

Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH.
[Judicial Department].

Cr.ANo. 296-B of 2019

Muhammad Gulfam and another.

Vs.

The State and another

JUDGMENT

For Appellants: M/S. Muhammad Rashid Khan
Dirma Khel and Abid Anwar
Advocates.

For State: Mr. Saifur Rehman Khattak
Addl: A.G.

For respondent: M/S. Zafar Jamal and Masood Iqbal
Khattak, Advocates.

Date of hearing: 17.11.2021.

SAHIBZADA ASADULLAH, J.-- The convict/appellants Muhammad Gulfam and Mst. Gul Mayo have called in question the judgment dated 26.09.2019, passed by learned Sessions Judge, Karak, in case F.I.R No. 306 dated 29.06.2016, registered at Police Station Yaqoob Khan Shaheed, District Karak, whereby appellant Muhammad Gulfam was convicted under section 302(b) P.P.C. and sentenced to life imprisonment with Rs.2,00,000/-, (two lac) as compensation to the legal heirs of deceased under section 544-A Cr.P.C, or in default thereof, to further undergo for six months SI. He was also convicted

under section 338-A (b) P.P.C and sentenced to imprisonment for three years rigorous imprisonment, whereas the accused/ appellant Mst. Gul Mayo was convicted under section 201 P.P.C and sentenced to two years rigorous imprisonment with fine Rs.5000/- (five thousand) or in default of thereof, to undergo one month simple imprisonment. Benefit of section 382-Cr.P.C was extended to both the appellants, whereas accused Muhammad Kaloo Khan earned acquittal.

2. The complainant Mst. Tabasam Shaheen being aggrieved from the impugned judgment approached this Court through Cr.R. No.60-B/2019, for enhancement of sentence awarded to the appellants, whereas the acquittal of the co-accused was questioned through Cr.A. No.316-B/2019. As all the three are the outcome of one and the same judgment, therefore, we intend to decide all the connected matters through this common judgment.

3. Brief facts of the case, as divulged from the First Information Report are that on 29.06.2016, Mst. Gul Mayo (accused/ appellant) wife of Kaloo Khan (acquitted co-accused) brought the dead-body of her daughter-in-law Mst. Maria Begum, wife of the appellant Muhammad Gulfam to the Police Station Yaqoob Khan Shaheed, Karak, where she

reported the matter to the effect that she along with her children were present in her room, while Mst. Maria Begum and her husband were present in another room for the purpose of sleep; that after sometime on hearing noise of fire shots, she ran towards the room of her son and noticed Mst. Maria Begum, lying dead in the pool of blood, whereas her son (husband of the deceased) was not present in the room; that they were having no enmity with anyone and charged unknown accused for *qatl-i-amd* of Mst. Maria Begum. The report of complainant was reduced in shape of F.I.R No. 306, whereas on the same day i.e. 29.06.2016, Mst. Tabassum Shaheen (PW-9), mother of deceased recorded her 161 Cr.P.C statement, wherein she stated that she alongwith her sons had gone to the house of her daughter Mst. Maria Begum for the purpose of giving her Eid clothes, where accused Muhammad Gulfam came and asked the deceased to prepare meal for the gests, but she refused to prepare being the month of Ramazan, which infuriated the accused, who talked his father accused Kaloo Khan on phone, who was abroad at that time, who asked to thrash her for the same, so he with consultation of her mother, beaten the deceased, the deceased tried to escape but accused Muhammad Gulfam fired at her with the intent to commit her *qatl-i-amd*, as a result of which she was hit and expired on the spot. After the

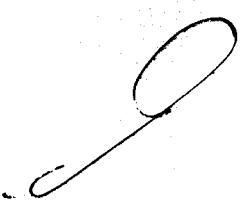
occurrence accused decamped from the spot alongwith the Kalashnikov. Mst. Tabassum Shaheen further stated that the occurrence was witnessed by her sons Muhammad Yasir and Atif Nadeem. She after seeing the occurrence became unconscious, so her sons took her to the hospital, where after gaining senses she approached the Police Station and reported the matter, whereas Mst. Gul Mayo, mother of the accused had already lodged a false report in order to save the skin of her son. Thereafter, Mst. Tabassum Shaheen recorded her statement under section 164 Cr.P.C on 04.07.2016, before the learned Judicial Magistrate; whereas her sons Muhammad Yasir and Atif Nadim recorded their statements under section 164 Cr.P.C on 13.07.2016, wherein they also charged the accused, Muhammad Gulfam, Kaloo Khan and Mst. Gul Mayo for commission of the offence.

4. After completion of investigation, complete challan was submitted against the accused before the learned trial Court, where at the commencement of trial the prosecution produced and examined as many as twelve (12) witnesses, whereafter, statements of accused were recorded under section 342 Cr.P.C, wherein they professed their innocence, however, neither they opted to be examined on oath as provided under section 340 (2) Cr.PC, nor produced defence evidence. On

10.11.2018, learned counsel for complainant drew attention of the Court towards the charge and requested that inadvertently charge under section 338-A P.P.C has not been framed, as the deceased Mst. Maria begum was pregnant at the time of her death, so the learned trial Court on the same date altered the charge to this extent and put the parties to adduce evidence, but the learned Public Prosecutor and the learned counsel for the parties opted not to record further evidence, so additional statement of accused under section 342 Cr.P.C was recorded. Again on 23.02.2019, one Muhammad Asghar, uncle of the deceased appeared before the learned trial Court and produced five photographs with respect to the occurrence and the complainant submitted application for placing the same on file, which application was allowed vide order dated 25.02.2019, and permission was granted to place the same on file, the Court also recorded statement of said Muhammad Asghar as CW-01, with respect to photographs Mark 'A' to 'E'. Thereafter, again additional statements of accused were recorded on 08.07.2019. After hearing arguments of learned counsel for the parties, the learned trial Court vide impugned judgment dated 26.09.2019 convicted the accused/appellants, while acquitted co-accused Kaloo Khan. The convicts/ appellants have filed instant Cr. A No.296-B/2019, whereas the complainant Mst. Tabasum

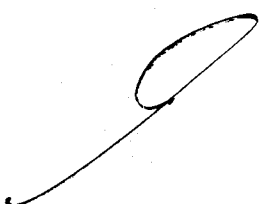
Shaheen filed Cr.R No. 60-B of 2019 for enhancement of sentence of appellants and Cr. A No.316-B of 2019 against acquittal of co-accused.

5. We have heard arguments of learned counsel for the appellant and learned Addl: A.G representing the state assisted by learned counsel for complainant and with their valuable assistance the record was gone through.



6. The appellants after having been convicted by the learned trial Court questioned the same through the instant criminal appeal, the learned trial Court dealt with the matter comprehensively and after application of judicial mind to the fact, circumstances and the collected evidence on file, convicted the appellants, as mentioned above. Though the learned trial Court dealt with the matter comprehensively, by highlighting material aspects of the case while convicting the appellants, yet this being the Court of appeal is under obligation to assess and re-assess the already assessed evidence, so that miscarriage of justice could be avoided. This Court is to see; as to whether the approach of the learned trial Court to the material aspects of the case was correct and as to whether reasons advanced for convicting the appellants get support from the material available on file. It is a classic case, as on one

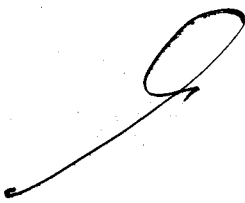
hand the deceased met her unnatural death in the house of her husband and the matter was reported by Mst. Gul Mayo i.e. her mother-in-law, whereas on the other Mst. Tabassum Shaheen i.e. mother of the deceased, charged the appellants and the absconding co-accused, after recording her statement under section 161, Cr.P.C. This Court is to strike a balance between the two and to assess as to which of the versions is nearer to the truth and which not. Though in the like matters, when the incident occurs, that too, in the house of a husband, the responsibility shifts to a husband to a greater extent where on one hand the prosecution is to prove its case, on the other, the husband is equally burdened to prove his innocence. We are to walk with a little bit different approach in the instant case as the complainant and her sons claimed to have seen the incident and in such eventuality, the primary duty rests upon the prosecution to establish on record that the incident occurred in the mode, manner and at the stated time. We are conscious of the fact that in the instant episode, the accused/appellant has been singularly charged for the death of the deceased, whereas rest of the two, either for abetment or facilitation. If on one hand in case of single accused substitution is held to be the rarest phenomenon then on the other the Court deciding the fate of the accused is under obligation to search for



independent corroboration and be vigilant while assessing the inherent worth of the evidence produced. It is advisable that the learned trial Court in case of a single accused must not be swayed with the impulse that substitution is a rear phenomenon and that it must not take it for granted that in case of single accused, the prosecution is not under obligation to prove its case and that once an accused is charged, he is outrightly be declared guilty, if the trial Court travels with the impulse then the criminal justice system will always and always be in peril and in that eventuality one cannot think otherwise, but miscarriage of justice will always occasion which approach is neither permissible nor finds a room in the system, as Courts are the custodian of the rights of the parties and in all eventualities they will follow the guidelines provided and the principles evolved. In the like situation, it is incumbent upon both the trial as well as the appellate Court to appreciate the evidence collected and thereafter after assessing the collected material the lis is to be answered so that to avoid miscarriage of justice.

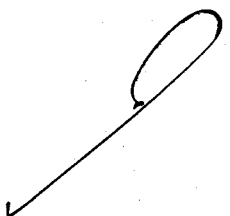
7. The learned trial Court after appreciating the evidence on record, convicted the appellants and through the same judgment acquitted the co-accused Muhammad Kaloo. Though the learned trial Court advanced reasons for conviction,

yet we are to see; as to whether the learned Court was justified to pass the impugned judgment and as to whether the learned trial Court was not swayed with emotions, as in the instant case the deceased was the wife of the appellant.

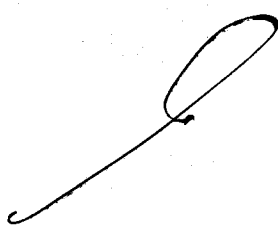


8. The unfortunate incident occurred on 29.06.2016, where the deceased was done to death leading to a charge against the appellants and the acquitted co-accused. It is pertinent to mention that the appellant Gulfam is the husband of the deceased and that soon after receiving firearm injuries the deceased died on the spot whose dead body was shifted to the police station where the matter was reported by Mst. Gul Mayo, mother of the appellant, who was later on implicated as an accused in the instant case, when Mst. Tabassum Shaheen, mother of the deceased recorded her statement to the Investigating Officer under Section 161, of the Criminal Procedure Code.

9. It is pertinent to mention that the Investigating Officer recorded the statement of Mst. Tabasum Shaheen, under section 161 Cr.P.C., followed by her statement under section 164 Cr.P.C. before the Court of Judicial Magistrate, where she stated that on 29.06.2016, she alongwith her sons namely Muhammad Yasir and Atif Nadeem visited the house



of the deceased as they usually did on arrival of Eid and that on the day of incident they too visited the house after purchasing clothes for the deceased. They were present in the house, when the accused/ appellant entered the house and asked his wife, the deceased, to prepare meal, as he had guests with him, to which the deceased did not accede which infuriated the appellant, who consulted his father Muhammad Kaloo, stationed abroad, on his mobile phone who directed his son to beat the deceased which the appellant did and fired at the deceased with a Kalashnikov in his possession which resulted into the death of the deceased. She went on to say that after receiving firearm injuries by her daughter, she being the mother could not tolerate, went unconscious and was rushed to civil hospital Takht-e-Nasrati for treatment, where she was administered medicines and after regaining senses, she in the company of her son Atif Nadeem visited the police station where she charged the appellants alongwith the acquitted co-accused. It is pertinent to mention that Atif Nadeem was examined as PW-8, who stated that on the day of incident, he alongwith his brother PW Muhammad Yasir and his mother left their house for the house of the deceased to provide her with the clothes purchased for the coming Eid, and while sitting in veranda of the house, the appellant entered into the house, altercated with the



deceased and on instigation of the co-accused Muhammad Kaloo Khan, first beaten the deceased and thereafter fired at her which resulted into her death. He further stated that on seeing the deceased lying in a pool of blood, his mother went unconscious who was rushed to the hospital and after getting comprehensive treatment from the doctors, she regained senses, visited the local police station where her statement under section 161, Cr.P.C. was recorded. The complainant charged the appellants and the acquitted co-accused for the murder of the deceased. This is surprising that despite the fact that PW Atif Nadeem was available with the complainant when her statement under section 161, Cr.P.C. was recorded but he did not opt for recording his statement. The prosecution is to answer that despite availability of the witnesses in the house at the time of incident and thereafter, why their statements were not recorded by the Investigating Officer on the day of incident. The belated statement of PW-8 has put a question mark on his veracity, had he been present in the hospital then his statement would have also been recorded. This is surprising to note that the statement of Atif Nadeem was recorded on 13.7.2016, after a considerable delay to which he tendered abnormal explanation. The prosecution is to tell that when the complainant recorded her statement on the day of incident and

visited the spot in the company of the Investigating Officer, then what precluded her to point out the place of incident and that why no addition in the site plan was made on her pointation. This is surprising to note that it was on 04.7.2016 when on pointation of the complainant addition of places was made in the site plan, where PW-8 and his brother Muhammad Yasir also put their signatures. PW-8 is to explain that why he did not record his statement on 04.7.2016, when he allegedly accompanied the Investigating Officer to the place of incident. The witnesses are to establish their presence on the spot, but the circumstances suggest that the incident did not occur in the mode; and manner and that they were not present at the spot house at the time of incident. Both the witnesses i.e. PW-8 and PW-9 fully contradicted each other on material aspects of the case. The witnesses admitted the cordial relation between the spouses and even they admitted in unequivocal terms that the appellant was stationed in Masqat who after meeting a road accident got his hands and legs fractured, was shifted to the country almost crippled. This is surprising to note that when the appellant was having deformed physical condition, then after killing the deceased how he escaped from the place of incident and that why the witnesses including two real brothers did not attempt to catch hold of him. The witnesses are to

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explain that despite their availability in the house, why they did not come forward to rescue their sister from the clutches of the appellant.

10. The conduct displayed by the witnesses is not only unnatural but abnormal as well, as the witnesses constantly made conscious attempts to establish their presence on the spot. This does not appeal to a prudent mind that after the deceased received firearm injuries, her mother went unconscious; and that the witnesses instead of attending their real sister, who was lying in a pool of blood, took their mother to the hospital for treatment. The record tells that when PW-8 recorded his 164 Cr.P.C. statement, he did not mention the unconsciousness of his mother and even he did not mention the presence of Muhammad Yasir, alongwith them, at the time of incident. Both the witnesses did not support each other regarding the manner in which their statements were recorded, as PW-9 stated that the statement of PW-8 was recorded on the day of incident, whereas PW-8 admitted that his statement was recorded after 13/14 days of the incident. The circumstances do tell that none of the statements were recorded on the day of incident, had the statements of the witnesses been recorded on 29.6.2016, then in that eventuality the site plan would have been prepared on their pointation. In order to establish the

physical condition of the complainant on the day of incident, neither the doctor, who treated PW-9 in the hospital was examined, nor the complainant produced the treatment chart of the hospital, so much so the Investigating Officer did not take pains to visit the hospital and collect evidence in that respect. This lack of interest on part of witnesses on this particular aspect of the case tells nothing, but that an attempt was made to establish their presence on the spot and thereafter, but the circumstances do not support the case of the prosecution on this particular aspect.

11. The Investigating Officer visited the spot and on pointation of the complainant Mst. Gul Mayo, prepared the site plan. The record tells that during spot inspection, the Investigating Officer collected 17 empties of 7.62 bore alongwith blood-stained earth from the spot. The appellant was arrested on 04.7.2016, in injured condition from the hospital but the record is silent regarding his arrest, as no card of arrest is available on file. It is pertinent to mention that allegedly, a Kalashnikov alongwith 17 live rounds and a hand-grenade were taken into possession by the Investigating Officer from Malkhana of the concerned police station, though the same were declared to have been recovered from possession of accused/appellant at the time of his arrest, but surprisingly no

one was examined to tell that at what time and at what place the appellant was arrested. The record tells that the accused was arrested on 04.7.2016 and on the same day the weapon of offence was taken into possession from Malkahana of the concerned police station, but the Investigating Officer could not produce any witness to depose in that respect. PW-12 Abdul Latif ASI appeared before the Court and stated that he witnessed the recovery memo already exhibited as Ex: PW 10/1, vide which the Investigating Officer took into possession one Kalashnikov recovered from the possession of accused Gulfam, Ex: P-6 and seventeen empties of the same bore exhibited as Ex:P-2. During cross examination, he came forward with strange replies by stating that at the time of preparation of recovery memo, the accused was not present in the police station, rather he was admitted in civil hospital Takht-e-Nasrati for his treatment. The circumstances do tell that the appellant was not arrested in the mode and manner and that nothing was recovered from his possession at the time of his arrest. The Investigating Officer is to tell that when the appellant was hospitalized, then why he was not arrested on the day of the incident and that why his arrest was deferred till 04.7.2016. His belated arrest raises an eyebrow over conduct of the witnesses and their presence at the time of incident in the

spot house. Right from the beginning till the end, the real facts were not brought on record rather an attempt was made, both by the Investigating Officer as well as the eyewitnesses to twist the events to their favour. This conscious attempt on part of the witnesses created numerous dents in the prosecution story.

12. It is pertinent to mention that the weapon was allegedly recovered on 03.7.2016, whereas the same was sent to the Firearms Expert after a considerable delay and was received on 28.7.2016. The Investigating Officer did not explain that where the recovered case property was lying in the intervening period, and even no witness was examined on this particular aspect of the case. The Investigating Officer admitted that he did not record the statement of the witness who took the same to the laboratory, even he did not record the statement of Moharrir of the concerned police station, so much so, he expressed his ignorance regarding the official who took the same to the Firearms Expert. The lack of interest on part of the Investigating Officer surprised us, when he admitted that though he addressed an application to the Director General Forensic Science Laboratory, but no date was put thereon. The way the recoveries were effected and transmitted to the Forensic Sciences Laboratory leads us nowhere but to hold that

the prosecution failed to establish this particular piece of evidence, which cannot be taken into consideration.

13. After evaluating the available record from all angles, this Court reaches to an inescapable conclusion that the incident did not occur in the mode, manner and at the stated time. This Court is to determine that despite the fact that the deceased lost her life in the house of her husband and that the incident was reported by mother of the appellant charging none, whether in that eventuality, the responsibility of the appellant increases and the burden would shift from the prosecution to the accused charged. Had the complainant charged the appellant for the murder of the deceased, even in absence of eyewitness account it would have been the responsibility of the appellant to discharge the burden being husband of the deceased, as it was he who was to convince otherwise, but when the complainant alongwith witnesses took the burden by posing themselves to be the eyewitnesses of the incident, then in that eventuality, the husband was to do less to establish his innocence and the witnesses to do more to prove him guilty. Though the learned counsel for the complainant placed reliance on a celebrated judgment of the apex Court titled 'Nazir Ahmad Vs. The State' (2018 S C M R 787), where the husband was burdened with the responsibility in the like situation, and

that the conduct of the accused charged therein, was taken an additional factor, but there too, the liability was never shifted, as the prosecution was held responsible to discharge the burden. True, that in the cited judgment, the apex Court was pleased to put some of the responsibilities on the shoulders of the husband, but never ever the prosecution was absolved of the liabilities to prove its case, in the circumstances, we can quote with convenience case titled 'Asad Khan Vs. The State' (PLD 2017 Supreme Court 681), where in the like situation, the prosecution was burdened with the liability to establish the guilt of the accused/appellant and to prove its case to the hilt, by holding that under all circumstances, it is the prosecution to prove its case and even if an accused takes a specific plea and fails to establish the same, he cannot be burdened with the liability to establish his innocence, rather the prosecution was held responsible under all circumstances to bring home charges against the accused charged.

14. The situation we are faced with, is altogether different, as in case in hand, we have the prosecution witnesses who claimed themselves have witnessed the incident and in such eventuality, we lurk no hesitation in our mind to hold that the whole burden shifts to the shoulders of the witnesses, who claimed themselves to have seen the incident. We are left with

no option, but either to consider the report made by Mst. Gul Mayo, who was later on substituted as an accused, where she charged no one for the death of the deceased or to accept the version put forward by PW-9 Mst. Tabassum Shaheen. If we go with the story narrated in the FIR, then in that eventuality, it turns hard to hold the appellant responsible for the death of the deceased and the co-accused as facilitator. Even the prosecution could not create a chain in shape of recoveries, positive laboratory report and arrest of the appellant, to help us in holding the appellants responsible for the death of the deceased, even in absence of direct ocular account.

15. We would like to assess; as to whether the witnesses succeeded in establishing their presence in the spot house at the stated time and as to whether the incident occurred in the mode and manner, as explained in earlier part of the judgment that neither the witnesses established their presence on the spot at the stated time, nor they came forward with the whole truth, so in such eventuality the prosecution did not succeed in bringing home guilt against the appellants. There is no denial to the fact that the deceased lost her life on receiving firearm injuries, but when the witnesses claimed themselves as the eyewitness, then we have no other option but to assess the veracity of their statements and to ascertain; as to whether they

were present at the time of incident as under the criminal dispensation of justice little room is left for presumption, when the Court reaches to a definite conclusion that the witnesses were telling a lie and even then convicts an accused on the sole ground of being the husband, then the results would be drastic and the approach so arrived to, will negate the real essence of justice. In case titled 'Nasrullah alias Nasro Vs. The State' (2017 SCMR 724), it was held that:-

“Be that as it may holding by this Court that some part of the onus lies on the accused person in such a case does not mean that the entire burden of proof shifts to the accused person in a case of this nature. It has already been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that the prosecution is bound to prove its case against an accused person beyond reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts presence of some eye-witnesses and such claim of the prosecution is not established by it there the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and none else who would have committed that murder”.

16. The cumulative effect of what has been stated above, leads this Court to an inescapable conclusion that the appellants have been succeeded in making out a case for indulgence of this Court, the impugned judgment is devoid of reasons, suffering from inherent defects and calls for interference. Resultantly, the instant criminal appeal is allowed, the impugned judgment is set aside, the appellants are acquitted of the charges. The appellant Muhammad Gulfam shall be released forthwith if not required to be detained in connection with any other criminal case, whereas Mst. Gul Mayo is on bail, her sureties are absolved from the liabilities of bail bonds. As the impugned judgment has been set aside, so in such eventuality, the connected Cr.R. No.60-B of 2019, for enhancement of the sentence and Cr.A. No. 316-B of 2019 against acquittal of the co-accused, have lost its utility, being bereft of merit, are hereby dismissed.

Above are the reasons of our short order of the even date.

Announced:
Dt:17.11.2021
Azam/P.S



JUDGE



JUDGE

(D.B)
Hon'ble Mr. Justice Sahibzada Asadullah and
Hon'ble Mr. Justice Muhammad Naeem Anwar.

15/12/2021
15/12/2021
15/12/2021