

JUDGMENT SHEET

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

Cr.A No. 205-M/2017

Asad Shah son of Rizwan Shah (Appellant)

Versus

The State & another (Respondents)

Present:

Mr. Shams-ul-Hadi, Advocate, for the appellant.

Mr. Rahim Shah, Asstt. Advocate General.

Mr. Sahibzada, Advocate, for the complainant.

Date of hearing: **01.10.2019**

JUDGMENT


WIQAR AHMAD, J.- This order of ours is directed to dispose of criminal appeal No. 205-M of 2017 filed by the appellant against his conviction and sentence dated 26.09.2017 of the Court of learned Additional Sessions Judge-II/Izafi Zila Qazi Buner at Dagger.

2. The complainant namely Mst. Rashida (PW-4) lodged a report on 27.12.2015 at 23:00 hours at her home which was reduced into writing by Muhammad Khalid Sub Inspector police station Gagra (PW-3). In pursuance thereof FIR No. 1141 dated 28.12.2015 was registered under section 302

PPC at Police Station Gagra District Buner.


Muhammad Khalid Khan, SI (PW-3) received information of the occurrence that a lady had been killed, whereafter he proceeded to the place of occurrence i.e. house of the deceased namely Mst. Wahida Naz wife of Luqman Shah.

Mst. Rashida wife of Fazal Wahid reported the matter to the police official that the deceased was her sister who had married to one Fazal Aziz resident of Deena District Swabi.



Out of the said wedlock a son namely Jamal Said aged about 16/17 years had been born. Due to strained relationship the lady got divorced, whereafter she remained at her mother's house for ¾ years. The deceased then contracted another marriage with one Luqman Shah son of Sultan Shah resident of Swabi. From the said wedlock five (5) children were born. The husband of the deceased was stated to have left the village for earning livelihood in District Swabi about nine or ten days before the date of occurrence. The house of the complainant was also stated to be situated near the house of the deceased. The complainant has

further stated in her report that she had been sleeping along with her other family members in her house that their neighbor Zawar Khan came and disclosed that her sister had been fired at and resultantly killed by some unknown person. She rushed to her sister's house and found her lying dead there. No one was named in the FIR and the complainant added that they have no enmity with anyone.



3. Investigation in the case was underway that a kid namely Marwa aged about 9/10 years, daughter of Luqman Shah as well as deceased got her statement recorded under section 161 as well as 164 Cr.P.C, naming the accused/appellant for causing murder of her mother. The husband and brother of the deceased namely Luqman Shah and Gul Said got their statements recorded on 29.01.2015 and 03.02.2016, wherein they also charged the accused/appellant for commission of the offence.

4. The accused was later on arrested and a pistol was also recovered from him which was sent to the FSL along with the empties shown recovered in the case for checking as to

whether it had been fired from the recovered pistol or not. In this respect, the FSL report was received in positive.

5. After submission of complete *challan*, charge was framed against the accused, to which he pleaded not guilty and claimed trial. The prosecution examined as many as nine (9) witnesses, whereafter, statement of the accused was recorded under section 342 Cr.P.C. On conclusion of the trial in the case, the accused/appellant was convicted vide judgment dated 26.09.2017 of the learned Additional Sessions Judge-11 Buner at Dagger and was sentenced as follows;

"Under section 302 (b) PPC to life imprisonment along with compensation of Rs. 500,000/- under section 544-A (2) Cr.P.C, or in default thereof to suffer six (6) months simple imprisonment. The appellant was also extended the benefit of section 382-B Cr.P.C."

The accused/appellant impugned his conviction and sentence through the instant appeal.

6. Learned counsel for the appellant/convict submitted in his arguments that the accused was charged with a delay of 32

days after consultation and due deliberations. He further added that the source of satisfaction stated by the witnesses was not believable. He submitted further that motive for the killing could not be proved and there had been no evidence against the appellant/convict, but despite that he has been convicted and sentenced to life imprisonment.


7. Learned counsel for the complainant stated in rebuttal that the complainant had got no *ill-will* or ulterior motive towards the appellant and that he has been charged after due satisfaction. He added further, that the recovered pistol as well as empties recovered from the spot had a matching report, which establish the case against the appellant/convict and he had therefore been rightly convicted for the commission of the offence.

8. The learned Astt: A.G. adopted the arguments of learned counsel for the complainant and supported him in his arguments.

9. We have heard arguments of learned counsel for the parties, learned Asstt: A.G. appearing on behalf of the State and perused the record.

10. The most important evidence in the case in hand is the statement of the child witness namely Marwa daughter of Luqman Shah examined as PW-6. At the time of recording of her statement her age was 9/10 years. The learned trial Court had put certain questions to her and had satisfied itself regarding understanding of the child *vis-à-vis* her capability for deposing as witness. In her examination-in-chief she stated that she had gone to her neighbor's house for bringing 'Lasay' (لسي) one day before the date of occurrence. She met the accused Asad Shah in the street, who handed her a piece of paper inscribed with his mobile phone number and told her that it should be handed over to her mother. She accordingly brought the said piece of paper and handed over to her mother i.e. the deceased then alive, who replied that she did not want to talk to any stranger. The

appellant/convict was stated to have entered their house one day before the occurrence at *Isha* time and was told by her mother that her husband was not at home and he should therefore immediately leave the house and should not throw stones at the door of their house. The witness have added further, that on the night of occurrence she woke up on the sound of firing and called the neighbours, who informed her aunty namely Mst. Rashida. She found her mother dead, whereafter, the police came and took her to the police station. She charged the accused Asad Shah for the murder of her mother.



11. This child who was presented as star witness of the prosecution against the appellant had not seen the occurrence. The motive narrated by this witness is also of such a nature that do not seem to be that much potent to have compelled the appellant to kill the deceased. Even otherwise the statement of a child witness is to be accepted with great care and caution. The Hon'ble Supreme Court of Pakistan in the case of "Ulfat Hussain v/s The State" reported as "2010 SCMR 247" held as follows;


"Accused was convicted by Trial Court under S. 302 (b) P.P.C and was sentenced to death, which sentence was maintained by High Court. Plea raised by accused was that his conviction was based upon sole testimony of child witness, which was neither corroborated by medical evidence nor with weapon of offence. Though in principle, conviction could be based upon testimony of an intelligent and understanding child witness but Courts had generally preferred to adopt settled principle of prudence and rule of care attached to sole testimony of child witness despite child's intelligent deposition. No evidence was available on record to corroborate testimony of child witness as medical evidence and recovery of weapon of offence did not furnish required support. Appeal was allowed accordingly.

In this regard, further reliance can also be placed on the judgments reported as "PLD 1995 Supreme Court 1, 1985 P Cr. LJ 2500 (Lahore), 2013 P Cr. LJ 708 (Peshawar) and 2017 P Cr. LJ 509 (Karachi)".

12. Beside this witness the other witness namely Luqman Shah, husband of the deceased who was examined as PW-5 was neither available in house nor was witness to any of the circumstance in the case except the recovery of a piece of paper whereupon mobile number of the appellant had been inscribed. The complainant namely Mst. Rashida was also examined as PW-4 but she was also neither the


eye-witness nor had witnessed any of the circumstance except the recovery memo Ex. PW-5/1, vide which the dead body of the lady was handed over to her. She had named the accused/appellant in her statement recorded in the Court, however she had failed to name him in her first report nor had ever recorded any statement thereafter, during the course of investigation.

13. Now coming to the circumstantial evidence relied upon by the prosecution it is enumerated as follows;

- 
- i. *recovery of pistol 30 bore from the accused/appellant and supporting FSL report;*
 - ii. *recovery of a piece of paper whereupon mobile number of the appellant had been inscribed;*

Empties recovered from the spot had not been sent to the FSL earlier. Same were lying in the police station and were sent to the FSL along with the pistol on 29.01.2016, wherefrom a matching report Ex. PW-7/27 has been received. The empties were recovered

from the spot vide recovery memo Ex. PW-2/1 on 28.12.2015. Keeping it in the police station and then sending the same to FSL along with pistol dilutes the force of the said recovery and the matching report of the FSL. Reliance in this respect, is placed on the judgment in the case of "Israr Ali v/s The State" reported as "2007 SCMR 525" wherein the Hon'ble Apex Court observed as follows;




Crime empty was not sent to the expert immediately after taking into possession and the weapon of offence was recovered from the convict/appellant after his arrest as borne out from the statement of P.W.16. P.W.15 Muhammad Arshad had taken possession of Crime-empty Exh.P.7 vide memo. Exh.P.H. on 10-10-1999. His statement is silent to whom he had given the said memo. P.W.14 Muhammad Akhtar stated in his examination-in -chief that Muhammad Arshad S-I. handed over to him sealed parcel containing crime-empty for safe custody in the Malkhana. This fact was not mentioned in his statement which was recorded by Investigating Officer under section 161, Cr.P.C. thrice on 10-10-1999 and 23-10-1999 as evident from cross-examination which is to the following effect:-

"I narrated to the Investigating Officer that parcel containing crime empty was handed over to him by Investigating Officer confronted with Exh.D.C. where it is not so recorded."

It was also admitted by him in cross-examination that he did not state before the Investigating Officer in his statement Exh.D.C. that the parcel containing crime empty was handed over to Khadim Hussain

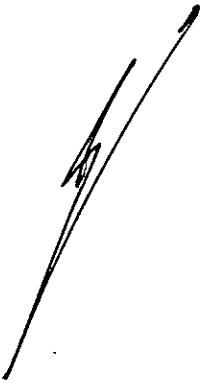
P.W.4. He also admitted that he did not send crime empty to expert till 1-12-1999. Khadim Hussain P.W.4 stated in examination-in-chief that he received parcel containing empty bullet on 3-11-1999 from Muhammad Akhtar P.W.14. He handed over to Muhammad Ramzan for onward transmission in the office of Forensic Science Laboratory. P.W.16 Khalid Rauf arrested appellant on 5-12-1999. He also got recovered the pistol from him on his pointation. Thereafter he had handed over pistol to P.W.4 Khadim Hussain. This type of recovery of crime empty does not provide strong corroboration qua the prosecution version

Further reliance in this respect is also placed on the judgment of Hon'ble Supreme Court of Pakistan in the case of "Jehangir v/s Nazar Farid and another" reported as "2002 SCMR 1986".



So far as the recovery of piece of paper recovered in the case in hand is concerned. Same has also been sent to FSL for comparison with handwriting of the appellant, report in the said respect was exhibited in the evidence as PW-7/24. The handwriting expert found the two as matching which fact was incorporated in the report of the FSL mentioned above. It is important however that the handwriting expert has not been examined in the evidence. His examination was necessary, as report of handwriting expert has not been

included in those technical experts whose statement or report has been held admissible per se under section 510 Cr.P.C. The Hon'ble Karachi High Court in the case of "Kaka Kishanchand v/s The State" reported as "PLD 2003 Karachi 618" observed as follows;



"34. From the above provision of law, it is clear that this provision is applicable in a case of report of Chemical Examiner, Assistant Chemical Examiner, Serologist, Finger-print and Fire-arm Expert appointed by Government or of the Chief Chemist of Pakistan Security Printing Corporation Limited. If any report is issued by the above named officers in respect of various fields of sciences mentioned in it then their report can be produced in evidence without calling them and can be used as evidence in any inquiry or trial or other proceedings under Criminal Procedure Code. The Court is also empowered to examine such person if it is found necessary in the interest of justice.

35. The handwriting science is a completely different field and a different science than the above mentioned categories of science. As such, the provisions of section 510, Cr.P.C are not applicable in the case of report of officers in respect of field of science other than those mentioned in the section. The trial Court has misconstrued and misinterpreted the said section. The above view is supported by cases Zamir Hussain v. Crown appellant Agha Wazir Abbas."

The Hon'ble Lahore High Court in the case of "Qasim Ali Malik v/s The State" reported as "2012 P Cr.LJ 124" also expressed a

similar view in Para 11 of the judgment, which is reproduced hereunder for ready reference;

"Bare reading of the above quoted provision of section 510, Cr.P.C. makes it crystal clear that report of the Handwriting Expert does not figure in this provision and thus the same is neither per se admissible nor it can be read in evidence until and unless proved in the manner prescribed under Article 78 of the Qanun-e-Shahadat Order, 1984. Point No.(ii) therefore is answered accordingly."

Since handwriting expert has not been examined in the case in hand, therefore the prosecution cannot rely on his opinion given in the report of the FSL.

14. There has not been direct evidence available with the prosecution. The prosecution has also failed to establish the case through circumstantial evidence as they relied upon a weaker type of evidence without netting the chain from start till the end. Confidence inspiring evidence is missing with the prosecution. Benefit of doubt has to go to the appellant/convict as he cannot be handed down a sentence of capital punishment on the basis of such weaker type of evidences. Reliance in this respect is placed on the judgment of Hon'ble Apex Court in the case

of "Fayaz Ahmad v/s The State" reported as
"2017 SCMR 2026".

15. For what has been discussed above, the appeal in hand is allowed by extending the benefit of doubt to the accused/appellant. He is resultantly acquitted of the charge. These are reasons for our short order of even date which read as follows;

"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 26.09.2017 passed by learned Additional Sessions Judge-II/Izafi Zila Qazi Buner at Dagger in case FIR No. 1141 dated 28.12.2015 registered under section 302 PPC at police station Gagra District Buner and resultantly acquit the appellant namely Asad Shah son of Rizwan Shah of the charges levelled against him. He be released forthwith if not required in any other case."

Announced
Dt. 01.10.2019


JUDGE


JUDGE

Office
13/11/2019
W/R