

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR,
JUDICIAL DEPARTMENT

Criminal Appeal No.890-P/2021.

Askar Ali .Vs. The State and another

For appellant: Mr. Jawad Ahmad Khan, Advocate.

For State: Mr. Muhammad Bashir Naveed, Additional Advocate General.

For complainant: Barrister Amir Khan Chamkani.

Date of hearing: 27. 07. 2022.

J U D G M E N T

FAZAL SUBHAN, J.- This criminal appeal is directed against the judgment dated 09.09.2021 of the learned Additional Sessions Judge-V, Charsadda, delivered in case FIR No.192 dated 28.07.2016 under sections 302/324/34 PPC of Police Station Battagram, District Charsadda, whereby appellant has been convicted and sentenced as under:-



Under section 302 (c) PPC:- To undergo 10 years Rigorous Imprisonment and to pay rupees three lac as compensation to the legal heirs of deceased in terms of section 544-A Cr.P.C, recoverable as arrears of land revenue u/s 544-A(2) Cr.P.C.

Under section 324 PPC:- To undergo 04 years Rigorous Imprisonment and to pay a fine of rupees twenty thousand or in default thereof to further undergo one month Simple Imprisonment.

All the sentences were ordered to be run concurrently. Benefit of section 382-B Cr.P.C was extended to the appellant.

2. Brief facts as per contents of the FIR are that on 28.07.2016 at 0720 hours, complainant Jangraiz Khan son of Meera Khan resident of Karkan, Charsadda, falling within the jurisdiction of Police Station Battagram, District Charsadda, while taking the dead body of deceased Mst. Shamim Ara daughter of Meera Khan and injured Mir Siyab son of Misal Khan through motorcar, reported to the local police in Police Station Battagram to the effect that at the relevant time of occurrence i.e. 0720 hours, they started altercation with one Almas son of Atlas Khan resident of Karkan when in the meanwhile Zahoor Khan, Askar Ali sons of Almas Khan and Zahid Gul son of Zrhawar Khan came duly armed with firearms and started firing upon them with the intention to cause their death and as a result his sister Mst. Shamim Ara was hit due the firing of accused and died on the spot while Mir Siyab was also got injured whereas he luckily escaped unhurt. Motive behind the occurrence was stated to be momentary altercation. He, therefore, charged the above named accused for the murder of his sister and causing firearm injures to the injured Mir Siyab.


3. After completion of investigation, challan was submitted in Court. Since the appellant, alongwith co-accused, after commission

of the offence went into hiding and was avoiding his lawful arrest, therefore, proceedings under Section 512 Cr.P.C. were initiated. After the arrest of appellant, supplementary challan against him was submitted. Formal charge was framed against appellant to which he pleaded not guilty and claimed trial. The prosecution in order to prove the charge and substantiate the allegations leveled against the appellant, produced 10 witnesses at the trial and thereafter closed its evidence. The appellant, at the close of prosecution evidence, was examined under Section 342 Cr.P.C, who, in his statement, denied the allegations leveled against him. After hearing arguments, learned trial Court, vide judgment dated 09.09.2021, impugned herein, convicted and sentenced the appellant as mentioned above. Feeling dissatisfied, the appellant has preferred the instant appeal whereas Jangraiz Khan complainant-petitioner has filed connected Cr. R No.174-P/2021, for enhancement of sentence.

4. Since both the appeal and the revision arise out from one and the same judgment dated 09.09.2021, of the learned trial Court, therefore, we propose to decide the same through this single judgment.

5. We have heard arguments of learned counsel for the parties and have gone through the record.

6. We have found that charge against the appellant was framed u/s 302/324/337-F(ii)/337-A(i)/34 PPC, and at the conclusion of trial the above referred sentence was passed by convicting the accused u/s 302(c) to 10 years. In our view, when the trial Court arrived to the conclusion that prosecution has proved its case beyond doubt, causing death of Mst. Shamim Ara, then the normal sentence of death u/s 302 (a) or life imprisonment u/s 302(b) was required to have been awarded due to the use of word "shall" in section 302 PPC, however appellant was sentenced under section 302 (c) PPC for 10 years without assigning any reason for awarding lesser punishment. Section 367(5) Cr.P.C deals with offences punishable with death, which is reproduced below for convenience:-



"S.367(5). If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed."

The said provision on the one hand empowers the trial Court that in the offence punishable with death the trial Court instead of awarding punishment of death may award any other sentence upon the accused but for awarding such lesser punishment, the Court must give cogent and convincing reason for awarding sentence other than death. In the case titled **Iftikhar alias Istikhar vs. The State and**

another, reported as PLD 2004 Peshawar 143 it has been held by

Hon'ble Peshawar High Court that:-

“---S. 302---Sentence---Offence when proved has to be met with the maximum sentence provided therefore---However, there is no yardstick to restrict or curb the discretion of the Trial Court while passing the sentence---Circumstances of each case would justify the severity or leniency in passing the legal sentence.”

Similarly, in the case titled Ashiq Hussain and others vs.

The State and 2 others, reported as (2003 SCMR 698) it was held

by the august Supreme Court of Pakistan that:-

---Ss.410, 173 & 367---Penal Code (XLV of 1860), S.302---Constitution of Pakistan (1973), Art,185(3)---Appeal against conviction---Acquittal by High Court without assigning cogent reasons---Effect---Section 367, Cr.P.C., cast duty upon Court to note down points for determination and then record decision---High Court while acquitting convict had been influenced by report of Investigating Officer, who had exonerated him from charge---Validity---Once accused had been challaned before Court under S.173, Cr.P.C. and prosecution had produced evidence against him, then Court was bound to decide case in view of material placed on record and was not supposed to follow reports of Investigating Officer being tentative in nature---Such acquittal was not sustainable in law---Case was remanded to High Court for its fresh decision.

Still in another case titled Syed Hamid Mukhtar Shah vs.

Muhammad Azam and 2 others, reported as (2005 SCMR 427)

wherein the august Supreme Court of Pakistan while elaborating the

circumstances for awarding normal penalty of death has held that:-

---S.302(b)---Murder---Sentence---

Circumstances where normal penalty of death sentence be awarded stated:---

Insufficiency of motive or motive being shrouded in mystery could not be considered as circumstances justifying non-awarding of the normal penalty of death to a murderer or to reduce the sentence of death to a lesser punishment.

Even where the occurrence resulting in a murder had taken place at the spur of the moment and even where only one shot had been fired and same had not been repeated, the only penalty deserved by the killer was the normal punishment of death prescribed for the said offence.

Inadequacy of weakness of the alleged motive or where motive had not been proved, an assailant if found guilty of causing the murder of another, did not deserve any leniency and the only punishment awardable in such-like circumstances would be the sentence of death.

7. We have also noticed that the appellant, in his defence has not taken any plea of self-defense throughout the trial but the trial Court in its findings at page 33 of the judgment has concluded that the appellant has exceeded in exercising his right of defense which seems to be a conclusion drawn beyond the facts and circumstances of the case, because there was no plea of self-defence in the case from the appellant, thus when the question of determination of plea of self-defence was not raised before the trial Court, the impugned judgment was not handed down keeping in view the provision of section 367 Cr.P.C.

8. For the above given reasons, we hold that the judgment recorded by the trial Court, is not sustainable in the eyes of law and

the same is set aside. The case is remanded back to the trial Court with the direction to rewrite the judgment in the case in light of the evidence available on record, within two months from the date of receipt of record, keeping in mind the provision contained in section 367 Cr.P.C. Till then, the appellant shall remain in custody and to be treated as under trial prisoner. Office is directed to send the record forthwith to the trial Court. The connected criminal revision No.174-P/2021 is dismissed having become infructuous.

Announced
27.07.2022


J U D G E


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(D.B) Hon'ble Mr. Justice Shakeel Ahmad and
Hon'ble Mr. Justice Fazal Subhan.

(Mahmood Shah,SSS)