

**JUDGMENT SHEET**  
**IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH**  
*(Judicial Department)*

**Cr. Appeal. No.68-D of 2016**

**Muhammad Azeem**

**Versus**

**The State & another.**

**JUDGMENT**

Date of hearing                      28.01.2019.

Appellant by:                      **Mr. Saif ur Rehman Khan,**  
   **Advocates.**

Respondent No. 2:                **Mr. Hidayat Ullah Malana,**  
   **Advocate.**

State by:                              **Mr. Kamran Hayat Miankhel, Addl:**  
   **A.G.**

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**SHAKEEL AHMAD, J.-** Muhammad Azeem aged about 44/45 years son of Baran was tried by the learned Additional Sessions Judge-II, Dera Ismail Khan for having murdered of his wife Mst. Zaroba Bibi, in his house in village Buzdar, District D.I.Khan, at a distance of 40/42 kilometers from police station Chowdawan on 20.12.2009 in the small hours of night. Initial report Ex. PW-3/1, in shape of murasila, was recorded at Civil Hospital, Dera Ismail Khan, on the same day at about 16 hours by Umer Daraz Inspector (PW-2) on the statement of Ghulam Rasool (PW-8) uncle of the deceased, subsequently, incorporated into FIR Ex. PW-8/1. Learned trial Judge

convicted Muhammad Azeem under Section 302 (b) P.P.C and awarded sentences as follows:-

*Under Section 302 (b), P.P.C---  
Sentenced to suffer imprisonment for life.  
He was further directed to pay Rs.  
5,00,000/- (rupees five lac) to the legal  
heirs of the deceased as compensation as  
provided under Section 544-A, Cr.P.C,  
failing which he has been directed to  
undergo further simple imprisonment for  
six months. Benefit of section 382-B  
Cr.P.C was extended to  
convict/appellant.*

The convict has filed appeal against his conviction and sentence.

2. According to FIR, on 21.12.2009, at 16.00 hours, the complainant Ghulam Rasool alongwith dead body of his niece Mst. Zaroba Bibi wife of appellant/convict, reported the matter to the police in emergency room of DHQ, Hospital, D.I.Khan stating that at about 7.30 a.m, he received information of the incident in his home, upon such information, he alongwith Sher Muhammad (his cousin) and Zain-ud-din (his nephew) rushed to the crime scene and found the dead body of Mst.

Zaroba Bibi in the residential room of the accused/convict, on query the inmates of the home disclosed that she has been murdered by her husband namely Muhammad Azeem (appellant) at small hours of night by giving her axe blows, he charged the accused/convict for committing murder of his niece.

3. After recording the FIR Sattar Khan S.I (PW-10) reached the crime scene alongwith police party, on the following day, prepared site plan Ex. P-B at the instance of complainant. Blood stained earth P-1 and blood stained axe P-2 were also taken into possession by him vide recovery memo Ex. PW-10/1 and Ex.PW-10/2, took into possession blood stained garments of the deceased Ex. P-3 vide recovery memo Ex. PW-10/4, conducted search of the house of accused vide memo Ex. PW-10/3 and recorded statements of PWs including parents of and brothers of the convict, received PM documents of deceased alongwith plastic jar containing swabs of deceased sealed these items into parcel No. 4 Ex.P-4 vide memo Ex. PW-1/1, also recorded supplementary statement of the complainant, whereafter, he handed over the case file to local police of police station Chaudawan.

4. At the trial the prosecution examined fourteen witnesses. Lady Doctor Khurshid Bhittani, who had

conducted autopsy, appeared as PW-6. She noted following injuries on her person.

**External Appearance**

*A young lady wearing printed Qameez and pink Shalwar with pink Dopata, ear rings, nose pin of gold. Rigor mortis developed.*

**Wound**

*All the incised wounds and crushed on the left side of the face. There was fractured of nose, upper lip cut and cheek brekented. There was fractured of mandible jaw. All the cheeks, nostrils of nose cut.*

The doctor opined that death had occurred due to injury to vital organs, injury by sharp weapon leading to shock, coma and death. According to her, duration between injury and death 10 to 20 minutes while duration between death and postmortem, 12 to 14 hours. Ghulam Rasool (PW-8) narrated the facts given by him in the FIR. Ghulam Qadir (PW-9) stated that deceased Zaroba Bibi was his sister. He had gone to Karachi for earning livelihood. There he was informed telephonically about the murder of his sister by convict. In pursuance thereof, he left Karachi for D.I.Khan and reached on the following

morning at about 8.00 a.m when he reached to his house, found dead body of his sister. He inquired about the incident from inmates of the house, who disclosed that Azeem Khan had committed murder of deceased with axe and decamped from the spot. He was examined by the I.O, wherein he charged the accused for committing murder of his sister. Safdar HC, who appeared as PW-14 stated of having witnessed the recovery of axe P-2, lastly worn garments of the deceased stained with blood Ex. P-3.

5. The accused when examined after close of prosecution evidence denied the charge and pleaded innocence. He did not produce any evidence in defence.

6. The prosecution case depended on the testimony of PW-8 & 9, namely Ghulam Rasool (uncle of the deceased) Ghulam Qadir (brother of the deceased). Recovery of blood stained earth and blood stained axe from crime scene, recovery of dead body of Mst. Zaroba Bibi from the house of the convict, medical evidence plead guilty of the appellant in previous trial and abscondence of accused.

7. Learned counsel for the appellant while criticizing the testimony of PW-8 & 9 contended that they did not witness the occurrence, there statement is based on hearsay, therefore, not be relied upon for conviction of appellant. He next contended that recoveries of axe and

blood stained earth is not reliable and be excluded from consideration. He further contended that medical evidence does not connect the appellant with the alleged crime. He lastly contended that the prosecution has failed to prove that the appellant was owner and in exclusive possession of the house where alleged murder was committed and prayed for outright acquittal of the accused.

8. As against that, learned counsel appearing on behalf of the complainant argued that the complainant and PW-9 Ghulam Qadir has no ill will to falsely depose against the appellant. He next urged that circumstances established that prosecution has proved its case against the appellant beyond a ray of doubt. He lastly argued that after commission of offence the accused remained at large for quite sufficient time, which proves his guilty, conscious and prayed for dismissal of appeal.

9. The learned A.A.G representing the State added that the recoveries of implicating material from the spot and medical evidence fully corroborates the statement of PW-9 & 10, he concluded that prosecution has proved its case against the appellant beyond a ray of doubt and prayed to maintain the impugned judgment.

10. We have carefully gone through the evidence on record and have heard the learned counsel for the parties with their eminent assistance.

11. Perusal of the record reflects that the crime in this case had taken place in odd hours/small hours of the fateful night at unknown time in the 2<sup>nd</sup> last week of December. The crime scene was inside house of the appellant. The FIR of the incident was lodged at 16 hours and according to site plan (Ex.P-B) there was other houses situated close to the house of occurrence.

12. We found in the deposition of PW-8 Ghulam Rasool that he was informed by a child, who had came from the house of the accused, about the incident, when he was present in his house alongwith Zain-uddin and Sher Muhammad, on receipt of this information he rushed to the crime scene alongwith the said Zain-uddin and Sher Muhammad, where they found the dead body of the deceased and blood stained axe. They inquired about the incident from the inmates of the house, who unanimously disclosed that the deceased Mst. Zroba Bibi was done to death by his husband (appellant) by means of axe. Admitteldy, Ghulam Rasool (PW-8) and Ghulam Qadir (PW-9) are not the eye witnesses of the alleged occurrence, their statement is based on the information furnished to them by the inmates of the house, therefore, it can safely be held that their statements were based on hearsay and being not hit by Article 71 of Qanun-e-Shahadat Ordinance, 1984, is not admissible which says

that oral evidence must be direct. It was deposed by Sattar Khan S.I (PW-10) that he had recorded the statement of parents and brothers of the appellant, but astonishingly, during trial they were not produced as witnesses to corroborate the statement of complainant, Sher Muhammad and Zain-uddin. They have been abandoned for no good reasons.

13. The allegation of the prosecution that murder of the appellant's wife in his house may be a circumstance to be taken into account alongwith other prosecution evidence. However, this may by itself not sufficient to establish appellant's guilt in the absence of any other evidence of the prosecution connecting him with the crime. The prosecution has failed to establish that the house where the murder was committed was in absolute and exclusive possession of the accused as we found in the deposition of Ghulam Rasool (PW-8) that he found other inmates of the house when he visited the crime scene.

14. The basic principle of criminal jurisprudence is that prosecution is under legal obligation to prove its case against the accused beyond a ray of doubt. This burden remains throughout and does not shift to the shoulder of accused, who is only burdened to prove a defence plea. Therefore, contention of the learned counsel for the complainant that some part of the onus had shifted to the



appellant to explain the circumstances under which his wife met unnatural death in his house on the fateful night, but he had failed to discharge that part of the onus. We have considered this aspect of the case and found that the prosecution has miserably failed to prove the guilt of the accused through positive and cogent evidence. In this context we are fortified by the judgment reported as *Nasrullah alias Nasro vs The State (2017 SCMR 724)* and *Asad Khan the State (PLD 2017 SC 681)*, wherein it has been held that:

*“The above mentioned shifting of same point of the onus to the accused may not be relevant in a case where the entire case of the prosecution itself is not reliable and where the prosecution fails to produce any believable evidence.*

15. In this behalf reference may also be made to the case reported as *Abdul Majeed vs The State (2011 SCMR 941)*, wherein it has been observed that:

*“In the absence of direct or substantial evidence the conviction of a person cannot be sustained merely on account of failure to explain the murder of his wife in his house”.*

In this context reliance can also be placed on the case reported as *Umer Zaman vs The State (2013 PCr.L.J 708)*.

16. Now adverting to contention of the learned counsel for the complainant that in earlier trial the accused had pleaded guilty and was convicted and sentenced. However, in appeal his conviction and sentence was set aside by this Court and case was remanded with the direction to frame charge against the accused/appellant afresh by recording his plea of guilty in his own words and then decide the case afresh after recording evidence of the prosecution and statement of appellant vide judgment dated 30.05.2015, after remand, the accused/appellant on 04.07.2012 submitted an application before the learned trial Court for his examination by the medical board as he is suffering from mental disorder, his request was acceded to on 04.07.2012, whereafter, he was examined by the Standing Medical Board and opined as under

*"That the accused has a past history of psychotic illness with depression. He still exhibit, disturbed behavior abnormally of thinking and perceptual abnormalities. The Standing Medical Board is of the opinion that he needs treatment with anti-psychotic medication. At the moment he does not understands the proceedings of the Court, nature of his offence its consequence therefore, he is unfit to plead in the Court of law. The board would review him after one year during this period he needs to be in a secure place like prison".*

17. After receipt of opinion of Medical Board, the learned trial Court, postponed the trial for a period of one year vide order dated 12.12.2012, after lapse of one year, he was again examined by the Medical Board on 13.03.2014 and furnished following opinion.

*The Standing Medical Board is of the opinion that the accused suffers from Chronic schizophrenia which is a major mental illness. The accused has responded to medication and has made significant recovery. The Standing Medical Board is of the opinion that at the moment he is very well communicative, coherent and rational. He understands the nature of his crime, its consequences court proceedings and therefore is fit to plead in the Court of law. However since schizophrenic illness is chronic and relapsing condition the accused needs treatment with anti-psychotic medication for foreseeable future. The honourable Court may dispose off his case under relevant section of mental health act.*

Whereafter, proceedings were restored and trial commenced.

18. In the instant case, the mental state of the convict during previous trial at the time of framing of charge is relevant. He did not defend his case and pleaded guilty. In his statement under Section 342 Cr.P.C, he stated that for the last so many years he is suffering from mental disease and on 23.08.2011, he was under the influence of his mental disease and was unable to

understand the proceedings of the Court. His contention leads support from medical evidence.

19. After going through the opinion of medical board, we are of the considered view that convict was not able to understand the proceedings of the Court at the time of framing of charge during earlier trial and was not aware of the consequences of admission of guilt, therefore, this would be of no help to the prosecution to prove the guilt of the accused.

20. The evidence of recovery of axe P-2 from the crime scene is of no consequence for determining the guilt of the appellant, the reason being that the axe was found lying on the crime scene. It was neither recovered at the instance of the accused nor it belonged to him, so it cannot be presumed that it was the appellant who had used the axe for inflicting the injuries.

21. Safdar Hussain while appearing as PW-14 deposed about having witnessed recovery of blood stained earth, axe P-2 from the spot and lastly worn garments of deceased Ex. PW-3, but did not say anything about the occurrence.

22. The learned trial Court while convicting the accused sought corroboration from medical evidence. It is by now settled that medical evidence neither identify

the assailant nor pin point the accused, at the most it reflects the seat of the injury, duration and weapon used in the commission of offence and cause of death. In this behalf reliance can be placed on the case reported as *Hashim Qasim and another vs The State (2017 SCMR 986) and Abdul Majeed vs Mulazim Hussain and otherse (PLD 2007 SC 637)*.

23. Adverting to abscondence of the accused, no doubt the accused remained absconder for more than eight years, however it is by now settled that abscondence can never remedy the defects in the prosecution case as it is not indicative of guilt. People do abscond out of fear to be killed in retaliation or to avoid police torture and duress. In this respect reference may be made to the case reported as *Mehar Khan and others vs the State (PLD 1977 SC 41)*.

24. For the reasons noted above, doubts have arisen in our mind and we feel that it would not be safe to maintain conviction of the appellant. This appeal is, therefore, allowed and the appellant is acquitted by way of grant of benefit of doubt. He shall be released forthwith if not required in any other case.

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

Announced.  
Dt: 28.01.2019.  
Minhas

  
JUDGE

  
JUDGE

(D.B)  
Hon'ble Mr. Justice S.M. Attique Shah and Hon'ble Mr. Justice Shakeel Ahmad

  
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