

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

**Cr.A. No.325-B/2019.**

Abdur Rahim  
Vs.  
The State etc.

**JUDGMENT**

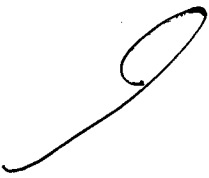
Date of hearing: **16.3.2021.**

For Appellants: **Haji Hamayun Wazir, Advocate.**

For State: **Mr. Shahid Hameed Qureshi, Addl: A.G.**

For Respondents: **Muhammad Farid Khan Maidad Khel, Advocate.**

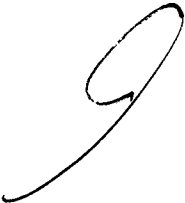
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**SAHIBZADA ASADULLAH, J.-** This judgment shall dispose of Cr.A.No.325-B of 2019 titled 'Abdur Rahim Vs. The State etc' and the connected criminal revision bearing No.66-B/2019, as both are the outcome of one and same judgment, dated 15.10.2019, rendered by the learned Additional Sessions Judge-III/MCTC, Lakki Marwat, in case FIR No.134 dated 27.4.2016, under sections 302/506/34 PPC of police station Ghazni Khel, District Lakki Marwat, whereby the appellant was convicted under Section 302(b) PPC and sentenced to life imprisonment alongwith compensation of Rs.10,00,000/- (one million) to be paid to the legal heirs of each of the deceased in terms of section 544-A, Cr.P.C. or in default thereof to

suffer six months simple imprisonment, which shall be recoverable as arrears of land revenue. He was further convicted under Section 506 PPC and sentenced to imprisonment for two years, with further conviction under section 15 of Khyber Pakhtunkhwa Arms Act, 2013, and sentenced to imprisonment for one year. All the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. was extended to the convict.

2. The prosecution story, as disclosed in the FIR Ex.PA, registered on the basis of murasila Ex. PW 3/1, is that on 27.4.2016 at 17:30 hours, complainant Asmatullah (PW-5), while present with the dead body of his uncle Rehmatullah, made report on the spot to Haider Ali Shah SHO (PW-3) to the effect that there was a land dispute between Abdur Rahim and Haji Shah Nawaz and to resolve the same, his uncle Rehmatullah was appointed as arbitrator; that on the same day, he alongwith his uncle Rehmatullah and cousin Kiramat Ullah (PW-6) had gone for arbitration/medication between the parties; that the first party was comprised of Abdur Rahim and Ahmad Khan, while the second party consisted of Shah Nawaz and Abdullah; that no sooner the arbitration started, Abdur Rahim etc got annoyed and asked Rehmat Ullah that why he came for arbitration as they would not give the



property to opposite party at any cost; that at about 17:15 hours, some altercation took place, upon which Abdur Rahim and his son Ahmad Khan rushed to their house and came back; that Abdur Rahim duly armed with DB 12 bore shotgun while his son Ahmad Khan armed with 303 bore rifle started firing at his uncle Rehmatullah with the intention to commit his qatl-i-amd, as a result whereof, he got hit and fell to the ground; that both the accused criminally intimidated the complainant party by aiming their respective weapons at them directing them not to attend the injured; that accused Ahmad Khan escaped from the spot, whereafter, the SHO of police station Ghazni Khel alongwith police Nafri reached to the spot and arrested accused Abdur Rahim alongwith weapon of offence; that when they attended the injured, by then he had succumbed to his injuries. Motvie for the offence was stated to be some altercation during arbitration between the parties. Besides the complainant, the occurrence was stated to be witnessed by PWs Kiramat Ullah, Abdullah and Haji Shah Nawaz. On the report of complainant, PW-3 drafted murasila Ex. PW 3/1, prepared injury sheet Ex. PW 3/2 and inquest report Ex. PW 3/3 of the deceased and on arrival of the Investigating Officer to the spot, handed over the accused alongwith card of arrest, the recovered

DB shotgun 12 bore alongwith the bandolier containing 12 rounds.

3. After completion of investigation, complete challan was submitted by him to the trial Court, where on the commencement of trial, the prosecution produced and examined as many as eight witnesses, whereafter, accused was examined under section 342 Cr.P.C, wherein he denied the allegations and professed innocence, however, neither he opted to be examined on oath in terms of Section 340(2), Cr.P.C., nor produced evidence in his defence. The learned trial Court after hearing arguments of learned counsel for the parties vide judgment impugned herein, convicted the accused and sentenced him, as mentioned in earlier part of the judgment. The convicts/appellant has assailed his conviction and sentence through the instant appeal, while the complainant has moved the connected criminal revision for enhancement of sentence awarded to the appellant, which are being decided through this common judgment.

4. We have heard learned counsel representing the appellant, Additional Advocate-General assisted by learned private counsel at length and with their valuable assistance, the record was gone through.

5. The incident occurred on 27.4.2016 at 17:15 hours, where the deceased lost his life in front of the house of the appellant. The motive was stated to be an altercation between the deceased and the appellant. The matter was reported to one Haider Ali Shah, SHO, who on receiving information reached to the spot. It is pertinent to mention that the appellant Abdur Rahim was arrested on the spot, whereas co-accused Ahmad Khan could not be arrested, as he allegedly decamped from the spot soon after the incident.

6. At the time of arrest, the appellant was allegedly armed with a DB shotgun, which was recovered from his possession by Haider Ali Shah S.H.O (PW-3), and on arrival of the Investigating Officer the same was handed over to him, who inspected the same and extracted an empty and a live cartridge from its barrels. Record tells that on pointation of PW-3, the Investigating Officer (PW-8) collected a Kalakov 222 bore lying by the side of deceased alongwith an empty of the same bore. The Investigating Officer also recovered an empty of 303 bore from the place of incident lying near the place which was assigned to the absconding co-accused.

7. The appellant at the time of his arrest informed the scribe, that he was beaten by the deceased along with

PW Haji Shah Nawaz and Abdullah, who had come to the spot to dispossess him of his property and that a scuffle took place between the parties, at the time of scuffle PW Abdullah was armed with a repeater 12 bore, which went off, resulted into injury on person of the deceased who later on died on the spot. In this respect the version of the appellant was taken vide a Naqal Mad and an inquiry was conducted u/s 156(3) Cr.P.C, but feeling dissatisfied the appellant approached the Ex-Officio Justice of Peace under section 22-A (6) Cr.P.C. asking direction for registration of F.I.R, which was answered in positive, resulting into registration of F.I.R No. 354, under section 324/34 P.P.C, against the accused who at the end were acquitted of the charges.

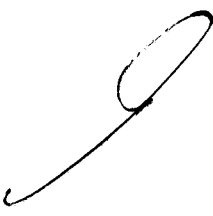
8. The learned trial Court, after a full-dressed trial, passed a guilty verdict against the appellant vide judgment under challenge. True, that the matter was comprehensively dealt with; and that the prosecution produced three of the eyewitnesses, who were allegedly present at the time of incident; and that the appellant was arrested from the spot duly armed, but this alone will not serve the purpose, rather the prosecution is under the bounden duty to establish its case against the accused through confidence inspiring and trustworthy witnesses.

Admitted, that the convict/appellant was arrested from the spot soon after the incident alongwith the weapon of offence, but that alone will not serve the purpose rather the prosecution is to travel a long way to prove the appellant guilty. Right from the beginning both the prosecution and defence came forward with their respective versions before the Investigating Officer and later before the trial Court, but towards the end it was the version put forth by the prosecution, that prevailed with the learned trial Court, whereas, the defence failed to persuade.

9. This Court is to see as to whether the approach of the learned trial Court is reasonable and as to whether the conclusion drawn calls for interference or otherwise. This Court is to determine as to whether the prosecution succeeded in proving the charges against the appellant, or that the counter claim had a substance, however, the duty of the learned trial Court does not end here, rather it is to unearth the real facts by placing both the versions in juxtaposition, and it was for the trial Court to determine that in case of suppression of facts which side is to be burdened and with what liability.

10. The impugned judgment tells that the trial Court was influenced from spot arrest of the appellant

along with the positive Laboratory report in respect of the recovered weapon. The place of incident was an additional factor which swayed the learned trial Court to convict the appellant for the murder of the deceased. This Court is still to resolve, as to whether the approach of the learned trial Court was correct or that the learned trial Court was still to labour, to unearth the twisted and concealed facts.



11. After scanning the record, it surfaced that on the unfortunate day the deceased left for the spot along with one Haji Shah Nawaz, the complainant, PW Abdullah and son of the deceased, namely, Kiramatullah, from the baithak of Haji Shah Nawaz situated at village Gul Baz Dehkan, in order to resolve the differences in respect of the disputed property and that it was during negotiation that the temper rose high, which resulted into the death of the deceased. The complainant was examined as PW-05, who stated that on the day of incident he along with the deceased and others visited the spot, while sitting with the appellant and the absconding co-accused, they started negotiation in respect of the disputed property and it was during negotiation that the appellant got infuriated, rushed to his house along with his son, the absconding accused, came duly armed and started firing at the deceased. It was the fire shot of the appellant which

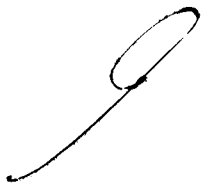


proved effective and the deceased after getting injured fell to the ground and died on the spot. It was further stated that all present wanted to attend the deceased then injured, but the appellant prevented them by aiming his gun; and that it was after some time that the deceased succumbed to the injuries; on arrival of local police to the spot the matter was reported. There is no denial to the fact that the matter was reported on the spot, but we are anxious to know that who informed the police, regarding the incident, as the witnesses categorically stated that they did not inform the police regarding the incident. The scribe was examined as PW-01, who stated that while on gusht at village Gul Baz Dehkan, he received information on his mobile phone, but till the end he failed to explain that who conveyed the information. The presence of the complainant and PW Kiramattullah, does not appeal to a prudent mind, despite their hectic efforts they failed to establish their presence on the spot. Both these witnesses appeared before the trial Court, but they failed to connect themselves with the purpose. It was stated that they accompanied the deceased to the spot to help in mediation, but both of them contradicted each other on this particular aspect of the case. They failed to convince that who asked their help in mediation and even nothing

was brought on record regarding the constitution of a Jirga. The witnesses admitted that in case of arbitration both sides are asked the people of their choice to represent them and when a consensus is built up the parties are bound down by depositing security, but the record is silent that who were nominated as arbitrators and that when the security was deposited, rather both these witnesses admitted that the deceased was the sole arbitrator, which is unusual. Though the witnesses struggled hard to convince, but they could not get the desired results.

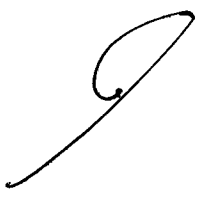
12. The prosecution witnesses failed to reconcile each other in respect of the recoveries effected from the spot. The complainant stated that when Haider Ali Shah S.H.O reached to the place of incident he arrested the accused/ appellant and from his personal possession the weapon of offence was recovered. He further stated that the Investigating Officer in their presence recovered a Kalakov 222 bore, lying near the deceased along with an empty lying on the spot, but PW-06 contradicted his stance and stated that no empty of 222 bore was recovered from the spot; and that he could not say as to whether the Investigating Officer took in to possession a Kalakov lying near the deceased. The matter does not end here, rather PW Abdullah introduced another story, when he

was examined as PW-07. He stated that after the deceased was fired at, the appellant took into possession the Kalakov of the deceased and started firing at the walls of his house, which created bullet marks and that when the Investigating Officer reached to the spot, he extracted the spent bullets therefrom. This explanation in no way favours the prosecution, rather it has damaged the prosecution case beyond repair.



13. The doctor who conducted autopsy on the dead body of the deceased was examined as PW-1, who confirmed that the deceased survived for long thirty minutes after receiving firearm injuries. If the witnesses were present on the spot, why they did not shift the deceased then injured to the hospital, as the motorcar was available on the spot. Had the witnesses including son of the deceased, were present on the spot, they would not let the deceased die, rather their first priority would have been to save his life. An abortive attempt was made to cover the situation, when the witnesses stated that the appellant was not allowing them to attend till the deceased lost his life, but it is hard for a prudent mind to accept. The conscious effort on part of the witnesses takes us nowhere, but to hold that they were not present on the spot; and that it was after receiving information regarding

the death of the deceased their presence was procured and the matter was reported on the spot. Though the presence of PW-07, has been admitted by the appellant when he was charged in case F.I.R No.354 under section 324/34 P.P.C, but PW Abdullah came forward with twisted and concealed facts.

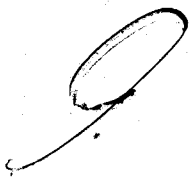


14. On arrival of the Investigating Officer to the spot, the weapon recovered from possession of the appellant was handed over. The Investigating Officer also recovered one empty of 303 bore near from the place of the absconding co-accused, whereas from the place of the deceased a rifle 222 bore along with an empty were taken into possession. The site-plan was prepared on pointation of the eye-witnesses with an addition in respect of the bullet marks on pointation of PW-03 Haider Ali Shah S.H.O. It is pertinent to mention that from the walls spent bullets were extracted. The recovered weapons along with empties were sent to the Forensic Science Laboratory, and a positive report was received in that respect.

15. It leaves no ambiguity that the deceased also resorted to firing, which though did not hurt the appellant but created bullet marks on the surrounding walls and this factor alone is sufficient to dispel what the complainant stated, rather an inference can be drawn that in fact both

the sides resorted to firing. It is pertinent to mention that the Investigating Officer has placed on file the revenue record of the disputed property. It was also brought on record that a civil suit was pending between the parties in respect of the land in question. The Investigating officer admitted on record that even on the day of occurrence, an application for temporary injunction was fixed before the concerned Court, where both the parties put their appearance.

16. In order to understand the issue in its true spirit, it is essential to read the explanation given by the appellant, when his statement under section 342 Cr.P.C, was recorded and when he reported the matter. The appellant stated that on the day of incident both the sides had attended the Court proceedings, where an application for temporary injunction was to be decided and it was on dismissal of the application, he left for his house followed by the deceased along with Haji Shah Nawaz and PW Abdullah, when they reached to the place of incident he was over powered, beaten and in that eventuality, the repeater 12 bore in possession of the PW Adbullah went off which resulted into the death of the deceased. We do not agree with what the appellant narrated, as on one hand, he was arrested on the spot and on the other, the



recovered empty matched with the weapon which was taken into possession at the time of his arrest. We lurk no doubt in our mind that it was the appellant who killed the deceased, but we cannot ignore that during spot inspection the Investigating officer also recovered a Kalakov belonging to the deceased along with an empty lying on the spot, which too yielded to a positive report. The record further tells that these were the fire shots of the deceased which struck the walls and the spent bullets were recovered by the Investigating Officer therefrom. The circumstances tell that it was not only the appellant who initiated, rather the deceased was also instrumental in aggravating the situation. The overall situation leads us nowhere, but to hold that it was the joint venture of both, i.e. the appellant and the deceased, which aggravated the situation to an extent that claimed the life of deceased, we cannot forget that the appellant at the time of his arrest was 70/71 years of age, an age where to kill is the rarest choice. The approach of the deceased and others to the spot duly armed tells another story. Both the sides twisted the facts to their favour and no one came forward with the whole truth. The proceedings before the civil court on the day of incident suggests that these were the deceased and two others who chased the appellant to his house. When

two of the witnesses failed to establish their presence on spot and the third one i.e. PW Abdullah, though present suppressed the real facts, in such eventuality this Court is to form its own independent opinion, keeping before the attending circumstances of the case. We feel no hesitation to hold that the deceased was equally responsible as the appellant was, and it is still a mystery that who out of the two took the start. The overall situation leads us to hold that the sentence awarded does not meet the ends of justice, in our view the appellant deserves a sentence under section 302(c) P.P.C, instead of 302(b) P.P.C. The matter in hand has already been dealt with by the august Peshawar High Court Peshawar, in its case, titled Sultanat Khan Vs the State and others". in JCr.A No.233-M/2016, decided on 28.11.2017 in the following manner

***"No doubt, the appellant had not taken the plea of self defence, neither in his report nor in the statement recorded under section 342 Cr.P.C, but it is by now settled that if an accused has not specifically taken the plea of self defence, but the circumstance of the case and the prosecution evidence suggests that the accused has acted in his self defence, its benefit can be extended to him."***

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 Vs the State" (2009 SCMR 929)**, wherein it has been held that:

*"The appellant did not raised 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."*

17. This view is further substantiated by a celebrated judgment from the Indian jurisdiction reported as **"Munshi Ram and others Vs. Delhi Administration (AIR 1968 SC 702)**. The question whether an accused can get benefit of the circumstances showing that he acted in



his defence, though he did not take that plea specifically, the august Supreme Court of India held that:

*"It is well settled that even if an accused, does not plead self defence, it is open to the court to consider such a plea if the same arises from the material on record.... The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."*

18. The situation is further been clarified by the apex Court, in its recent reported judgment "Raza and another Vs the State and others, (2020 SCMR 1185),

wherein it is held that:

*"As observed earlier, that the occurrence had taken place due to the act of the deceased, which enraged the mental faculty of the petitioner and under the impulses of the same the instant occurrence had taken place, the same is spelled out from the record and as such the benefit of the same is available for which so many circumstances are not required rather the glimpse of the same is always deemed sufficient, which has been established by the Superior Court from time to time."*

11. For what has been discussed above, we are of the considered view that

*sentence inflicted upon the petitioner by learned Courts below under section 302(b), P.P.C. is not made out, therefore, keeping in view the facts narrated above, instant petition is converted into appeal and same is partially allowed and we convert the sentence from imprisonment for life under section 302(b), P.P.C. to imprisonment for 10 years under section 302(c), P.P.C.*

19. After deriving wisdom from the quoted judgments, this court reaches to the safest conclusion to modify the sentence, awarded to the appellant in order to avoid miscarriage of justice. We, therefore, partially allow the appeal in hand by convicting the appellant u/s 302(c) P.P.C to 10-years RI and is burdened with compensation of Rs.2,00,000/- (two lac) u/s 544-A Cr.P.C, to be paid to the legal heirs of the deceased recoverable as arrears of land revenue, or in default whereof the convict shall further undergo (3) three months SI. Whereas conviction and sentence under section 15 AA is maintained. Both the sentences shall run concurrently. Benefit of section 382-B Cr.P.C is also extended to the accused/ appellant. As the prosecution

has failed to prove its case u/s 506 P.P.C, against the appellant, so the sentence awarded under section 506 P.P.C is set aside and the appellant is acquitted therefrom. As the sentence awarded to the appellant Abdur Rahim has been modified, therefore, the connected Cr. R No.66-B of 2019, has become redundant, is dismissed as such.

Announced.  
Dt: 16.3.2021.

\*Azam/P.S\*

  
**JUDGE**

  
**JUDGE**

(D.B)

Hon'ble Mr. Justice S.M. Attique Shah  
Hon'ble Mr. Justice Sahibzada Asadullah

  
**SCANNED**

29 MAR 2021  
  
Khalid Khan