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

Cr.A No. 892-P of 2021
Barkat Ullah
Vs
The State & another

Date of hearing: **11.10.2023.**
Appellant (s) by: Mr. Shaiber Khan, Advocate

State by: Malik Haroon Iqbal, AAG

Complt: by: M/s. Naseer-ud-Din Shah, Advocate, alongwith Said Nazir, Advocate, as Amicus Curiae.

JUDGMENT

SAHIBZADA ASADULLAH, J.- Through this single judgment we intend to decide the instant criminal appeal as well as the connected **Cr.R No.184-P of 2021** titled **"Ghani Khan Vs Barkat Ullah & another" and Cr.A No.975-P/2021,** titled **"Ghani Khan Vs Hazrat Ullah etc.",** as all the cases are the outcome of one and same judgment dated 30.10.2021, passed by learned Additional Sessions Judge-XV, Peshawar delivered in case FIR No.1137 dated 16.10.2014 under sections 302/109/34 PPC, registered with Police Station Chamkani, Peshawar, whereby the appellant Barkat Ullah has been convicted and sentenced under section 302 PPC to imprisonment for life alongwith fine of Rs.2,00,000/- (two lac) as compensation to be paid to the legal heirs of deceased within the meaning of Section 544-A Cr.P.C, in default whereof the appellant shall further undergo six months simple imprisonment. Benefit of Section 382-B Cr.P.C has been extended to the appellant.

2. The crux of the instant case as per contents of FIR is that complainant Ghani Khan reported the matter to the police at the casualty of Lady Reading Hospital, Peshawar, while present with the dead body of his deceased daughter namely, Mst. Fozia, that her daughter was married to Barkat Ullah s/o Hanif Ullah three years ago and strained relationship was existed in between the husband and wife; that her husband namely Barkat Ullah and his brother namely Hazrat Ullah used to threaten his daughter, due to which his daughter got annoyed and came to his house on 15,10.2014; that her husband namely Barkat Ullah came to his house to take home back Mst. Fozia and they left his house; that on the eventful day he was present in his house when his son Sohail came to the house and disclosed him that Barkat Ullah has killed Mst. Fozia on the instigation of Hazrat Ullah with firearm; that on receiving information, he immediately went to the house of his daughter, and found her lying unconscious; that he hurriedly shifted his daughter with the help of co-villagers to the hospital, where the doctor pronounced her dead. Motive was disclosed strained relations between the spouses. He charged the accused for commission of the offence, hence, the FIR ibid.

3. After arrest of the accused and completion of investigation, case was put in Court, where the appellant was charge sheeted to which he pleaded not guilty and claimed trial. In order to prove its claim, the prosecution

produced and examined as many as 10 witnesses. After closure of the prosecution evidence statements of accused were recorded under section 342 Cr.P.C, wherein they professed innocence, however, neither they opted to be examined on oath under section 340 (2) Cr.P.C, nor wished to produce defence evidence. The learned trial Court, after conclusion of the trial, found the appellant guilty of the charge and while recording his conviction sentenced him as stated above, and the co-accused was acquitted of the charge hence this appeal and the connected Cr.A No.975-P/2021. It is worth to mention that the complainant through the connected criminal revision has asked the enhancement of the awarded sentence.

4. The learned counsel for the parties were heard at length and with their valuable assistance the record was scanned through.

5. The shocking death of the deceased was reported to the local police, in the Causality Room of the Lady Reading Hospital, Peshawar, by the complainant. The report of the complainant was penned down in the shape of murasila and thereafter the injury sheet and inquest report were prepared. After doing the needful, the dead body of the deceased was sent for postmortem examination. The investigating officer after receiving copy of the FIR, visited the spot and on his personal observation prepared the site plan. During spot inspection the investigating officer took

blood stained piece from the bed sheet and he also recovered an empty of .30 bore alongwith a live cartridge from inside the room. During further search an empty of .30 bore was taken into possession from the *Veranda* of the house. The accused soon after the occurrence went into hiding and on their arrest, they faced the trial, which ended in the conviction of the appellant and in the acquittal of the co-accused.

6. True that the incident has shocked us to the core, but that by itself must not influence the Courts of law while determining the fate of the accused and holding him responsible for the tragic incident. We understand that most of the times matrimonial disputes end in tragedies and so is the case before us. The learned Trial Court took into consideration the evidence on file, statements of the witnesses and thereafter reached to a definite conclusion regarding the guilt of the one and innocence of the other, but this Court is to see that whether the learned Trial Court was justified in handing down the impugned judgment and as to whether the learned Trial Court appreciated the evidence on file. No doubt the deceased died an unnatural death in the house of her husband, and that the husband was supposed to explain the circumstances which led to the death of the deceased, but under no circumstances, it is the husband to prove himself innocent, rather this is for the prosecution to prove him guilty. The burden never shifts

from the prosecution to the accused, rather the same shifts only when an accused takes a specific plea, which is not the case before us. The law never permits the willful shifting of this burden as in that eventuality the scheme of things would change abnormally, and the change brought would fade away the purpose, as by then it would turn easy to charge and hard to disprove. This factor time & again came before the superior courts of the country, more particularly, the Apex Court, and in different cases, because of its different circumstances, the approach was different, but no rule of thumb was laid down for absolving the prosecution of its liability to prove. Few judgments were cited before this Court, rendered by the Apex Court, but in all these judgments never ever the liability was fixed against the accused / husband, rather the approach of the Apex Court was different from case to case and from circumstances to circumstances. We derive wisdom from the judgments of the Apex Court, and so the learned counsel tried, for determining the issue in hand. Two judgments were cited by both the sides to achieve two different targets. The defence wanted us to apply the principles laid down in *“NAZIR AHMAD Versus The STATE”, (2018 S C M R 787),* whereas the prosecution wanted strict application of the law laid down in *“Saeed Ahmad Vs the State”, (2015 SCMR 710)*.

7. We heard with patience the learned counsel for the parties and are eager to determine that which of the two would resolve the controversy and that which of the two has answered the circumstances we are facing. In *“NAZIR AHMAD Versus The STATE”, (2018 S C M R 787),* it was held that the liability to prove will never shift the shoulders, rather under all circumstances it is the prosecution to prove and it is the prosecution to discharge its liability. The judgment never indemnified the husband, rather he is burdened with explaining convincingly the circumstances which led to the tragic dead, but the same should not be misconstrued by holding the husband responsible for the tragedy. The terms “to explain” by no stretch of imagination would mean to disprove, if it was interpreted as such, then the sole character to occupy the stage would be the poor husband and the role of the prosecution would be confined to that of a silent spectator with its only contribution to charge, which has never been permitted by the law and by the jurisprudence. The controversy of shifting liabilities is set to rest by the Apex Court in the above quoted judgment and many others. Even in *“NAZIR AHMAD Versus The STATE” (supra),* the Apex Court demands an explanation from the husband to explain that what led to the tragic death of his wife and that what were the circumstances which ended in to the tragedy, but the liability of the husband is a circumstance which can be taken into

consideration to understand the issue in hand, with a limited scope and for a limited purpose, it has never been hold as the determining factor, had this been the intention, then the conclusion drawn would be other than the concluded. We are confident in holding that it is the prosecution to charge and it is the prosecution to prove. The role of the prosecution has never been restricted regardless of the fact that of what nature the cases are. To our understanding if the accused is burdened to disprove and the prosecution is permitted to charge then the scheme of things would lead to a catastrophe and the damage caused would be beyond repair.

8. Now diverting to *"Saeed Ahmad Vs the State", (2015 SCMR 710)*, it leaves no ambiguity in telling that in case of an unnatural death the husband would explain the circumstances which led to the unnatural death, provided they remained in uninterrupted association till the death. Holistically, it never shifted the burden to prove, from the prosecution to the accused / husband, but burdened the husband to tell the circumstances which led to the tragic death. When both the judgments are read in juxtaposition, we are confident in holding that the target was the same and so the approach, but both speak of different circumstances. What we gathered from the same is, that under all circumstances the burden to prove lies on the prosecution and it never shifts to the accused. Under all

circumstances the prosecution is under the bounded duty to connect the accused with commission of the offence, but in rare circumstances, the burden shifts, that only when an accused takes a specific plea. The death of the deceased has shocked us all and we are not reluctant to hold that she was done to death, but who, is and was, a question which the prosecution failed to answer. The learned Trial Court entangled in the tragic atmosphere of the case while handing down the impugned judgment. As this Court is seized of the matter, so we deem it appropriate to re-visit the entire evidence and to scan through the record of the case, to ascertain as to whether the learned Trial Court was justified while handing down the impugned judgment. The record tells that apart from the circumstantial evidence, an eyewitness also appeared and deposed that the deceased lost her life in his immediate presence. The learned Trial Court appreciated the eyewitness account and the circumstantial evidence as well, which convinced him regarding the participation of the appellant in the incident. To resolve the controversy that how the deceased lost her life and that who was the killer, this Court deems it appropriate to reconsider the evidence on file and to re-assess the role played by the appellant and the circumstances of the case.

9. 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 eyewitness was present at the time of incident and at the time of report; as to whether the medical evidence supports the case of the prosecution and as to whether it was the appellant, who killed the deceased at the instigation of co-accused. For just determination of the instant matter, we deem it essential to go through the statements of the witnesses and to see its worth in light of the attending circumstances of the present case. We have two witnesses before us, one the complainant who is the father of the deceased and the other the eyewitness, a real brother, so to appreciate the inherent worth of their statements, we deem it essential to read the same in juxtaposition with the medical evidence and the circumstantial evidence, collected by the investigating officer. It is the inter-se relationship between the parties which put this Court on guard and we are anxious to apply the test of accuracy, so that miscarriage of justice could be avoided. The complainant was examined as PW-4, who disclosed the inter-se relationship between the spouses, and also disclosed that few days before the incident the deceased had come to his house and that it was on reassurance of the appellant that she accompanied him. The witness further disclosed that the unfortunate incident occurred in the presence of his son and that it was PW-Sohail who soon after the incident, rushed to the house and informed him regarding the incident. This witness

explained the relationship between the parties and he also explained that it was the co-accused Hazrat Ullah who instigated the appellant to kill and that it was he who handed over a pistol to the appellant for the purpose. The eyewitness was examined as PW-6, who supported the report of the complainant and also narrated the events as it occurred. The witness disclosed that on the day of incident, he had visited the house of his sister; that there was exchange of hot words between the spouses; the co-accused instigated the appellant to kill and handed him over a pistol; that the deceased was fired at, who after receiving firearm injuries fell unconscious; he rushed to his house, informed his father and thereafter, the deceased then injured was shifted to the hospital in taxi. As the eyewitness deposed that the incident occurred in his immediate presence and as the complainant is not the eyewitness of the incident, so we deem it essential to consider the attending circumstances of the present case and the statements of these witnesses as well. This is admitted on record that the complainant is not the eyewitness, rather he reported the matter in the manner as was disclosed by the eyewitness. It is interesting to note that the statement of the eyewitness was not recorded on the day of the incident and even on his pointation the site plan was not prepared. Had the eyewitness been present at the time of incident and soon thereafter, he would have

reported the matter to the local police and he would have verified the report of the complainant. But right from the beginning till the end, this witness remained absent and even he did not identify the dead body before the police at the time of report and before the doctor at the time of postmortem examination. True that the complainant disclosed the cause of killing as the strained relationship between the spouses, but no report or complaint was made in that respect and even no witness was produced who could tell regarding such relationship. When the record is silent regarding the strained relationship between the parties and when no report was made in that respect, coupled with the fact that no independent witness ever appeared in support of the claim of the complainant, so in such eventuality this Court cannot presume that the spouses had strained relationship. The complainant disclosed that few days earlier the deceased came to his house, and a day earlier to the incident, the appellant came after her and that it was on his assurance that the deceased accompanied him. As even in respect of this episode no witness from the house, other than the complainant, was produced, so this aspect of the case loses its significance. The complainant disclosed that the parties married three years back and that the relationship between the two for most of the time remained strained, but the complainant could not point out that in the initial days

the deceased had ever deserted the house of the appellant or that she was ever maltreated. When the complainant failed to convince on this particular aspect of the case, so our anxiety regarding the involvement of the appellant in the incident, has further increased and the same has put us on guard to apply extra care and caution, while determining the guilt of the appellant.

10. The investigating officer visited the spot and on his personal observation prepared the site plan. It is interesting to note that when PW-Sohail was the eyewitness of the incident, then under all circumstances he would have accompanied the investigating officer to the spot and would have pointed out the respective places of the deceased and the accused, but his absence from the house at the time of spot proceedings has put a question mark over his presence at the time of incident. We are anxious to know as to whether PW-Sohail was present when the deceased was done to death and as to whether it was he who informed the complainant regarding her death. The eyewitness when appeared before the Trial Court, he was questioned regarding the material aspects of the case, more particularly, the manner in which the deceased was done to death and the manner in which the information was conveyed to the complainant and the dead body was shifted to the hospital. It is pertinent to mention that the statement under section 161 Cr.P.C of this witness was

recorded on the next day of the incident and that his presence in the hospital at the time of report and at the time of postmortem examination is not established from the record, so much is needed to verify the truthfulness of this witness. The witness deviated from his earlier recorded statement and also made dishonest improvements. It is pertinent to mention that in his statement recorded u/s 161 Cr.P.C, the eyewitness did not mention the exchange of harsh words between the spouses, whereas in his court statement he made dishonest improvement and the exchange of harsh words between the spouses was introduced. When the eyewitness appeared before the Trial Court, he disclosed that after receiving firearm injuries, the deceased fell unconscious, he rushed to his house and informed the complainant, but in his earlier statement he did not mention the same. The witness in his 161 Cr.P.C statement, explained that after the deceased was fired at he informed his father telephonically. When the witness realized his mistake, he attempted to rectify the same and explained that his court statement regarding rushing to his house and informing his father is correct and the telephonic information to his father as mentioned in his statement u/s 161 Cr.P.C is incorrect. Even his statement before the police is silent regarding the unconsciousness of the deceased. The witness improved his court statement and deposed that after the dead body was shifted, the doctor

pronounced her dead, but his police statement does not contain the said explanation. When both these statements are read in juxtaposition, we found glaring contradictions between the two and the same has damaged the prosecution case beyond repair. As stated earlier that his absence from the hospital at the time of report and his absence during spot proceedings, is a circumstance which cannot be ignored and the same confirms that the incident did not occur in his immediate presence. The conduct of the eyewitness is not above board and even the attending circumstances of the present case do not confirm his stance. As admittedly the deceased was his real sister, had he been present, he would have resisted, but he did not and his this attitude raises an eyebrow regarding his presence, as a silent spectator. This witness is further to tell that what harsh words were exchanged between the two and that what for the co-accused instigated the appellant and handed him over a pistol. On one hand the record is silent regarding the strained relationship between the deceased and the co-accused and on the other no positive evidence was produced to tell that during the days of incident the co-accused was also living under the same roof. The manner in which the eyewitness explained the circumstances does not appeal to a prudent mind and the dishonest improvements he made, in his court statement, has tarnished the worth and credibility of this witness. The

circumstances do tell that the eyewitness was not present and that he was introduced as an eyewitness at a belated stage, to strengthen the case of the prosecution. Once the eyewitness claimed his presence on the spot at the stated time, then under all circumstances it is he to prove his presence on the spot and it was he to convince that the incident occurred in the stated manner. But once the eyewitness failed to establish his presence, then in that eventuality it is the prosecution to suffer, as it was the prosecution which shouldered the burden, so in case of failure the burden would never shift. The similar circumstance came before the Apex Court in case titled **"NAZIR AHMAD Versus The STATE", (2018 S C M R 787),** which reads as follows: -

> **"We have attended to this aspect of the case with care and have found that when every other piece of evidence relied upon by the prosecution has been found by us to be utterly unreliable then the appellant could not be convicted for the alleged murder simply on the basis of a supposition. The principle enunciated in the above mentioned cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) was explained further in the cases of Nasrullah alias Nasro v. The State (2017 SCMR 724) and Asad Khan v. The State (PLD 2017 SC 681) wherein it had been clarified that the above mentioned shifting of some part of the onus to the accused may not be relevant in a case where the entire case of the prosecution itself is not reliable and where the prosecution fails to produce any believable evidence. It is trite that in all such cases the initial onus of proof always lies upon the prosecution and if the prosecution fails to adduce reliable evidence in support of its own case then the accused person cannot be convicted merely on the basis of lack of discharge of some part of the onus on him."**

11. Once the presence of the eyewitness is disbelieved, then this Court is to see the probability of the presence of the appellant at the stated time. As admittedly the appellant was running a vegetable shop during the days of incident in a vegetable market and the co-accused was serving in the police department, so the presumption would be that the appellant was present at the place of his business when the unfortunate incident occurred and the co-accused at the place of his service. As the incident occurred at 2:00 PM, so presumption is attached to his presence at the place of his business and not to his presence in the house at the time of incident. The responsibility of the appellant would be greater, if the incident occurred in the odd hours of the night or early in the morning, as in that eventuality his constant uninterrupted association with the deceased would have been a circumstance, for the appellant to explain, but once the association was broken, then his presence can be presumed at the place of his business, and less is left for the appellant and more for the eyewitness, to convince. The story received a major blow when the eyewitness introduced the co-accused as the instigator. The presence of both the accused at the stated time does not appeal to the judicial mind of this Court, in case the spouses were having strained relationship and in case they exchanged hot words, in the immediate presence of the eyewitness, then this Court cannot resist to presume

that the murder was not preplanned and when so, then the presence of the co-accused would not convince. This is for the eyewitness to tell that what prompted the co-accused to instigate the appellant to kill the deceased, as the co-accused had no axe to grind. As the witness failed to explain the interest of the co-accused to instigate, so his participation has rightly been disbelieved and even this Court is not ready to accept the same. As in the instant case, it was the co-accused who instigated the appellant to kill and that it was he who handed over the pistol, and once the prosecution story to his extent is disbelieved, then benefits of the same must have been extended to the appellant. The circumstances do tell that the incident did not occur in the mode, and in the manner and that the eyewitness was not present at the stated time. The prosecution case is replete with doubts and benefit of the same must be extended to the appellant. It was the eyewitness who gave a twist to the prosecution story by diverting it from its natural course, so it was he to explain that why he did not resist the act of killing and that why he did not intervene, to put the parties at ease, the conduct displayed by the witness is not natural and his this conduct has put at stake the veracity of his statement. Once the witness failed to establish his presence on the spot and once his testimony in respect of the co-accused was disbelieved, then no conviction could be awarded on the

basis of evidence, once disbelieved. In this regard, wisdom can also be derived from the judgment rendered in case titled **"MUHAMMAD PERVAIZ Versus THE STATE and other", (PLD 2019 Supreme Court 592),** wherein it was held that: -

> **"A criminal case is to be essentially decided on the basis of evidence adduced by the prosecution. Once the witnesses had visited the deceased to take her back, apparently there was no occasion for them to hold in abeyance the purpose of their detour and in case they were present and in the next room, there was no compulsion for the appellant to do away with the deceased at the risk of retaliation or a certain prosecution…….. Yet another circumstance to cast away the conviction is rejection of prosecution evidence qua Khalid co-accused. Role assigned to the acquitted co-accused is inexorably intertwined with appellant's alleged participation in the crime and thus even strongest corroboration, otherwise hopelessly lacking cannot rescue the charge."**

12. We are conscious of the fact that the deceased received as many as three injuries on her body and the seat of injuries do confirm that she did not commit suicide, but that by alone would not be sufficient to hold the appellant responsible for the killing, more particularly, when the eyewitness failed to prove his presence on the spot. The dead body was examined by the doctor, but no specific opinion was given regarding the cause of death, as to whether the death was homicidal or suicidal. The attending circumstances of the present case do confirm that the deceased died an unnatural death, but who killed, is still shrouded in mystery. The introduction of the eyewitness is another factor which cost the prosecution a lot, as it was he who shouldered the burden, but failed to discharge. The

investigating officer though collected one empty of .30 bore alongwith a live cartridge from inside the room and an empty of .30 bore from the veranda of the house, but in absence of a matching report the same has lost its worth and cannot be taken into consideration.

13. Another piece of evidence was the weapon used for the killing of the deceased, but the same could not be recovered. Had the pistol been recovered, then the prosecution had the chance, of sending the same with the recovered empties to the Firearms Expert, but the collected empties have lost its utility as no matching report could be procured. In the given circumstances of the present case, this Court is confident in holding that the prosecution failed to connect the appellant with the murder of the deceased and that the prosecution could not absolve itself from the liability to prove. Once this Court comes to a definite conclusion that it was the prosecution to prove the accused guilty and once the prosecution failed, then the only choice available to the court, is to extend the benefit of doubt.

14. The motive was alleged as the strained relationship between the spouses, but in that respect the complainant failed to produce any independent witness and even the investigating officer could not record statements of independent witnesses in that respect. True that strained relationship between the spouses was disclosed to be the cause of killing, but equally true that neither any complaint

was made to the police nor any Jirga was convened for the purpose. When so, then this Court is confident in holding that the prosecution failed to prove the alleged motive. True that absence or weakness of motive would hardly be a ground for acquittal, but when the motive was the only cause of killing, then its failure would lead only & only to the acquittal, and the present case is no exception.

15. There is not denial of the fact that soon after the incident the appellant went into hiding and he failed to explain, but mere abscondance would hardly be a ground for holding the appellant responsible for the tragic death of the deceased. As the prosecution failed to bring home guilt against the appellant and as the eyewitness account failed to convince the manner in which the incident occurred and to establish its presence on the spot, so once the prosecution witnesses are disbelieved and once the credibility of the witnesses is shattered, then the abscondance by itself would hardly be a circumstance to ask for conviction. True that the appellant went into hiding, but his abscondance by itself is insufficient to hold him guilty, as different people reacts differently when such tragic incident occurs, as is held by the Apex Court in case titled **“WAJAHAT Versus GUL DARAZ and another” (2019 SCMR 1451),** which reads as follows: -

> **“Appellant's belated plea of the suicide even if rejected outrightly by itself would not absolve the prosecution to drive home the charge, on its own strength and same goes for appellant's**

> **absconsion; people avoid to face process of law or their adversaries for a variety of reasons, not necessarily inclusive of their guilt; Appellant's reticence to satisfactorily explain as to what befell upon his better half under the same roof, though somewhat intriguing, however cannot be equated to qualify as evidentiary certainty, essentially required in order to saddle him with formidable corporal consequences; his failure would not give rise to an adverse presumption within the contemplation of Article 121 of the Qanun-e-Shahadat Order, 1984 and thus it would be grievously unsafe to maintain the conviction, without potential risk of error as well as diametrical departure from adversarial nature of criminal trial."**

16. The cumulative effect of what has been stated above, leads this Court to an irresistible conclusion that the prosecution failed to bring home guilt against the appellant and the learned Trial Court fell into error while handing down the impugned judgment. The impugned judgment does not find support from the record of the case and statements of the witnesses, the same calls for interference. The instant criminal appeal is **allowed**, the impugned judgment is set aside and the appellant is acquitted of the charge. He shall be released forthwith if not required to be detained in connection with any other criminal case.

17. The complainant feeling dissatisfied asked for enhancement of the sentence through the connected **Criminal Revision No.184-P/2021,** but as the appeal against conviction has succeeded, so the instant criminal revision has lost its utility, hence, the same stands **dismissed**.

18. The co-accused stood acquitted vide the impugned judgment and the complainant approached this Court through **Criminal Appeal No.975-P/2021,** but as the main criminal appeal against conviction succeeded and the appellant Barkat Ullah stood acquitted of the charge, so the instant criminal appeal has lost its utility, hence, the same stands **dismissed**.

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

Announced
11.10.2023
Hafeez Burki, PS

SENIOR PUISNE JUDGE

JUDGE