

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Jail Appeal No.28/2018

Kabir Khan

versus

The State

Appellant by: Ms. Qurat-ul-Ain Ayesha, Advocate.
(at State expense)

Respondent by: Mr. Zulfiqar Ali Safdar, Advocate for
complainant.
Mr. Fareed Hussain Kaif, State Counsel.

Date of Hearing: 29.03.2019.

MOHSIN AKHTAR KAYANI, J: The instant jail appeal is preferred against judgment dated 01.03.2018, passed by learned Additional District & Sessions Judge-II, Islamabad (East), whereby appellant has been convicted in case FIR No.261, dated 10.09.2015, under Section 302/34 PPC, P.S. Shahzad Town, Islamabad and sentenced under Section 308 PPC for 20 years R.I. as Ta'zir along with payment of Diyat. The appellant has also been sentenced under Section 338C(a) & (c) PPC to 07 years R.I. along with payment of 1/20th of Diyat. However, benefit of Section 382-B Cr.P.C. has been extended to him.

2. Brief facts as referred by PW-11 Anwar Sher/complainant in his complaint Exh.PD are that his daughter namely Sana Begum (hereinafter "*deceased*"), aged about 20 years, was married to Muhammad Kabir Khan (hereinafter "*appellant*"), who were living in Farash Town, Islamabad and appellant in connivance with Nawab Ali s/o Ali Shah, Mukhtiar Ali s/o Nawab Ali as well as Syed Kareem s/o Fazal Kareem killed her daughter/deceased with .30 bore pistol for the reason that her

in-laws were not giving her jewellery and had been quarrelling with her. On the basis of this complaint, FIR No.261/2015 (Exh.PE) was lodged and investigation was started, during which appellant was arrested on 12.09.2015, who then got recovered weapon of offence i.e. .30 bore pistol as well as motorcycle. After completion of investigation, challan was submitted before the Court, whereupon learned trial Court framed the charge, to which he pleaded not guilty and claimed trial. The learned trial Court, after recording of 13 prosecution witnesses and statement of appellant under Section 342 Cr.P.C., convicted and sentenced the appellant as mentioned above. Hence, the instant jail appeal.

3. Learned counsel for appellant, *inter alia*, contended that there are no eyewitness to corroborate the allegations leveled against appellant; that prosecution has no material against the appellant to sustain the conviction and sentence; that the case of prosecution is full of doubts, benefit of which should be given to appellant; that despite scores of illegalities and irregularities in the prosecution case, the appellant has been convicted and sentenced; that alleged recoveries are planted ones and have not been conducted in accordance with law, on the basis of which the learned trial Court convicted and sentenced vide impugned judgment, therefore, the same may be set-aside.

4. Conversely, learned State Counsel as well as learned counsel for complainant contended that all the requirements of Section 154 Cr.P.C. have been fulfilled in registration of FIR; that complainant has clearly described the motive in his complaint, due to which appellant committed murder of deceased; that the evidence produced by prosecution witnesses remained unshaken with respect to murder of

deceased at the hands of appellant; that the medical evidence is corroborated with prosecution evidence; that the appellant has effected recovery of weapon of offence i.e. .30 bore pistol; that prosecution has successfully proved the case against the appellant and learned trial Court has rightly convicted and sentenced the appellant.

5. I have heard the arguments advanced by learned counsel for both the sides and perused the record with their able assistance.

6. Perusal of record reveals that the PW-11 Anwar Sher/complainant lodged complaint (Exh.PD) on 10.09.2015 with the allegations that his daughter namely Sana Begum was married to appellant 03 years ago and had been living in Farash Town, Islamabad, whereas he received information that her daughter has been murdered and dead body is lying in Polyclinic Hospital, whereupon he along with one Nisar Khan reached there and identified the dead body of his daughter. He alleged that in-laws of his daughter were not delivering her jewellery, due to which his daughter has been murdered by appellant with .30 bore pistol in connivance with Mukhtiar Ali, Nawab Ali and Said Karim. The complaint was converted into FIR No.261, dated 10.09.2015, under Section 302/34 PPC, P.S. Shahzad Town, Islamabad, referred as Exh.PE.

7. PW-13 Muhammad Abbas/I.O. arrested the appellant on 12.09.2015 and on his pointation, .30 bore pistol was recovered on 16.09.2015. After completion of investigation, the appellant was put to trial, whereupon he pleaded not guilty and denied the allegations in his statement recorded under Section 342 Cr.P.C., whereafter learned Trial

Court convicted and sentenced the appellant vide impugned judgment dated 01.03.2018.

8. The prosecution has produced Dr. Shazia Nazeer/CMO as PW-9, who conducted postmortem of deceased and recorded following evidence:

EXTERNAL APPEARANCE

Dead body of young female lying in Mortuary table wearing purple color Shalwar Qameez, Dopatta and Burqa soaked in blood, eye and mouth were partially opened, body was in state of rigor-mortis. Wound of fire-arm entry on right temporal region while exit wound was on left paritoccipital region. Another entry wound with burning on lips and right angle of mouth. Exit wound on left lateral side of neck was present.

INTERNAL EXAMINATION

All other organs were found healthy and intact except skull fractures. The deceased was 20 weeks pregnant and male fetus of 20 week size was in the womb and he also died due to death of his mother. Perinial vaginal rectal swabs were taken for detection of siemen.

EXAMINATION

Upon examination, following injuries on dead body were found"-

- 1. Wound of fire-arm entry on right temporal region 1x1 cm circular in shape with blackening of margins.*
- 2. Exit wound was on left paritoccipital region involving skull resulting in fracture.*
- 3. Another entry wound with burning on lips and right angle of mouth.*
- 4. Exit wound on left lateral side of neck.*

OPINION

In my opinion deceased died due to fire-arm injury on right temporal region of skull ruptured the brain matter and function of brain arrest, vital organ of the body. All these injuries were ante-mortem in nature which were sufficient to cause death in ordinary course of life.

Time between injury and death:- 03 to 05 minutes approx.

Time between death and postmortem:- more than 24 hours.

During the course of cross-examination, PW-9 Dr. Shazia Nazeer/CMO acknowledged that she mentioned the death 24 hours earlier as rigor

mortis was fully devolved at the time of postmortem. She also acknowledged that she had not signed the inquest report as dead body was received by Dr. Tanveer Ahmad/MLO.

9. Umar Badshah appeared as PW-1 and stated that on 09.09.2015, he along with Said Kareem and some other people were in search of appellant and deceased as Said Kareem told them that his son has taken his wife with intent to murder her, whereas they found the dead body of deceased in corn fields, which was identified by Said Kareem as his daughter-in-law. He further stated that Said Kareem told him that his son has cruelly murdered his wife, whereupon PW-2 Muhammad Nadeem Qureshi informed the police about the incident. However, during the course of cross-examination, PW-1 Umar Badshah acknowledged that whatever he has stated that before the Court, he heard it from Said Kareem, who is also an accused in this case.

10. Muhammad Nadeem Qureshi appeared as PW-2 and stated that on 09.09.2015, he was informed that dead body of a female is lying in fields, whereupon he along with other people of vicinity reached at the place of occurrence and identified the dead body as daughter-in-law of Said Kareem. He further stated that Said Kareem told him that his son has taken his wife with intent to commit murder of her. He further stated that he called and informed Rescue 15 Police about the incident. However, during the course of cross-examination, PW-2 Muhammad Nadeem Qureshi acknowledged that he heard whatever he stated before the Court from Said Kareem, who is accused in this case.

11. The complainant of this case i.e. Anwar Sher appeared as PW-11 and stated that on 09.09.2015, at about 5 p.m. he received a call from

Johar Ali, uncle of accused, who informed that appellant and deceased had gone out, whereas at about 11:30 p.m., he received another call from one police official, who informed him to collect dead body of his daughter from Polyclinic Hospital, which he identified through identification memo Exh.PF. He stated that his daughter was pregnant and dead body of new born child (*jinaain*) was also lying with deceased daughter. He received both the dead bodies vide recovery memo Exh.PH and signed memo of last worn clothes of deceased vide memo Exh.PG. He submitted application (Exh.PD) for registration of criminal case against appellant and stated that prior to this occurrence, the appellant had been abusing and advancing life threats to him and his family members. However, during the course of cross-examination, PW-11 Anwar Sher/complainant acknowledged that he is not eyewitness of the occurrence and he did not lodge any application in Police Station regarding domestic violence on his daughter at the hands of appellant.

12. Muhammad Niaz Khan/S.I. appeared as PW-6 and stated that on 16.09.2015, the appellant made a disclosure of weapon of offence i.e. .30 bore pistol and led him along with Investigation Officer, Arshad and Basit to the place of recovery, from where he got recovered .30 bore pistol from bushes in front of Street No.25, Farash Town, Islamabad. He further stated that 02 live bullets were found from the said .30 bore pistol, which was slightly rusty and taken into possession vide recovery memo Exh.PB and signed by Arshad/constable. The appellant also got recovered motorcycle bearing registration No.ICT-982 from the house of one Muhammad Aleem, which was taken into possession vide recovery

memo Exh.PC. However, during the course of cross-examination, PW-6 Muhammad Niaz Khan/S.I. acknowledged that place of recovery of pistol is an open area and the allegedly recovered pistol is not available in the Court. He also acknowledged that memo of recovery of .30 bore pistol bears inscription of seal "LA", however when it was confronted, it was not so recorded. He also acknowledged that pistol was lying nakedly in bushes and the place of recovery is accessible to every person.

13. The prosecution has produced Investigation Officer of this case namely Muhammad Abbas/Inspector as PW-13, who stated that on 09.09.2015, he received information through Rescue 15 Police that behind Nafees Hospital, Farash Town, dead body is lying in field, whereupon he along with PW-6 Muhammad Niaz Khan/ASI, Muhammad Arshad/Constable, Aslam/Constable and Sajid/Constable reached at the place of occurrence, where one Haji Ishtiaq and few other persons of the area were already present there, who informed that dead body of deceased is lying and during the formalities at the place of incident, father of appellant namely Said Kareem also reached there. PW-13 Muhammad Abbas/Inspector prepared inquest report (Exh.PN) as well as unscaled site plan (Exh.PP), inspected the place of incident, collected bloodstained soil as well as 02 empties of .30 bore pistol vide memo Exh.PO, and ultimately shifted the dead body to Polyclinic Hospital through private vehicle and submitted application (Exh.PR) to CMO for keeping the dead body in mortuary. On 10.09.2015, the postmortem of deceased was conducted, whereafter father of deceased submitted application (Exh.PD) for registration of FIR. On 12.09.2015, PW-13

Muhammad Abbas/Inspector arrested the appellant and obtained physical remand, during which period the appellant disclosed that he can get recovered the weapon of offence and consequently, the appellant led the police party to Farash Town, from where he got recovered .30 bore pistol from bushes and handed it over to him, which was taken into possession vide recovery memo Exh.PB, whereafter he prepared rough site plan (Exh.PQ) of the place of recovery of .30 bore pistol. He further stated that the appellant also effected recovery of motorcycle (ICT-982-EN), referred as Exh.P1, on which he has taken his wife to the place of occurrence. PW-13 Muhammad Abbas/Inspector further stated that the appellant sold out the motorcycle (Exh.P1) to one Muhammad Hanif and on pointation of accused the motorcycle was recovered vide recovery memo Exh.PC. He further stated that on 17.09.2015, the appellant was sent to judicial lockup and later on application (Exh.PS) for recording of confessional statement was filed, whereupon learned Executive Magistrate passed the order and the accused was given time to think again.

14. From the above referred detailed evidence, the following main facts have been observed.

- i. Sana Begum was murdered with firearm injuries and as per report of PW-9 Dr. Shazia Nazeer/CMO, deceased received 02 fire shots i.e. one on right temporal region and second one on lips and right angle of mouth.
- ii. PW-2 Muhammad Nadeem Qureshi noted the dead body in open field and then informed the police.

- iii. PW-1 Umar Badshah and PW-2 Muhammad Nadeem Qureshi expressed that father of appellant namely Said Kareem told them the appellant had committed murder of deceased.
- iv. The appellant was arrested on 12.09.2015.
- v. The appellant got recovered the weapon of offence i.e. pistol .30 bore on 16.09.2015 from an open place accessible to everyone near Farash Town.
- vi. The 02 fire empties recovered next to dead body from the place of incident were sent to Forensic Science Laboratory on 08.10.2015 with unexplained delay of 28 days.
- vii. The .30 bore pistol was recovered on 16.09.2015 and sent to Forensic Science Laboratory on 26.10.2015 with unexplained delay of 40 days.
- viii. .30 bore pistol was recovered from open place accessible to everyone and can be visible.
- ix. .30 bore pistol was not produced during the trial.
- x. As per FSL report, .30 bore pistol recovered at the pointation of the appellant matched with 02 crime empties.
- xi. Prosecution has neither produced any eyewitness of the alleged occurrence nor any witness of last seen.
- xii. The FIR has been lodged with delay.
- xiii. The motive alleged in the FIR has not been proved on record.
- xiv. The occurrence was unseen.
- xv. No witness of last seen is available or produced before the Court.
- xvi. There is no extra judicial confession.

xvii. The inquest report (Exh.PN) is silent regarding fire empties as Column No.23 is blank.

xviii. The deceased was pregnant and had a male fetus of 20 weeks, who also died in the said incident.

15. I have also gone through statement of appellant recorded under Section 342 Cr.P.C., whereby he denied the allegations and stated that fake recoveries have been planted upon him and on the day of alleged occurrence, he was in Mardan as he used to work in Tandoor, though he acknowledged that his wife was pregnant and he has falsely been implicated by his father-in-law in connivance with police officials.

16. This Court, after putting the entire prosecution evidence and the defence taken by appellant in juxtaposition and weighing the same on the principle of appreciation of evidence, came to the conclusion that the prosecution has failed to prove the motive as alleged in the complaint (Exh.PD) through any independent mean, even the complainant has not uttered a single word regarding the said motive in his examination-in-chief, therefore, the motive of case is shrouded in mystery.

17. It is trite law that prosecution is not under obligation to establish motive in every murder case, but if motive is alleged, then it is the duty of prosecution to prove the same and in case the prosecution failed to prove the alleged motive, then it is the prosecution who has to suffer and not the accused person. Reliance in this regard is placed upon 2010 SCMR 97 (Noor Muhammad vs. The State), 2018 P.Cr.LJ (Note) 15 (Abdul Ghaffar alias Kaka vs. The State), 2018 P.Cr.LJ 310 (Rani Bibi vs. The State) and 2002 P.Cr.LJ 915 (Nawab vs. The State) with reference

to above said case laws, I am of the view that non-adherence of the motive alleged in FIR during the entire prosecution case reflects upon the shaky stand of the prosecution as held in 2015 YLR 582 (Muhammad Aslam vs. The State).

18. Essentially, the case in hand rests upon circumstantial evidence and the prosecution is bound to complete the chain of events from the recovery of dead body at one end and to the neck of accused person at the other end, otherwise the entire matter crumbles down if any link is found missing. One of the link of this case is the weapon of offence i.e. .30 bore pistol, which was allegedly recovered on 16.09.2015 and sent to Forensic Science Laboratory on 26.10.2015 with unexplained delay of 40 days, whereas on the other hand, 02 fire-arm empties allegedly recovered on 10.09.2015 were sent to FSL on 08.10.2015 with unexplained delay of 28 days, even otherwise, if the fire-arm empties were kept in Police Station till recovery of weapon of offence without any plausible explanation, the entire recovery becomes doubtful and as such, the effect of delay in sending weapon of offence and fire-arm empties nullifies the effect of such recoveries. Reliance is placed upon 2002 SCMR 986 (Jahangir vs. Nazar Farid) and 2001 P.Cr.LJ 340 (Naseer-ud-Din vs. The State), therefore, this Court is of the view that despite the report of National Forensic Science Laboratory (Exh.PU), where crime empties were found to be matched with the alleged weapon of offence i.e. .30 bore pistol, the same is inconsequential as the witness of recovery i.e. PW-13 Muhammad Abbas/I.O. acknowledged that the pistol (was recovered at the identification of accused from among the bushes),

whereas the other witness of recovery namely PW-6 Muhammad Niaz Khan/S.I. conceded that *"the place of recovery of pistol is an open area. It is correct that pistol is not available in the court today."* Furthermore, PW-6 Muhammad Niaz Khan/S.I. also confirmed that the pistol was lying nakedly in the bushes and the place of recovery of pistol is accessible to every person, even recovery memo of pistol is silent qua sealed inscription of "LA" and all these facts clearly spell out that the recovery of .30 bore pistol is worthless and the same could not be relied upon for the purpose of conviction in a capital charge.

19. As per record, the incident took place on 09.09.2015 after Asr prayer (exact time unknown), while the FIR was lodged on 10.09.2015 at 4 p.m., hence the delay of 24 hours has not been explained.

20. The other important missing piece of evidence is the blank column in inquest report (Exh.PN) i.e. Column No.13, where the fact of 02 firearm empties has not been referred.

21. Similarly, the state of affairs made this Court to opine that the case has been registered after due deliberation, especially when PW-11 Anwar Sher/complainant, father of deceased, came from his hometown i.e. Mardan to Islamabad on police information and submitted his application for registration of case and ultimately the FIR has been lodged with unexplained delay. In such scenarios, the Courts had acquitted accused persons as held in 2014 YLR 2628 (Abdul Rehman vs. 2nd Additional Sessions Judge, Badin) and 2011 YLR 921 (Rifat Hussain vs. The State).

22. Alternatively, the prosecution has heavily relied upon the testimonies of PW-1 Umar Badshah and PW-2 Muhammad Nadeem Qureshi, who were just informers and seen the dead body of deceased, although they have claimed that father of appellant told them that his son i.e. the appellant had gone to commit murder of his wife/deceased, but in my humble view, such statement is to be called a hearsay statement and such statement could not be relied upon for the purpose of conviction, therefore, statements of PW-1 Umar Badshah and PW-2 Muhammad Nadeem Qureshi are considered to be of no value to prosecution case.

23. I have also gone through the impugned judgment of the learned Trial Court, which is not based on proper appreciation of the evidence and has been passed without considering all the defects and lacunas visible on record, hence, benefit of doubt emerges on record, even otherwise, it is trite law that it is not necessary to have many circumstances or gaps or instances to apply the principle of benefit of doubt, rather a single circumstance is enough to create reasonable doubt, and if a doubt emerges on record, the benefit has to be extended to accused person as a matter of right. Reliance in this regard is placed upon 1997 SCMR 25 (Muhammad Ilyas vs. The State), 1995 SCMR 1345 (Tariq Pervez vs. The State), 1999 SCMR 1030 (Muhammad Irshad vs. The State), 2016 SCMR 2073 (Wajahat Ahmed vs. The State), 2017 YLR 375 Lahore (Ageel alias Mundri vs. The State) and 2019 SCMR 129 (Abdul Jabbar vs. The State).

24. The epitome of whole discussion gives rise to the situation that the appellant has been convicted without appreciating the evidence in its true perspective, rather the prosecution case is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellant as a matter of right, therefore, the instant Jail Appeal No.28/2018 (Kabir Khan vs. The State) is **ALLOWED**, impugned judgment dated 01.03.2018 is hereby **SET-ASIDE**. The appellant is **ACQUITTED** of the charge under Sections 302(b), 308 and 338C(a) & (c) PPC, therefore, the appellant be released forthwith, if not required in any other criminal case.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 8th April, 2019.

~ JUDGE

Khalid Z.