

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

CrA No. 26-D of 2016
With Murder Reference 3-D/2016

JUDGMENT

Date of hearing 23.01.2017

Appellant-petitioner Rehmat Ullah by Mr. Saleem Ullah Khan
Ranazai Advocate.

Respondent State by Mr. Kamran Hayat Miankhel AAG and Mr.
Muhammad Ismail Alizai Advocate for complainant Assisted by
Sheikh Muhammad Adeel Advocate.

MUHAMMAD AYUB KHAN, J.- Through this single judgment, we propose to dispose of instant Criminal Appeal No.26-D/2016 filed by appellant Rehmatullah against his conviction and sentence and Murder Reference No.3-D/2016 forwarded by learned trial Court under section 373 Cr.P.C as both the matters are the outcome of one and the same judgment dated 03.5.2016 of learned Sessions Judge, Tank, whereby the appellant Rehmatullah was convicted under section 302(b) PPC and sentenced to death as Ta'zir and to pay compensation of Rs.5000000/- under section 544-A Cr.P.C to the legal heirs of deceased Mst. Shamshad and also compensation of Rs.5000000/- to the legal heirs of deceased

Misbahullah. He was further convicted under section 15 Arms Act and sentenced to three years R.I with fine of Rs.50000/- and in default, to undergo six months SI and benefit of section 382-B Cr.P.C was extended to him.

2. The prosecution story as spelt out from the FIR lodged by complainant Rehmatullah is that on 27.8.2014 at 'dopehr-vela', he alongwith his wife Mst. Shamshad Bibi (deceased), his sons Nasratullah and Naqeebullah aged about 6 and 3 years respectively and his brother Misbahullah (deceased) aged about 21/22 years, were asleep in their room; that all of sudden, complainant got up and noticed his wife Mst. Shamshad Bibi and brother Misbahullah in immoral actions; that previously, the complainant was in doubt that they had illicit relations; that accused could not bear it, he took out his pistol lying beneath the pillow and fired two shots at each of them. Deceased got injured and succumbed to the injuries. That, on hearing the fire shots, mother of the complainant namely Mst. Bulbula Bibi, his brother Abdul Hameed and other relatives attracted to the spot and witnessed the occurrence. That, 30 bore pistol was taken by Abdul Hameed, brother of the complainant, hence the

report vide FIR No.93 dated 27.8.2014 registered under section 302 PPC read with section 15 Arms Act at police station Gomal, District Tank.

3. After completion of usual investigation, challan against the appellant was submitted before the learned trial Court where he was formally charged. He did not plead guilty to the charge and claimed trial. In order to establish the guilt of appellant, the prosecution examined eight witnesses. Thereafter, statement of the appellant was recorded under section 342 Cr.P.C, wherein he professed innocence and false implication. However, he neither appeared as his own witness on oath nor produced any evidence in his defence. After hearing the arguments, the learned trial Court convicted and sentenced the appellant as mentioned above vide judgment dated 03.5.2016.

4. The learned counsel for the appellant vehemently contended that there is no eyewitness of the occurrence and mother and brother of the appellant attracted to the spot after hearing the fire shots; that the pistol was produced to the police by PW Abdul Hameed

and it was not taken into possession from the appellant; that postmortem reports of the two deceased negate the version of prosecution; that prosecution case rests on circumstantial evidence but the chain has been broken many times and all such evidence has been misread and not properly appreciated by the learned trial Court due to which grave miscarriage of justice has occasioned by convicting the appellant and that too, to a normal penalty of death.

5. As against that, the learned Additional Advocate General assisted by learned counsel representing brothers of the two deceased contended that the case against the appellant was proved to the hilt and was supported by direct evidence, medical evidence, circumstantial evidence and recovery of 30 bore pistol, therefore, the learned trial Court has rightly convicted and sentenced the appellant.

6. We have heard the arguments of learned counsel for the appellant and that of learned Addl: A.G assisted by learned counsel for brothers of the two deceased and have gone through the record.

7. The prosecution mainly relied on the FIR lodged by the appellant himself, recovery of 30 bore pistol as crime weapon, report of expert, motive and statement of Fazal Din (PW-7), brother of deceased Mst. Shamshad Bibi.

8. First of all, we would take the FIR and its probative value. As the record stands, the FIR was recorded on the basis of report made by the appellant himself. There is no cavil with the proposition that the FIR itself is not a substantive piece of evidence unless its contents are affirmed on oath and subjected to the test of cross examination. Legally, it is a previous statement which can be used for the purpose of contradicting and corroborating its maker and unless it is not proved in accordance with law, it is no evidence and therefore, cannot be taken as a proof of anything stated therein. But when it is based on a statement made by an accused before the police which tends to incriminate him with reference to the offence he is charged with, in that event, it being inadmissible in evidence is not even worth the paper it is written on, hence has to be left entirely out of

account. In the instant case, admittedly neither the maker of FIR appeared in its support nor stood the test of cross examination. In such circumstances, the report in the instant case is ruled out of consideration. In this respect, we are fortified by the case of *Muhammadullah. Vs. The State (PLD 2001 Peshawar 132)*.

9. Next comes the recovery of 30 bore pistol. Admittedly, it was not recovered from personal possession of the appellant. It is in the report of appellant that the pistol was taken from him by his brother Abdul Hameed. The said Abdul Hameed has been abandoned by the prosecution and thus the best available evidence to support such recovery has been withheld. As stated earlier, the FIR has been left out of consideration, therefore, the same is of no avail to the prosecution. Though the report of F.S.L (Ex.PC) reveals that the four empties were fired from 30 bore pistol No.XN 836-1957 but since the recovery of pistol to be weapon of offence has been disbelieved, therefore, the report of F.S.L is of no help to the prosecution.

10. The cause of murder in the FIR has been mentioned by the appellant that all of sudden, he got up and noticed his wife Mst. Shamshad Bibi and brother Misbahullah busy in nefarious actions; that such actions annoyed him, he took out his pistol lying beneath the pillow and fired two shots each at them, who got injured and succumbed to the injuries. The report of F.S.L Ex:PK reveals that vaginal swabs of Mst. Shamshad Bibi were sent for chemical analysis which were found negative for semen. As Fazal Din (PW-7) brother of deceased Mst. Shamshad Bibi is not an eyewitness of the occurrence, therefore, it is of no benefit to the prosecution. It is by now a settled principle of law that for giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of rights. The above narrated facts and circumstances created reasonable doubts in the prosecution story but the learned trial Court has not taken

into consideration these benefits and erred in convicting the appellant.

11. For the reasons mentioned above, we accept Criminal Appeal No.26-D/2016, set aside the impugned judgment of conviction and sentence dated 03.5.2016 and consequently acquit the appellant Rehmatullah of the charges levelled against him in this case. He shall be set free forthwith from Jail if not required in any other case.

12. Murder Reference No.3-D/2016 is answered in negative.

13. Above are the detailed reasons for our short order of even date.

Announced.
Dt: 24.01.2017.
Habib/*

JUDGE

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