

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, PESHAWAR**  
**JUDICIAL DEPARTMENT**

**Criminal Appeal No.1280-P/2019**

**Wasim**  
**Vs**  
**The State etc.**

Date of hearing.....**12-04-2023**.....

Appellant(s): Mr. Shabbir Hussain Gigyani, Advocate.

State/AAG: Mr. Jalal-ud-Din Akbar Azam Garah.

Complainant(s): Syed Akbar Ali Shah, Advocate.

**JUDGMENT**

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**SAHIBZADA ASADULLAH, J.-** Through the instant criminal appeal, the accused/appellant Wasim, has questioned the judgment dated 14.10.2019, passed by the learned Additional Sessions Judge-IV, Peshawar, whereby the appellant involved in case FIR No.1252, dated 02.12.2016 registered under sections 302/34 PPC read with section 15-AA at Police Station Badhber, District Peshawar, was convicted and sentenced to life imprisonment along with compensation of Rs. 1000,000/- (ten lac) under section 544-A Cr.P.C to be payable to the LRs of deceased or in default thereof, the same shall be recovered as arrears of land revenue, if not recovered, he shall further suffer six months imprisonment. He was further

convicted under section 15-AA and sentenced to three years R.I along with fine of Rs. 10,000/- or in default, he shall further suffer three months S.I, however, benefit of section 382-B Cr.P.C was extended to him.

2. Brief and essential facts of the prosecution case, according to the Murasila (EX PA/1) drafted by Sher Ahmad/ASI, are that while on patrol duty he received information regarding the death of the deceased in the house of the appellant; that soon the information was received he left for the spot and near the spot he came across Mst. Nazrana i.e. the complainant who reported the matter to the effect that on the eventful day, she alongwith her brother-in-law (Arshad Khan / deceased), who was called to their house, were present, when in the meanwhile accused/Wasim alongwith Tila Muhammad, Syar & Bawal attracted to spot duly armed and entered into conversation with the deceased regarding the disputed property; that while negotiating, the temperament rose high and the accused/appellant started firing at the deceased who got hit & died on the spot, whereas the co-accused commanded the appellant to kill the complainant as well; that because of fear of her death, she rushed to the street where she reported the matter. The same was duly thumb impressed by the

complainant and verified by one Imran Ali & Haroon Khan sons of Asghar Ali; hence the instant FIR.

3. The accused/appellant and the acquitted co-accused were arrested from the spot whereas one of the accused namely Jamal alias Bawal decamped from the spot who was subsequently declared as proclaimed offender and proceedings u/s 512 Cr.P.C were initiated against him. It is pertinent to mention that the absconder co-accused was arrested on 23.11.2017 and supplementary challan was submitted before the Court of competent jurisdiction. The accused/appellant was charge sheeted where he denied the charge and claimed trial. On conclusion of the trial, the learned trial court was pleased to convict the appellant u/s 302(b) PPC and the co-accused were acquitted from the charges. It is pertinent to mention that the trial against the co-accused Tila Muhammad could not be concluded as during the trial he met his natural death.

4. The learned counsel for the appellant and the learned AAG assisted by the learned counsel for the complainant were heard at length and with their able assistance the record was scanned through.

5. The deceased lost his life inside the house of the complainant and that matter was reported by the complainant to the local police. The matter was reported in the shape of murasila whereafter the scribe visited the spot house, arrested the convict/appellant and from his personal possession a Kalashnikov alongwith five live rounds was taken into possession. The injury sheet and inquest report of the deceased were prepared and the dead body of the deceased was sent to the doctor for postmortem examination. The investigating officer after getting copy of the FIR visited the spot and on pointation of the complainant prepared the site plan. During spot inspection the investigating officer collected blood stained earth from the place of deceased and five empties of 7.62 bore near from the place of the convict appellant. The crime weapon alongwith recovered empties were sent to the Fire Arms Expert for determination, as to whether the collected empties were fired from the same weapon, recovered from possession of the appellant. The Kalashnikov and empties were examined by the expert and a report was received in positive. The appellant faced trial and on conclusion of the trial was convicted vide the impugned judgment.

6. The learned Trial court took pains to appreciate the record of the case and the inherent worth of the prosecution witnesses and thereafter handed down the impugned judgment. The prosecution case rests upon the sole statement of the complainant, who too, was declared hostile. The learned Trial Court was highly swayed by the conduct of the complainant and her subsequent statement before the Trial Court, so it convicted the appellant for commission of the offence. As is evident from the record that apart from the complainant, no ocular account was produced which could substantiate the prosecution case, so in such eventuality this Court is under the obligation to test the veracity of the statement of the complainant and her subsequent conduct she displayed before the learned Trial Court. As the complainant is the star witness and that it is her testimony which can either benefit the accused/appellant or the prosecution, so in the attending circumstances of the present case, we deem it essential to dilate upon the legal aspect of her status as a hostile witness and to determine that in whose favour her statement is to be taken into consideration. True that the learned Trial Court dealt with the matter comprehensively and that apart from statement of the complainant the recovery of the weapon of

offence and its positive report added to the anxiety of the Court and as such the impugned judgment was handed down. This Court is to see as to whether the learned Trial Court did apply its judicial mind to the facts & circumstances of the case and that it properly appreciated the evidence on file, so for the purpose we deem it essential to scan through the record once again so that miscarriage of justice could be avoided.

7. The points for determination before this Court are, as to whether the incident occurred in the mode, manner and the stated time; as to whether the complainant witnessed the incident; as to whether the accused/appellant was arrested on the spot and from his personal possession the weapon of offence was recovered. In order to determine these particular questions, we would like to appreciate the role of the complainant and her subsequent conduct before the investigating agency and the learned Trial Court as well. No doubt, the matter was reported by the complainant while running from the spot, to one Sher Ahmad/ASI and the same was duly verified by the real brothers of the deceased but this is for the prosecution to tell that the incident occurred in the mode, manner and at the stated time, that too, when the complainant resiled from her statement and

she was declared hostile. The scribe was examined as PW-2, who stated that on the eventful day he was on his routine patrol duty alongwith police officials when he received the information regarding the death of the deceased; that the moment he received information, he started towards the spot house, when the complainant came across and reported the matter; that he went inside the house arrested the appellant and others and from personal possession of the appellant, the weapon of offence was recovered; that after the recovery was effected from personal possession of the appellant, he was arrested and the murasila was sent to the local police station for registration of the case. This witness was cross examined on material aspects of the case, more particularly, regarding the place where he received information and the time he spent while reaching to the place where the complainant reported the matter. This is surprising to note that the information was received at a distance of 1 ½ kilometer from the spot and that the official took more than 10-minutes to reach to the place where the matter was reported, but the complainant was still available at a little distance from her house. When admittedly the information was received to the scribe when he was at a quite long distance from the place of

incident, then how he came across the complainant a little away from her house, when admittedly she was rushing out from the house in the state of panic. This is for the prosecution to tell that in 10/15 minutes, the complainant would have gone a greater distance and her coming across to the scribe does not appeal to a prudent mind. This is again for the prosecution to tell that when the matter was reported, where from the real brothers of the deceased attracted to the place of report and who informed them regarding the incident. The availability of the brothers of the deceased at the time of the report is a circumstance which goes against the prosecution case. Had the complainant reported the matter while running away from her house and had the scribe per chance came across her, then in such eventuality she would have been alone and there was hardly an occasion for the verifiers to reach. In order to appreciate this particular aspect of the case, we deem it essential to go through the relevant portion of the report of the complainant where she disclosed that after the deceased was fired at, the accused wanted to kill her as well. The report of the complainant does not support the case of the prosecution, as the investigating officer prepared the site plan on pointation of the complainant where the complainant has been



shown at point No.1, the deceased at point No.2 in veranda of the house and the appellant at point No.3 near the deceased. If we admit for a while that the deceased was called from his house to settle the dispute regarding the disputed property then the complainant instead of occupying point No.1, which is situated in the outer main gate of the house, would have been present inside the house. The site plan does not depict the initial places where the appellant and the deceased were sitting to resolve the dispute. The attending circumstances of the present case do tell that the incident did not occur in the mode and in the manner. There is every possibility that the report was never made in the street soon after the incident rather the same was made at a belated stage when the prosecution succeeded in procuring the attendance of the complainant. As the prosecution case is shrouded in mystery and the complainant who happened to be the sole eye witness of the incident did not support the case of the prosecution, so in that eventuality it is for the prosecution to convince this Court that apart from her statement the prosecution succeeded in bringing home guilt against the appellant, which to our understanding the prosecution failed to convince.

8. The complainant was examined as PW-3, and when her examination in chief was recorded, she deviated from her report and she did not support the case of the prosecution. Keeping her conduct in mind, the prosecution requested the Court to declare her hostile and as such she was declared hostile. The learned Trial Court after declaring the complainant hostile provided an opportunity to both the sides to test the veracity of the witness and as such she was re-examined and cross-examined. It is pertinent to mention that when the complainant was cross examined by the prosecution, the prosecution could not succeed in bringing on record that she willfully deviated from her report with the sole purpose to extend benefit to the accused charged. In order to ascertain as to whether the prosecution succeeded in discrediting the veracity of this witness, we deem it essential to go through the report of the complainant and the attending circumstances of the case. As discussed earlier that the incident did not occur in the mode; and in the manner as disclosed by the complainant and that the matter was never reported as has been disclosed by the scribe, so in the like circumstances, this Court is inclined in holding that first the

appellant was arrested, the case was investigated and thereafter the complainant was compelled to report the matter.

9. It is interesting to note that soon after the incident, the complainant was sent to Darul Aman, by the Court of competent jurisdiction on the basis of an application submitted by the investigating officer. The contents of the application tell that the complainant was feeling threat to her life at the hands of her parents and that she wanted to be placed in Women Shelter Home (Dar-ul-Aman), the application was allowed and she spent there as many as 13-months. The request for sending her to Dar-ul-Aman, the presence of the deceased in veranda of the house at the time of incident and her presence in the main gate of house are the circumstances which tell that there was some understanding between the deceased and the complainant which led to the incident. The matter was not purely a landed property dispute, had this been so, then there was no occasion for the accused to attempt at her life. As while reporting the matter the complainant categorically stated that after the deceased was fired at, the co-accused commanded the appellant to kill the complainant as well. In case of landed property dispute there was no reason for the appellant to attempt at her life

but his part of her report clarifies the mist and confirms our belief regarding the mutual understanding of the two. When the facts are twisted from both the sides then in that eventuality it is only & only the appellant to be benefited.

**10.** The legal question which this Court is to resolve is, as to whether the statement of a hostile witness can be pressed into service in support of the prosecution and if so, what extra is needed to enhance its veracity and its inherent worth. There is no cavil to the proposition that a hostile witness is the witness of none and he speaks in two tones. The sole statement of a hostile witness is hardly a ground to be relied upon, as such a witness by its very conduct has lost his integrity and worth. As in this particular case, it is not the witness who deviated from her stance, as she wanted to favour the appellant, rather while reporting the matter she suppressed the real facts from both, the investigating agency and the learned Trial Court. As the landed property dispute has never been established on record, so it can validly be held that the cause of killing is still hidden and the availability of the deceased at the odd hours of night in the house of the complainant is a question which is still asking for an answer, to which the prosecution failed to answer. This state of

uncertainty is a factor which must be weighed in favour of the appellant and on this score too he is entitled to the benefit of doubt.

As is held in case law reported as **“PLD 2007 Supreme Court 223”**, titled as ***“Muhammad Suleman and 4 others Vs The State”***,

which is reproduced herein below:

**“12. The testimony of a witness who speaks in the different tune at different times is certainly not reliable unless strong confirmatory evidence of independent character is available on record. Similarly, the sole testimony of an interested witness, without independent corroboration may not be confidence inspiring to be relied upon for conviction. The rule of independent corroboration is a rule of abundant caution which is followed in the interest of safe criminal administration of justice and is not a mandatory rule of law to be necessarily applied in each case.”**

**11.** True that soon after his arrest the Kalashnikov was allegedly recovered from his possession and that the collected empties from the spot were sent alongwith the weapon of offence, to the Fire Arms Expert and that a positive report was received in that respect, but this is for the prosecution to tell, that when the appellant was arrested on 02.02.2016, then why the empties and the weapon were received to the Forensic Science Laboratory on 21.12.2016, after a considerable delay. The delay caused in sending and receiving the incriminating articles could not be explained and even the investigating officer could not bring on record any evidence in

respect of its safe custody, when such is the state of affairs, this Court lurks no doubt in mind that this piece of evidence has lost its utility and the same cannot be taken into consideration. As is held in case law reported as “**2022 SCMR 1494**”, titled as “***Muneer Malik and others Vs The State***”; the relevant para of which is reproduced herein below:

**“12. ....Furthermore, the record shows that eight empties of Kalashnikov and six empties of T.T. pistol were recovered from the scene of occurrence on the same day i.e. 17.05.2007 through recovery memo but the said crime empties were neither kept in safe custody nor sent to Chemical Examiner immediately after recovery. The weapons of offence and the crime empties were jointly sent to the office of Chemical Examiner after a delay of more than two months i.e. on 13.07.2007 for which no plausible explanation has been given by the prosecution. In these circumstances, the recoveries are inadmissible in evidence and cannot be relied upon to sustain conviction of the appellants. We, therefore, set aside the conviction of the appellants under section 13(e) of the Arms Ordinance.”**

**12.** Though the motive was alleged as the landed property dispute, but neither the investigating officer could bring on record the revenue papers in respect of the property nor any independent witness was produced in that respect. The record tells that the widow of the deceased Mst. Menaz appeared before the Trial Court as PW-7, who stated that the deceased had purchased some land from her father and that for the same, an amount of forty thousand was paid,

but the transaction was not documented. She further disclosed that for the resolution of dispute, she time and again requested her father but to no avail and that on the day of incident her husband was called to the house and was killed. The statement of this witness was recorded u/s 161 Cr.P.C where she did not mention the amount and did not tell of her request for documentation to her father, so this witness could not convince the learned Trial court as well as this Court regarding the dispute brought on record. When the motive remained unproved which was the sole purpose of killing the deceased, then the same plays a decisive role in determining the fate of the appellant. This particular aspect of the case takes this Court nowhere, but to hold that the prosecution came forward with concealed and twisted facts. The suppression of facts on part of the prosecution has gone a long way and damaged the prosecution case beyond repair, as is held in case law reported as **“2021 SCMR 149”**, titled as ***“Qazi Muhammad Amin Ahmed, JJ Vs The State”***. The operative para of which is reproduced below:

**“4. We have observed that there is lack of motive in the case in hand and what happened prior to the scene of occurrence or what prompted the appellant to take away the life of the deceased-Mst. Saima Bibi are the circumstances which have rightly been considered by the Courts below as mitigating**

**circumstances and thus, the appellant has rightly been dealt with by the Courts below.”**

**13.** The cumulative effect of what has been stated above leads this Court nowhere but to hold that the prosecution could not succeed in bringing home guilt against the appellant and the learned Trial Court fell into error while handing down the impugned judgment. The impugned judgment is suffering from legal infirmity and inherent defect which calls for interference. The instant criminal appeal is allowed, the impugned judgment is set-aside and the appellant is acquitted of the charges leveled against him. He shall be released forthwith if not required to be detained in connection with any other criminal case.

**Announced.**  
**12.04.2023.**  
 \*Hafeez Burki, P.S.\*

**JUDGE**

**JUDGE**

(D.B)  
 Hon'ble Mr. Justice Ishtiaq Ibrahim, J.  
 Hon'ble Mr. Justice Sahibzada Asadullah, J.