جب گلی کے وسط میں پہنچا تو اس نے مجھے گالیاں دینی شروع کی اور بھتیجا گان ام کے ساتھ ناجائز تعلق اور فعل کا طعنہ دیا۔ جس پر میں طیش میں آیا کیونکہ اپنے یتیم بھتیجاگان مسمیان افنان اور اعزاز ولد یوسف مرحوم (بھائی ام) کے طعنہ کو برداشت نہ کر سکا اور عصمت اللہ پر کالاکوف سے فائرنگ کی ۔ میرا ارادہ ان کو زخمی کرنے کا تھا جان سے مارنے کا نہیں اس لئے اس پر صرف دو فائروہ بھی ٹانگوں پر کئے۔ وجہ تنازعہ ایک عرصے سے یتیم بھتیجاگان ام کو سکول آتے جاتے پر عصمت اللہ کی طرف سے ناجائز تعلقات اور بد فعلی پر اکسانا ہے۔ اور بروز وقوعہ ان کی طرف سے طعنہ بدفعلی و بدکاری ہمراہ بھتیجاگان اش ہے ۔ اس لئے پہلے بھی ان کو خود اور بذریعہ مشران منع کیا تھا لیکن وہ باز نہ آیا۔



**11.** In this case the substantive piece of evidence with the prosecution relied upon is confessional statement of the appellant. From perusal of the same it transpires that the same is voluntary and according to the narration of the occurrence because the appellant had disclosed such facts which otherwise were neither known to the complainant nor to the investigating officer that the deceased made him annoyed by saying that he was having illicit liaison with his nephews, thus, in such circumstances the confessional statement has rightly been believed by the learned trial Court.

**13.** The contention of learned counsel for the appellant is that the confessional statement was retracted soon before commencement of trial. This Court is of the view that even conviction can be based on retracted judicial confession provided it is true and voluntary and corroborated by some strong piece of independent evidence. In this case the confession of the appellant was recorded not only in accordance with Sections 164/364 Cr.PC but also in accordance with the provisions of High Court Rules and Orders.

**14.** It is well embedded principle of the criminal justice that when there is no other evidence then the confession or for that matter the statement of the accused is to be taken in totality. The Court is not left with any choice but to take into consideration the same in toto. It is clear than crystal from the confessional statement of the appellant that it was not a premeditated murder and the occurrence took place in the heat of passions when the appellant became annoyed due to the act of deceased. Wisdom in this respect is derived from the case law reported as 1994 SCMR titled, “*Naseer Husain Vs. Nawaz and others*” where the following view was taken by Apex Court:-

*“Learned counsel has pointed out that the conviction of the petitioner and the sentence imposed on him by the learned trial Court rests only on his own statement where he admitted having caused the death of Ghulam Sarwar deceased and explained the circumstances in which the incident occurred. His plea, in short, was that he had caused the death of Ghulam Sarwar under grave and sudden provocation.*

*It is submitted that the High Court in enhancing the sentence has accepted that part of the statement in which he inculpated himself but rejected the other part thereof which showed that the act was committed under grave and sudden provocation. The contention is that if the conviction of the accused is founded on his own statement it has to be accepted in toto or not at all”*

15. Besides the above, in case titled, “*Ghulam Nabi Vs. The State*” reported as 2007 SCMR 808, the Apex Court has held as under:-

*“The Magistrate who recorded the confessional statement of the petitioner has categorically stated that he recorded the confessional statement of the accused after completion of all formalities and providing sufficient time to him to think over the matter before making the confession. The perusal of statement of the witnesses together with the statement of the petitioner would suggest that there was no element of coercion, undue influence or pressure rather the record shows that confession was made voluntarily and was truthful. The mere*

*fact that confessional statement was made on the last day of physical remand would not be indicative of any doubt regarding its voluntariness to exclude it from consideration, instead it would ensure its voluntariness because petitioner was aware of the fact that he would not be again given in the custody of police and was being sent to the judicial custody. ”.*

16. During spot inspection, PW-12 Shahbaz Khan S.I recovered two empties of Kalakov (Ex.P-1) from the place of occurrence vide recovery memo Ex.PW-2/1. On 21.11.2012, the appellant was arrested and one Kalakov bearing No.81-803667 (Ex.P-4) was recovered from him which was taken into possession through recovery memo Ex.PW-2/3. The recovered empties (Ex.P-1) and the Kalakov (Ex.P-4) were sent to the FSL and according to report (Ex.PW-12/7) of Fire Arms Expert *“Microscopic examination of the case has revealed that the two 222 bore crime empties marked C1 and C2 were fired from 222 bore rifle No.81-803667 in question, in view of the following major points i.e. striker pin marks, breach face marks, etc are similar. The rifle in question is foreign made and working condition”*. So the recovery of Kalakov and positive report of Fire Arms Expert duly corroborate the confessional statement of the appellant.

**17.** Though the medical evidence does not identify the culprits but it shows that the deceased received two firearms injuries, therefore, same also corroborates the confessional statement of the appellant wherein he stated that he fired two shots at the deceased.

**18.** In view of facts and circumstances narrated above, the learned trial Court rightly held that it was a case of grave and sudden provocation and accordingly convicted and sentenced the appellant under section 302(c) PPC. The complainant has also filed Cr.Rev.No.18-B/2014 for enhancement of sentence of the appellant to death and the amount of compensation. As we have held that the learned trial Court has rightly held the instant case of grave and sudden provocation, therefore, the sentence awarded to the appellant is sufficient to meet the ends of justice and that too when the deceased received fatal firearm injury on upper part of left thigh i.e. non-vital part of his body. Thus we see no justification in enhancing the sentence of the appellant. The impugned judgment is well reasoned, in accordance with law and needs no

interference, therefore, the same is upheld. Consequently, both  
the appeal and the revision are hereby dismissed.

Announced.  
Dt:11.4.2017.

**JUDGE**

**JUDGE**