

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT (Judicial Department)

Cr.A. No.135-M/2015

JUDGMENT

Date of hearing: **26.1.2016**

Appellant: (Mian Gul Rahim)
M/S Saeed Ahmad Khan Nasar and
Mian Gul Saeed, Advocates.

Respondent: (State) by Mr. Rafiq Aham, Assistant
Advocate General.
(Shamas Khan) by
Mr. Abdul Wadood, Advocate.

HAIDER ALI KHAN, J.- Through this single judgment we intend to dispose of the instant appeal as well as the connected criminal revision petitions bearing Cr.R No. 44-M/2015 and Cr.R No. 07-M/2016 preferred by the State and widow of the deceased, respectively for enhancement of the sentence awarded to the appellant/convict. All the matters arise from one judgment dated 15.6.2015 of the learned Additional Sessions Judge/Izafi Zilla Qazi, Swat at Kabal, delivered in case FIR No.408 dated 05.9.2014,

registered under section 302 PPC, at Police Station Kanju, District Swat.

2. Vide the impugned judgment, the learned trial Court has convicted the appellant/convict herein namely Mian Gul Rahim under Section 302(c) PPC and sentenced him to 14 years rigorous imprisonment with payment of Rs.200,000/- as compensation to the LRs of the deceased or in default thereof he was ordered to suffer further six months S.I. The appellant has challenged the above conviction through the instant appeal.

3. The State as well as widow of the deceased, being aggrieved of the lesser punishment awarded to the appellant/convict, have filed the connected revision petitions bearing Cr.R No. 44-M/2015 and Cr.R No. 07-M/2016, respectively, whereby they have prayed for enhancement of the sentence of the appellant/convict.

4. Precise and relevant facts of the case are that on 05.9.2014 at the time of *Maghrib* prayer the complainant Shamas Khan reported to the local police at Casualty Ward of Saidu Sharif Hospital to the effect that at the relevant time he alongwith Ibrahim Khan was going for performance of *Maghrib* prayer and when they reached near the lumberyard (لکڑی ٹال), they saw his brother Asghar Khan (deceased) and accused Mian Gul Rahim having a scuffle because of hand-cart/push-cart; that in the meanwhile the accused Mian Gul Rahim caused a knife stab at the right side of the neck of his brother Asghar Khan with which he got seriously injured and the accused decamped from the spot; that the injured Asghar Khan succumbed to his injury while he was on the way to the hospital. The occurrence was reported by the complainant to have been witnessed by him and Ibrahim Khan whereas the motive behind the occurrence was stated to be a dispute over a hand-cart.

Report of the complainant was recorded in shape of *Murasila* Ex.PW-10/1 which was later on incorporated in FIR, Ex.PA. The accused was arrested and challan was submitted against him in the Court after completion of the investigation. The trial Court framed formal charge against the accused to which he pleaded not guilty and claimed the trial whereafter the prosecution produced as many as ten witnesses in order to bring home guilt to the accused. After recording the prosecution evidence, statement of the accused under section 342, Cr.P.C was recorded wherein he again claimed his innocence, however, he felt no need to produce any evidence in his defence nor he opted to be examined on oath under Section 340(2), Cr.P.C. At the conclusion of the trial, the trial Court found the accused guilty of the charge and sentenced him as mentioned in Para No.2. Being aggrieved, the appellant/convict has preferred the instant appeal whereby he has challenged his conviction whereas the

State as well as widow of the deceased have filed their respective revision petitions seeking enhancement of the punishment awarded to the appellant/convict, all the matter being inter connected are being disposed of through this single judgment.

5. Learned counsel for the appellant/convict contended that the impugned judgment is based on conjectures and surmises as well as the same is against the law and facts on the record; that the learned trial Judge did not appreciate the evidence in its true and legal perspective and drew a wrong conclusion without application of judicial mind which resulted in gross miscarriage of justice to the appellant; that the prosecution evidence is suffering from serious contradictions and dents, hence, the case against the appellant/convict has not been proved beyond reasonable doubt but the learned trial Court did not consider the same and convicted the appellant through

the impugned judgment which is not legally sustainable.

6. As against the above, learned counsel for the complainant as well as the learned A.A.G appearing on behalf of the State argued that the prosecution has successfully proved the allegation against the appellant/convict through convincing and confidence inspiring evidence but the learned trial Judge did not consider the same and awarded lesser punishment to the appellant without any legal justification. They prayed that appeal of the appellant/convict be dismissed whereas by allowing the connected revision petitions, the sentence awarded to the appellant/convict be enhanced in accordance with law.

7. We have heard the arguments advanced by learned counsel for the parties as well as that of the learned A.A.G appearing on behalf of the State and perused the record in light of their valuable assistance.

8. Perusal of the record would reveal that the prosecution has examined three witnesses namely Shamas Khan (complainant), Sajjad and Ibrahim Khan as PW-2 to PW-4 respectively who had witnessed the occurrence. The statements recorded by the aforementioned eye witnesses reveal that they have set forth a true account of the occurrence and depicted the incident in the manner in which it actually occurred. Learned counsel for the appellant/convict argued that the two witnesses namely Shamas Khan (PW-2) and Ibrahim Khan (PW-3) are interested witnesses being closely related to the deceased besides the prosecution has not established their presence on the spot. There is no denial to the fact that the mentioned two eye witnesses and the deceased are closely related inter se, however, the evidence of an interested witness cannot be discarded merely on the ground of his close relationship with the deceased provided the same is duly corroborated by an independent source. In the

present case the prosecution has produced the third eye witness namely Sajjad as PW-3 who is an impartial and independent witness and has fully supported the prosecution version. By comparing the statements of the three eye witnesses it becomes abundantly clear that they are consistent in their deposition on material points and their testimony has not been shattered despite lengthy cross-examination. Learned counsel for the appellant also contended that the name of PW Sajjad has not been mentioned by the complainant in the FIR and he was later on introduced, hence, a dishonest improvement was made in the prosecution case. Admittedly, PW Sajjad is son of Ala Khan who is owner of the lumberyard/ (ٹال لکڑی) where the occurrence took place, hence, his presence on the spot cannot be doubted mere on the ground that his name was not mentioned in the FIR. Moreso, the said witness has been cross-examined at length but nothing favourable to the appellant has been extracted from his

mouth. Thus, in the estimation of this Court, the eye witnesses have produced a trustworthy account of the occurrence and there is nothing on the record in rebuttal to belie their statements.

9. In addition to the above, the statements of the eye witnesses are fully corroborated by the postmortem report and statement of Dr. Abdullah Khan (PW-1) who conducted the postmortem on the deceased. Moreso, weapon of the offence has been recovered on pointation of the appellant/convict and blood stained pieces of wood have also been collected by the I.O from the spot. On analyzing the remaining material on the record in light of the statements of the eye witnesses, a clear picture of the occurrence emerges in a prudent mind that undoubtedly the appellant/convict is directly involved in the murder of the deceased. Furthermore, learned counsel for the appellant/convict also referred to certain contradictions in the statements of the prosecution witnesses and also

pointed towards the fact that the hand-cart being the cause of the occurrence, has not been taken into possession by the local police. No doubt, there are minor discrepancies in the prosecution case and the hand-cart has not been seized up by the local police, however, the above facts are not fatal to the prosecution case keeping in view the remaining evidence available on the record being worth reliance and sufficient for bringing home guilt to the appellant .

10. It was also the contention of the learned counsel for the appellant/convict that the alleged motive as depicted by the prosecution has not been proved. It is well settled that motive cannot be *sine qua non* for bringing home guilt to an accused and it is enough to determine factum of intention which can be gathered from facts and circumstances of the case. If guilt of an accused stands proved in light of statements of the eye witnesses then absence of the motive or failure on the part of the prosecution to prove the same

does not adversely affect the ocular account produced by the witnesses. Reliance in this regard is placed on **2010 SCMR 1090 and 2009 SCMR 523.**

11. Now adverting to the stance of the learned counsel for the complainant and the learned A.A.G. that the trial Court has awarded lesser punishment to the appellant/convict despite the fact that no mitigating circumstances prevail in the present case. The learned trial Judge has held that the murder was the result of sudden fight over a hand-cart dispute, no previous enmity was there *inter se* the parties and the appellant/convict gave a single stab to the deceased. The above facts were taken as mitigating circumstances by the learned trial Court and the appellant was convicted under section 302(c) PPC by awarding him punishment of fourteen years rigorous imprisonment. No doubt, mitigating circumstances mentioned by the learned trial Court can be considered for avoiding the capital punishment of death sentence

but not in the case of awarding punishment under section 302(c) PPC keeping in view the attending facts and circumstances of the present case. Record shows that the present case is that of a single accused who has been charged for inflicting knife blow to the deceased which proved fatal and caused the death of the deceased. It is also noticeable that the occurrence originated from a petty matter and there is no evidence of premeditation on the part of the appellant/convict, therefore, the Court in such like circumstances should not lose sight of the principle of proportionality and should avoid the award of capital punishment to an accused. But in the present case the learned trial Court has penalized the appellant/convict under Section 302(c) PPC which is not fair just keeping in view the mode and manner in which the appellant/convict inflicted knife injury to the deceased. Since, proof of the sort specified in Section 304 PPC is not available in the present case and the mitigating circumstances are

available for avoiding death sentence to the appellant/convict as discussed above, therefore, in estimation of this Court Section 302 (b) PPC would be the right section under which the appellant/convict should be convicted by enhancing his sentence to imprisonment for life as 'tazir'.

12. In view of the above discussion, the instant appeal, being devoid of merits, is dismissed, the connected Cr.R No. 44-M/2015 preferred by the State is allowed and the impugned judgment of the learned trial Court is modified by enhancing sentence awarded to the appellant Mian Gul Rahim in terms that his conviction is converted from Section 302 (c) PPC to Section 302(b) PPC. Resultantly, the sentence awarded to the appellant/convict of fourteen (14) years rigorous imprisonment is enhanced to rigorous imprisonment for life and the compensation of Rs.200,000/- (rupees two hundred thousand) enhanced to Rs.600,000/- (rupees six hundred thousand) to be paid by the

appellant/convict to the legal heirs of the deceased in terms of Section 544-A, Cr.P.C or in default thereof the same shall be recovered as arrears of land revenue. Benefit of Section 382-B, Cr.P.C is extended to the appellant/convict. The trial Court is directed to issue modified jail warrant in respect of the appellant/convict and transmit the same to the Superintendent Jail where the appellant is confined. The criminal revision petition bearing Cr.R No. 07-M/2016 preferred by widow of the deceased stands dismissed for having become infructuous.

Announced
26.1.2016

JUDGE

JUDGE