Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr. A No.170-B of 2022

Tauseef & 2 others
Vs.
The State & another.

JUDGMENT

For Appellants: Mr. Salahuddin Marwat, Advocate

For Respondents: Mr. Masood Adnan, Advocate

For State: Sardar Muhammad Asif, Asstt: AG.

Date of hearing: 08.3.2023.

*****

SAHIBZADA ASADULLAH, J.- The appellants have called in question the judgment dated 07.9.2022, rendered by learned Additional Sessions Judge-III, Lakki Marwat, whereby the appellants were convicted, under section 302(b) P.P.C. and sentenced to imprisonment for life on two counts as taazir with fine of Rs.10,00,000/- each as compensation to the legal heirs of the deceased in terms of section 544-A Cr.P.C, or in default thereof to further undergo six months simple imprisonment. Under section 324 P.P.C the appellants were convicted and sentenced to imprisonment for two years S.I along with payment of compensation of Rs.5,000/- each, to be paid to the injured/complainant and in default the appellants shall further undergo 15 days S.I. Under section 337-A(i) P.P.C, the appellants were convicted and sentenced for

imprisonment to one month and also liable to payment of sum of Rs.5000/- as "Daman", each to be payable to injured/complainant or in default of payment thereof to further suffer 15 days S.I. Benefit of section 382-B Cr.P.C was extended in favour of convict/appellants.

2. The complainant, Nadir Khan moved criminal revision petition No.47-B/2022 for enhancement of sentence of appellants. Since both the matters have arisen out of the same judgment, therefore, we intend to decide the same through this common judgment.

3. Brief facts of the case as per contents of F.I.R are that on 02.6.2017, at 21:30 hours, injured/complainant being present with dead bodies of his son Abbas Khan and nephew Dil Jan, reported to police that his niece Mst. Shamshada Bibi was married to Tauseef. Some three months ago, relation between the spouses became strained. On the eventful day, he along with his son Abbas Khan and nephew Dil Jan were going to the house of his niece, situated at Ghulam Khel Adamzai, in order to conciliate the matter. on reaching near the house of Tauseef, at about 18:45 hours, Tauseef, Mohibullah sons of Nawaz Khan, Muhammad Nawaz son of Mir Ghaffar and Sikndar son of Muzaffar, duly armed with Kalashnikovs, came out from Baitak of Tauseef and on seeing the complainant party, all the accused started firing at them

with the intention to kill. Resultantly, Abbas Khan and Dil Jan got hit and fell down on the ground while he received injury on his head. Accused after commission of the offence decamped from the place of incident. Motive has been disclosed as dispute over womenfolk, hence the ibid F.I.R.

4. After completion of investigation, prosecution submitted challan against the accused for trial. After compliance of provisions of section 265-C Cr.P.C, charge was framed against the accused/appellants under sections 302/324/337-A(i)/34 P.P.C to which they pleaded not guilty and claimed trial. During the course of trial, accused Sikandar Khan met his natural death and in this respect Jail Superintendent furnished his report vide order sheet dated 24.9.2019, as such proceedings against accused Sikandar Khan were abated. The prosecution in support of its case produced as many as 11 witnesses. On close of prosecution evidence statements of accused was recorded under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they opted to be examined on oath as provided under section 340(2) Cr.P.C, nor wished to produce defence evidence. After hearing arguments, the learned trial Court vide impugned judgment dated 07.9.2022, sentenced the accused /appellants as mentioned above, hence, the instant appeal against the judgment of conviction.

5. We have heard learned counsel for the parties alongwith learned A.A.G for the State at length and with their valuable assistance, the record was gone through.

6. The tragedy claimed the lives of two innocent persons and led to an injury to the complainant. The complainant along with dead bodies was shifted to the hospital where the matter was reported and the appellants were charged for the death of the deceased and the injury caused to the complainant. After report of the complainant the injury sheet and inquest reports along with injury sheet of the complainant were prepared and thereafter the complainant was referred to the doctor for his medical examination, who was examined by the doctor and his medico-legal certificate was prepared. The dead bodies were sent to the doctor and the doctor conducted autopsy on the dead bodies. The investigating officer after receiving copy of the F.I.R visited the spot, but the spot proceedings could not be conducted as by then, the complainant was not available. It was on the next date i.e. 03.6.2017 when the site plan was prepared on the pointation of the complainant. During spot inspection the investigating officer collected blood stained earth from the respective places of the deceased and 21 empties of 7.62 bore lying scattered, from the places of the accused. It is pertinent to mention that on the same day, two out of the accused also received fire arm

injuries, who were shifted to the same hospital, where out of the injured accused Mohibullah reported the matter in respect of the injuries caused to him and to his co-accused Sikandar. Both the injured were examined by the doctor and their medico-legal certificates were prepared. The report made by the accused Mohibullah was incorporated in F.I.R No.197, where Nadir, Sharifullah son of Mumraiz, Dil Jan son of Sharifullah and Abbas son of Nadir were charged for the injuries caused. It is interesting to note that the copy of F.I.R No.197 was also received by the investigating officer, who was present on the spot in connection with the investigation of case F.I.R No.196. During spot inspection in case F.I.R No.197, the investigating officer collected 15 empties of 7.62 bore from the places assigned to the accused and also collected blood stained earth from the places, where the injured after receiving fire arm injuries, fell down. On one hand the injured/ complainant of case F.I.R No.197 was taken into custody along with injured Sikandar in the hospital whereas, complainant of case F.I.R No.196 was also arrested in case F.I.R No197. It is pertinent to mention that on the day of incident i.e. on 02.6.2017 the accused/ appellant Tauseef, who was serving in police department attached with Bomb Disposal Squad, was arrested and was confined in quarter guard of the Police Lines. The record further tells that on 03.6.2017 the

official Kalashnikov belonging to the accused Tauseef was taken out from his box by one Sher Nawaz Khan ASI and the same was handed over to the incharge BDS who deposited the same in the Koth and was handed over to the investigating officer on 14.6.2017. It is interesting to note that investigating officer addressed an application to the Director General Forensic Science Laboratory on 14.6.2017, asking an opinion regarding the recovered weapon and the collected empties, but the same were received to the laboratory on 06.7.2017. The laboratory report was received where out of 21 empties, 11 were shown to have been fired from the recovered weapon, whereas the remaining were disclosed to have been fired from different weapons. All the accused except the accused Sikandar, as he died during trial, after their arrest faced the trial and on conclusion of the trial, they were convicted and sentenced, feeling aggrieved the instant criminal appeal.

7. True that in the incident two persons lost their lives and the complainant got injured, but equally true that from the other side too, two received fire arm injuries on the vital parts of their bodies and in such eventuality, it is essential for this Court to see as to whether the incident occurred in the mode, manner and at the stated time and as to whether both the sides came forward with the whole truth. True that the learned trial Court dealt with the matter comprehensively and that after

application of its judicial mind convicted the accused charged, but it is equally true that this being the Court of appeal is under the boundened duty to revisit the record of the case and to re-appreciate the already appreciated evidence, so that miscarriage of justice could be avoided. As the incident occurred in front of the house of the convict/appellants, where they too got seriously injured, so the attending circumstances of the present case has increased both, the anxiety and obligation of this Court to go deep to the roots of the prosecution's case, so that miscarriage of justice could be avoided.

8. The learned trial Court while handing down the impugned judgment dealt with the matter comprehensively and that it was mostly, the place of incident, the motive and the injuries caused to the complainant which persuaded it to convict, but at the same time little attention was paid to the injuries caused to two of the accused/appellants and the attending circumstances of the present case. In order to gain clarity, we deem it essential to scan through the record once again; and to dig out as to whether the approach of the learned trial Court was correct; and that the finding rendered down was in accordance with law and finds support from the evidence on record.

9. In order to comprehend the circumstances of the case, we deem it essential to go through the inter-se relationship between the parties. It is on record that two nieces of the complainant, who happened to be the sisters of one of the deceased, were married in the house of the convict/appellants i.e. one Shamshada Bibi was married to the convict/ appellant Tauseef whereas another to his brother in the same house. It is the case of the prosecution that owing to strain relationship between Tauseef and his wife, the complainant party was compelled to go and effect a compromise between the spouses and that on reaching to the place of incident the tragedy occurred, where the deceased lost their lives and the complainant got injured. As in the same incident two from the accused side received serious injuries on the most vital parts of their bodies, so the question which needs determination at the earliest is, as to what were the actual circumstances which led both the sides to the use of lethal weapons and that in what fashion the incident occurred. We at this juncture are not in a happy mood to hold that some of the accused were not present on the spot, as seat of injuries on the convict/ appellants is a circumstance which tells that they were present on the spot at the time of incident, but what concerns us, is that what prompted the parties to fire on each other which put both the sides in trouble.

10. To begin with, we would like to go through the statement of the complainant who appeared before the trial Court as PW-6. The complainant stated that on the day of incident he along with deceased left their house to the village of the accused to effect a compromise between the accused Tauseef and his wife, as the convict/ appellant Tauseef had contracted second marriage which turned to be the basis of strained relationship between the spouses; that soon they reached near the house of the accused, all the accused duly armed, started firing at them which led to the death of the deceased and injury to the complainant; that after receiving fire arm injury, he and the dead bodies were lying on the ground and that it was after 40 minutes of the incident that cots were arranged, the deceased were shifted and on availability of Datsun/pick-up, the dead bodies and the complainant were shifted to the hospital, where the matter was reported. It is interesting to note that the complainant, right from the beginning till the end, maintained silence regarding the injuries caused to the accused and while reporting the matter, he suppressed this material aspect of the case. From the spot 21 empties of 7.62 bore were collected from the places of convicts/appellants and blood stained earth from places of the deceased, but also in the counter case i.e. F.I.R No.197, 15 empties were

collected from the places assigned to the complainant and the deceased and blood stained earth from the places of the injured, which indicates that if on one hand two persons lost their lives and the complainant received injuries, then on the other two accused also received serious injuries on their bodies. In order to substantiate this particular aspect of the case, we went through the statement of the investigating officer. The investigating officer was examined as PW-8, who stated that after receiving copy of the F.I.R he visited the spot, but could not prepare the site plan as the complainant was not available; that on the very next day on the availability of the complainant he prepared site plan and effected the recoveries from the spot. This witness further confirms that on the same day he also prepared the site plan in case F.I.R No.197 and that recoveries were also effected and in that respect the recovery memos were prepared. The investigating officer was categoric in holding that both the cases are the cross-cases. The investigating officer was examined on material aspects of the case, more particularly, the arrival of the complainant party to the spot and their active participation in firing. The investigating officer admitted that the complainant side came to the spot duly armed and that from their firing two of the appellants received serious injuries. The investigating officer also

mentioned in the site plan the respective places of the injured/ appellants, from-where blood stained earth was collected. Even during spot inspection the investigating officer noticed bullet marks on the walls of the Baitak of accused Tauseef. It is interesting to note that when the complainant was cross-examined he introduced another story by disclosing that, he was told that when the accused committed the offence, they left the spot and after covering a distance of 30 minutes, reached Kharoba, where his nephews were already present duly armed, fired at them and that it was from their fire-shots, the convicts/ appellants received fire arm injuries. He further disclosed that none of the appellants received injuries on the spot and that they never fired at the accused party. If we admit to what the complainant stated regarding the occurrence at Kharoba then, it is for the complainant to convince, that who informed his nephews regarding the occurrence and the decamping of the appellants towards Kharoba. It is of prime importance to note that no site plan regarding the incident at Kharoba was prepared and even the investigating officer did not visit the place, where allegedly the accused/ appellants received fire arm injuries. When the investigating officer was asked regarding this particular aspect of the case, he categorically denied any incident to have occurred at

Kharoba. When such is the state of affairs, we lurk no doubt in mind in holding that the complainant has concealed the real facts. The conscious attempt of the complainant to introduce another story regarding the injuries caused to the appellants, clearly tells that the incident did not occur in the mode and manner as disclosed by the complainant. The scribe who was examined as PW-4 stated that on the day of incident he along with police constables was on Gasht and after receiving information regarding the arrival of the dead bodies to the hospital, he reached to the hospital, where the complainant reported the matter; that after preparation of the injury-sheet and inquest report, the complainant was sent to the doctor for his medical examination and the dead bodies for post mortem examination; that soon thereafter the injured/ appellants were brought to the hospital where the convict/ appellant Mohib Ullah reported the matter which was taken in shape of murasila. During cross-examination he admitted both the cases as cross cases. The injured were examined by the doctor, their medico-legal certificates were prepared, the doctor mentioned the duration of injuries on the bodies of both the injured from 2 to 3 hours, and when this time is taken in juxtaposition with the time of occurrence, it confirms that the injured received the injuries at the time given by the complainant in case FIR No.196.

11. We are to determine that which of the parties is responsible and which not, and in order to determine the responsibilities of the parties concerned, we deem it essential to re-visit the motive and the purpose of visiting the place of incident by the complainant and the deceased. The record tells that all the three left their house to mediate between the spouses as their relation had turned bad and when the statement of the complainant is taken into consideration, there too, he disclosed that the convict/appellant Tauseef had entered into second marriage which turned to be the basis of strained relationship between the spouses, so they visited the place to settle the differences. But the record does not support the stance of the complainant. If the complainant and others had an intention to bring the spouses at ease, then instead of leaving their house a little earlier from breaking the fast, they would have either waited to break their fast or would have gone much earlier to the house of Tauseef to negotiate, but the hasty leaving of their house confirms their intention and it was because of such a haste that the unwanted incident occurred. The complainant admitted in his Court statement that prior to leaving their house they did not inform Tauseef and his family of their arrival to their house, for the purpose, but when they reached to the place of incident they were fired

at. This is still astonishing that when convict/ appellant Tauseef and his family were not informed regarding their arrival, then how on reaching to the spot they were fired at, as by that time neither an altercation had taken place between the parties nor the parties sat to settle the differences. If the motive is the one which has been given by the complainant then, the incident did not occur in the manner given by the complainant, but what we can assess from the attending circumstances of the present case, is that, that the parties went in altercation, the situation went from bad to worse and the complainant side who was duly armed started firing and as a result the accused party resorted to firing as well. If the intention was to negotiate then the complainant would have visited the spot unarmed, but the collection of empties from the places of the complainant party is another circumstance which tells that the complainant side visited the spot with the sole purpose to kill. Even the bullet marks on the walls of the Baitak of the convict/ appellant Tauseef is another circumstance which clarify the active involvement of the complainant and deceased in firing as well. The seat of injuries on body of the convict/appellants confirms that these were not self inflected. Right from the beginning till the end the complainant struggled hard to make believe that it was the

accused party who fired at them and they never involved in the episode and that no firing was made from their side. The complainant was blowing hot and cold in the same breath, as on one hand he denies the incident to have occurred in the manner as disclosed by the investigating officer, whereas on the other, he admitted the injuries on the bodies of the convict/ appellants, but at the hands of his nephews, away from the place of incident, but the recoveries of empties from the places assigned to them and the blood stained earth from the places of the injured/ appellants confirm their participation in the incident, and a circumstance which cannot be ignored. From the attending circumstances of the present case, this Court is firm in its belief that both the sides suppressed the real facts and consciously attempted to create an atmosphere of uncertainty.

12. It was argued from the complainant's side that the injuries received by the convict/ appellants cannot be taken in favour of the defence as in such eventuality, it was the obligation of the defence to take a plea from the very beginning, which it did not and that when a plea is not taken the Court by itself cannot appreciate that aspect of the case. We are not convinced with what the learned counsel for the complainant submitted, as the circumstances of the present case by itself are sufficient to tell that it was the complainant

side who attracted to the spot, duly armed and that it was their this intention which led to the tragedy, so in such eventuality the possibility cannot be excluded that it was the complainant side, who went aggressor, that too, by the time when the fast was yet to be broken. In case titled ***"Abdur Rahim Vs. the State" (2021 YLR Note 139),*** it has been held that:

> ***"The factum of suppression of real facts of the appellant by both the sides, are the circumstances suggesting the act of firing by the appellant to have been committed in exercise of his defence, the benefit of which can be extended to him irrespective of the fact that he did not specifically take that plea during trial. Reliance is placed on case titled "Ghulam Fareed v. The State" (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 private defence, as codified in the Pakistan Penal Code.""

13. The cumulative effect of what has been discussed above, leads this Court nowhere, but to hold that there was aggression on part of the complainant and that the appellants were to retaliate. As the complainant side exceeded the limits and the accused realized a threat to their lives, so in that eventuality one side received serious injuries, whereas the other got two dead and one injured. True that casualties from one side are higher than the other, but it is equally true that these are not the casualties which should be the determining factor, rather this is the attitude of the parties which must be taken into consideration and as the convicts/appellants too received serious injuries on the most vital parts of their bodies,

so we cannot exclude the possibility that they just retaliated to save their lives. When the two versions regarding the same incident comes with the twisted facts, then courts are to decide the genuineness and the same is possible only and only when the attending circumstances of a particular case are taken into consideration, while applying the test this Court without any hesitation holds that the complainant side was the aggressor.

14. As the complainant in his court statement introduced new story and also could not explain the circumstances which led to the incident, so in such eventuality, it is for this Court to determine the same. If we accept for a while that the purpose was to reconcile the spouses then, we failed to understand that how the accused came to know regarding their approach to the place of incident and that why instead of talking to each other, firing was made at once, which resulted into the death of the deceased and injuries to the complainant. In this particular issue two most important witnesses are the nieces of the complainant, and sisters of one of the deceased, who were married in the house. None of the ladies were produced before the investigating officer and even before the learned trial Court to confirm the stance of the complainant. This is surprising that complainant in his Court statement stated, that the sisters of the deceased attracted to the spot soon after the incident, but the investigating officer

remained silent on that particular aspect of the case. If the tragedy occurred in the mode, manner and at the stated time, that too, owing to the strained relationship between the spouses, then in such eventuality, the wife of the accused/ appellant Tauseef would have deposed against her husband, with whom she was not enjoying good relations, but neither she appeared nor she was examined which in fact can be interpreted in no other manner, but that she was not ready to support the false claim of the complainant. This is surprising that despite the fact that real brother of Mst. Shamshada Bibi was killed in the incident, but till date, both the sisters are living a happy life in the house of appellants, which further negates the stance of the complainant, as in the incident motive was the most essential element and for the same the material witnesses were the sisters of the deceased, but their non-production can be taken only and only against the complainant and inference can be drawn under Article 129 (g) of Qanoon-e-Shahadat Order, 1984. In this regard, wisdom could also be derived from the judgment rendered by the Apex Court in case titled ***"Lal Khan Vs The State" (2006 SCMR 1846)*** in which it was held that:

> ***"The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence***

is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutorial misconduct which would not only be considered a source of undue advantage for possession but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought into witness-box, he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."

15. The convict/appellant Tauseef admittedly, was serving in the police department, attached with Bomb Disposal Squad during the days of incident. The record tells that on the day of incident, he was arrested and put in quarter guard as he was charged in the instant case. This is interesting to note that on 03.6.2017, his official rifle was taken into possession from his official box, lying in police lines and the same was handed over to the investigating officer on 14.6.2017. This is for the

prosecution to explain that how, when and wherefrom the convict/ appellant Tauseef was arrested and that who arrested him and who put him in the quarter-guard. The investigating officer was asked regarding this particular aspect of the case, but he too could not explain that who and from where the appellant was arrested. This is further surprising that record is silent that who took the official rifle in possession from possession of the convict/ appellant Tauseef and who put it into the box belonging to the accused, lying in the Police Lines, but no evidence has been collected by the investigating officer in that respect. The investigating officer mentioned one Sher Nawaz Khan, ASI that it was he who handed over the weapon to Noor Kamal, but neither the said Noor Kamal recorded statement of Sher Nawaz ASI, incharge Bomb Disposal Squad, nor the investigating officer recorded his statement under section 161 Cr.P.C. When the witnesses are silent regarding the arrest and recovery and when the witnesses could not explain that wherefrom the accused/ appellant Tauseef was arrested, then in such eventuality, this piece of evidence cannot be taken into consideration until corroborated. The investigating officer took the Kalashnikov into his possession on 14.6.2017 and on that very date an application was addressed to the Director General Forensic Science Laboratory, but surprisingly the weapon along with the

recovered empties were received to the laboratory on 06.7.2017, after a considerable delay of more than one month. On one hand the witness admits that the recovered Kalashnikov was not sealed by the investigating officer and by the police official who took the same from the box, whereas on the other the collected empties and the weapon were received to the laboratory after a considerable delay of more than one month. In this respect neither the investigating officer examined Muharrir of the concerned police station nor the official who took the same to the Forensic Science Laboratory. When the most relevant witnesses have not been produced then in such eventuality this Court lurks no doubt in mind that the prosecution failed to prove safe custody of the collected empties and recovered weapon. When such is the state of affairs, this Court is not in a happy mood to take into consideration the laboratory report, against the convicts/appellants.

16. As the unfortunate incident occurred, because of the alleged strained relation between the spouses and the purpose of visiting the place of the accused was to bridge the differences between the two, but neither Mst Shamshada Bibi was examined by the investigating officer nor another sister of the deceased who is married in the house. The investigating officer could not collect independent evidence in that respect

and as such, the motive advanced by the complainant could not be established on record. True that absence or weakness of motive hardly plays a role to dislodge the prosecution case provided, it inspires confidence, but in the case in hand as purpose was to bridge the differences between the spouses and that it was because of this reason that the deceased lost their lives, so it was essential for the prosecution to prove the same, but it did not, which has damaged the prosecution's case beyond repair. In case titled ***"Muhammad Ilyas vs Ishfaq alias Munishi and others" (2022 YLR 1620),*** it was held that:

> ***"So far as motive is concerned. Though the prosecution is not under legal obligation to set up a motive. Ordinarily the absence or weaknesses of motive in murder case cannot be considered to justify the acquittal. It is well settled that once a motive is set up it is imperative for the prosecution to prove the same. On failure whereof adverse inference can be dawn against the prosecution. Reference is made to the cases of Muhammad Khan v. Zakir Hussain PLD 1995 SC 590 and Hakim Ali v .The State 1971 SCMR 432."***

17. The cumulative effect of what has been stated above, leads this court nowhere, but to hold that the prosecution failed to bring home guilt against the appellants and the impugned judgment is suffering from inherent defects and is lacking reasons, which calls for interference. The instant criminal appeal is allowed, the impugned judgment is set aside, and the convict appellants are acquitted of the charges. They be released forthwith, if not required to be detained in connection with any other criminal case.

18. As the criminal appeal against conviction is allowed and the impugned judgment is set aside, so the connected Criminal Revision Petition **No.47-B of 2022** has lost its efficacy which is dismissed as such. These are the detailed reasons for our short order of even date.

Announced
08.3.2023.
"Ihsan"

Date of writing of judgment:
3rd of April, 2023

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Sahibzada Asadullah &
Hon'ble Mr. Justice Muhammad Faheem Wali.

07 APR 2023