

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 124-M/2017

(1) *Ghauso Rehman son of Sher Zaman (Appellant)*
Versus

(1) *The State through A.A.G*
(2) *Saram son of Bacha*

(Respondents)

Present: *M/S Said Hakim and Musa Khan, Advocates, for the appellant.*

Mr. Rahim Shah, Asstt. Advocate General.

Mr. Akhtar Munir, Advocate, for the accused/respondent.

Cr.A No. 127-M/2017

Mst. Jamila Hassan w/o Yousaf Khan (deceased)
Versus (Appellant)

1) *Saram Khan son of Bacha*
2) *The State through A.A.G.*

(Respondents)

Present: *Mr. Allah Dad Khan, Advocate, for the appellant.*

Mr. Akhtar Munir, Advocate, for the accused/respondent.

Mr. Rahim Shah, Asstt. Advocate General.

Date of hearing: **12.09.2019**

CONSOLIDATED
JUDGMENT

SYED ARSHAD ALI, J.- Through this single judgment, I propose to decide this criminal appeal bearing No. 124-M/2017 as well as the connected criminal appeal bearing No. 127-M of 2017, as both these matters

emanate from one and the same judgment dated 17.04.2017 rendered by the learned Sessions Judge/ Zilla Qazi Malakand (Camp Court at Dargai) in case F.I.R No. 60 dated 08.04.2014 registered under sections 279, 320, 337-G, 427 PPC at Levy Post Sakhakot District Malakand, whereby the accused/respondent Saram son of Bacha was acquitted of the charges.

2. As per prosecution story, on 08.04.2014 Fazal Akbar, IHC PS Sakhakot (PW-10), had received information that an accident took place at *Muskan Fashion Hotel near Sakhakot Toor Pull* (Bridge). When the said IHC along with other levy officials reached at the spot where they found the wreckage of three motorcars and two motorcycles. On query, they were informed that on 08.04.2014 a motorcar bearing No. MQ-796, black colour driven by Saram (accused/respondent) coming from Shergarh heading towards Dargai when at about 19:45 hours reached at the place of occurrence, due

to rash and negligent driving hit two motorcycles owned by Irshad son of Ghulam Muhammad and Yousaf Khan (deceased) son of Dildar along with two other motorcars parked in the parking area of the said hotel. Due to the said accident, Muhammad Yousaf and Ghausor Rehman received serious injuries. Later, Muhammad Yousaf succumbed to the injuries in the hospital. Thus, *Murasila*, Ex. PA/1 was drafted, on the basis of which FIR *ibid* Ex. PA was registered against the accused/respondent at PS concerned.

3. Upon arrest of the accused/respondent and subsequently on completion of the investigation, complete *challan* was submitted against him before the Court of learned Sessions Judge Malakand, where at the commencement of the trial, the prosecution has examined as many as ten (10) witnesses whose statements were recorded and placed on file. On closure of the prosecution evidence, accused was examined under section

342 of the Code of Criminal Procedure ("Cr.PC"). He denied the charges, claimed innocence and stated to have falsely been implicated in the case.

4. On conclusion of the trial, the learned trial Court acquitted the accused/respondent Saram vide the judgment impugned herein. Hence, these connected matters.

5. Arguments heard and record of the case was perused with the able assistance of learned counsels for the parties including learned Astt: Advocate General appearing on behalf of the State.

6. Prosecution has examined ten (10) PWs in support of its case against the accused respondent. PW-1 is Dr. Ruhullah M.O, who examined the deceased then injured Yousaf Khan and injured Ghaus-ur-Rehman in hospital Dargai. His reports regarding the two injured persons are Ex.PW-1/1 and Ex.PW-1/2, respectively.

PW-2 Muhammad Ilyas IHC registered formal F.I.R (Ex.PA) on the basis of *murasila*.

Muharrir Nazim Ali (PW-3) is the attesting witness of recovery memo Ex.PW-3/1 whereby the I.O took into possession the damaged motorcycle 125-CC owned by Irshad. He also attested the recovery memo Ex.PW-3/2 whereby the I.O took into possession the damaged Hunda 70-CC motorcycle of deceased Yousaf. He is also the marginal witness of recovery memos Ex.PW-3/3, Ex.PW-3/4, Ex.PW-3/5 and Ex.PW-3/6 whereby damaged motorcar VXR No. BA-5780 of Muhammad Zahoor, motorcar GLI No.B-1060 of Dr. Nowsherwan, motorcar XLI No. QM-796 of accused Saram and broken bumper, pieces of brake lights thereof were taken into possession respectively.

Ghaus-ur-Rehman appeared as PW-4 who deposed that he and deceased

Yousaf had come to the hotel at Toor Pul for eating fish; they were standing in the parking of the hotel when at 07:45 evening time black colour motorcar XLI No. QM-796, being driven by accused Saram, hit them with his car due to which they sustained serious injuries. This witness further deposed that the accused also caused damage to motorcycles and motorcars by striking the same with his car due to rash and negligent driving. He charged the accused for causing him injuries.

Nowsherwan (PW-5) was attracted to the spot on hearing the collision and reached there after 5/6 minutes of the occurrence. He deposed that he had seen the accused on the day of occurrence and his car was damaged due to rash driving of the accused. He charged the accused for causing damage to his car.

Muhammad Zahoor appeared as PW-6. He stated that he was busy in eating

fish in the hotel near Toor Pul when the occurrence took place resulting into injuries to two persons and causing damage to his car as well another car parked in the hotel. He, however, did not charge the accused for the reason that he had effected compromise with him regarding the damage to his car in the accident.

PW-7 is Muhammad Irshad, a co-villager of the accused. On his arrival to the spot after the accident, he saw Yousaf laying on the ground while accused Saram and another person were standing near the car.

Hazrat Yousaf (PW-8) is not eye witness of the occurrence, however, he charged the accused for causing death of his brother Yousaf Khan through rash driving.

Amir Zaman Khan Naib Subedar (PW-09) conducted investigation in the case.

Fazal Akbar IHC (PW-10) drafted *murasila* Ex.PA/1 and took into possession the damaged cars and motorcycles through recovery memos. He also prepared site-plan Ex.PB, recorded statements of the witnesses u/s 161, Cr.P.C, prepared the injury sheets of the injured persons and made addition of section 320 P.P.C in the case vide memo Ex.PW-10/3 after death of injured Yousaf Khan.

7. The learned trial Court has acquitted the accused respondent on the ground that nobody has witnessed him while driving the vehicle, however, I do not find myself in consonance with such findings of the learned trial Court keeping in view the evidence available on record. I am conscious of the fact that when an accused is acquitted by competent Court of law then there is double presumption of innocence in his favour. However, this rule cannot be applied where the findings of the trial Court are

perverse, ridiculous and are not based on proper appreciation of evidence. In this regard wisdom can be derived from the judgments *Ghulam Sikandar and another V/s. Mamaraz Khan and others (PLD 1985 SC 11)*, *Khadim Hussain V/s. Manzoor Hussain Shah and 3 others (2002 SCMR 261)* and *Munawar Shah V/s. Liaquat Hussain and others (2002 SCMR 713)*.

8. In the present case, the occurrence has taken place in the parking of a hotel and the crime scene narrated in the site plan clearly exhibits the high speed of the vehicle. According to the site plan (Ex.PB), the vehicle which was being driven by the accused/respondent had hit a VXR car, a GLI car, two motorcycles and also thereby caused serious injuries to two persons present on the spot. True that the site plan is not a substantive piece of evidence but the panoramic view of the crime scene based on the observations of the

Investigating Officer can be considered for the purpose of appreciating evidence. Reference can be had to "Iqbal Shah V/s. The State" (1998 P Cr. L J 1177 [Peshawar]).

9. The time of occurrence is 19:45 hours which was very promptly reported at 20:00 hours on the same day whereby the present accused/respondent was directly charged. Although the accused/respondent was not previously known to the injured witness PW-4 and other witnesses PW-5 and PW-6 who have seen the occurrence, however, in this regard the statement of PW-7 is worth perusal as, according to him, the accused Saram is his co-villager and was known to him. Prosecution has examined Ghaus-ur-Rehman as PW-4, who sustained injuries in the occurrence. This PW stated in his examination-in-chief that:

حلفاً بیان کیا کہ بروز وقوعہ میں ہمراہ یوسف خان (متوفی) مچھلی کھانے کی غرض ہوٹل واقع طور پل موٹر سائیکل کے ذریعے گئے تھے۔ موٹر سائیکل

پارکنگ میں کھڑی کر کے مچھلی پکنے کے انتظار میں پارکنگ میں کھڑے تھے کہ اس دوران بوقت تقریباً 07:45 شام ویلا سا کھوٹ کی طرف سے ایک موٹر کار برنگ کالا نمبر QM-796 از قسم XLI جس کی ڈرائیونگ ملزم سارم کر رہا تھا، آتے ہوئے ملزم سارم نے مجھے اور یوسف خان کو ٹکڑا ماری۔۔۔۔۔

Nowsherwan (PW-5) stated in his examination-in-chief that:-

میں 5/6 منٹ کے بعد جائے وقوعہ جا کر دیکھا، تو لوگوں نے مجھے کہا کہ یہ باچہ ڈرائیور کا بیٹا ہے جس کا نام سارم ہے۔ اور میں نے وقوعہ کے دن ملزم کو دیکھا تھا۔

Muhammad Irshad (PW-7), who is co-villager of the accused, deposed that:-

جب میں جائے وقوعہ آیا تو یوسف نامی شخص زمین پر پڑا ہے اور گاڑی کے ساتھ ملزم سارم اور دیگر شخص کھڑا تھا۔

During examination u/s 342, Cr.P.C, the accused was confronted with a question regarding custody of the vehicle. The relevant question and answer are reproduced for the sake of convenience.

س: یہ بات شہادت میں ہے کہ بعد ازاں ایکسڈنٹ شدہ موٹر کار جو کہ تم ملزم کی ملکیت تھی، تم ملزم کو باغذ رسید Ex.PW-9/2 حوالہ کیا گیا، اس بارے تم کیا کہتے ہو؟

ج: یہ غلط ہے۔ دراصل موٹر کار میری والد کی ملکیت تھی اور میرے والد کو حوالہ ہوئی تھی۔ رسید پر پولیس نے میرا جعلی دستخط ثبت کرایا ہے۔

Attested copy of order dated 22.04.2019 passed by learned Judicial Magistrate, Dargai, is available on the record which transpires that the present accused had applied for custody of the vehicle on *superdari* by dint of his claim being owner and last possessor of the motorcar. Pursuant to the said order, the motorcar No. MQ 796/ Islamabad was handed over to accused/respondent vide receipt dated 22.04.2014 which is available on record as Ex.PW-9/2. In view of the above referred evidence, the prosecution has been able to prove that PW-4 had sustained injuries while Yousaf Khan had died as a result of the accident which had happened by the car of accused/respondent. The doctor who have examined the injured and the deceased has appeared as PW-4 and confirmed the death of Yousaf Khan and injuries on the body of the injured victim. However, the record is not clear that the occurrence had taken place



due to rash and negligent driving of the accused respondent. The word '**rash**' as defined in Advanced Law Lexicon (5th Edition) means '*acting without due consideration or regard to consequences*' while the word '**negligence**' has been defined as '*failure to use the care that a reasonable and prudent person would have used under the same or similar circumstances*'. However, for reaching at a fair and just conclusion, all the surrounding or attendant circumstances must be taken into account which may affect the standard of care reasonably required in a particular case. The close perusal of the testimony of the PWs in the present case though sufficient to establish that the accused respondent was driving the car at the relevant time but it is not convincing enough to prove that he was driving the car rashly and negligently. In such circumstances, the said act of the accused respondent amounts to *Qatl-i-Khata*

as defined and explained u/s 318 of the Pakistan Penal Code (PPC) and he cannot be held guilty of the offence u/s 320 P.P.C.

10. The scheme of culpable homicide not amounting to murder which is indeed *Qatl-i-Khata* has been provided u/s 318, 319 and 320 P.P.C. For ready reference the said provisions are reproduced as under:-

“318. Qatl-i-khata. Whoever, without any intention to cause the death of, or cause harm to a person, causes death of such person, either by mistake of act or by mistake of fact, is said to commit *qatl-i-khata*.

319. Punishment for qatl-i-khata.- Whoever commits *qatl-i-khata* shall be liable to *Diyat*.

Provided that, where *qatl-i-khata* is committed by any rash or negligent act, other than rash or negligent driving, the offender may, in addition to *Diyat*, also be punished with imprisonment of either description for a term which may extend to five years as *ta'azir*.

320. Punishment for qatl-i-khata by rash or negligent driving. Whoever commits *qatl-i-khata* by rash or negligent driving shall, having regard to the facts and circumstances of the case, in addition of *Diyat*, be punished

with imprisonment of either description for a term which may extend to ten years”.

Bare reading of the above provisions would reveal that the essential and basic punishment u/s 319 P.P.C is *Diyat* only, however, according to the proviso to said section when the said act of *Qatl-i-khata* is result of rash and negligent act other than rash and negligent driving then the accused, if found guilty, shall be punished, in addition of *Diyat*, with imprisonment which may extend to five years. Similarly, if *Qatl-i-khata* is committed with rash and negligent driving then the convict, in addition of *Diyat*, may also be punished with imprisonment which may extend to 10 years u/s 320 P.P.C. Thus, the rationale behind the aforesaid three provisions of law is that even if the accused is charged for rash and negligent act thereby causing *qatl-i-khata* of a person and the prosecution could not

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establish the element of rash and negligence in the act or omission of the accused then the accused will not be entitled to acquittal but he may be held guilty of the offence of *Qatl-i-khata* as provided u/s 319 P.P.C. I am also conscious of the fact that the accused at the trial was charged u/s 320, P.P.C and his conviction u/s 319 P.P.C at appellate stage would obviously amount to alteration in his charge, however, this occasion has been taken care of by section 237, Cr.P.C which empowers the Court to convict an accused for an offence although for which he was not charged. The only exception to this rule is that for offence of which the Court is convicting the accused should not be greater than the offence for which he was charged. In this regard reliance is placed on

"Jehanzeb Khan V/s. The State" PLD 1963

(W.P) Peshawar 145.

11. Upshot of the above discussion is that the evidence on record discloses the offence of accused respondent punishable u/s 319, P.P.C and the learned trial Court has reached at a wrong conclusion by acquitting him in the case. Resultantly, both these connected criminal appeals bearing No. 124-M and 127-M of 2017 are allowed and accused/respondent Saram son of Bacha is convicted under section 319 PPC to pay *Diyat* to the legal heirs of deceased Yousaf Khan son of Dildar Khan. He is also convicted u/s 337-G PPC and sentenced to pay *Daman* of an amount of Rs.300,000/- (rupees three lacs) to injured Ghausor Rehman son of Sher Zaman. Regarding the said quantum of *Daman*, the injured Ghausur-Rehman has not produced any certificate or document regarding the expenses incurred by him on his treatment, however, keeping in view the injury on his body i.e complete fracture of right femur at shaft region and the

anguish caused to him due to the said accident, the amount of Rs.300,000/- appears to be an appropriate amount of *Daman* payable to him. The accused/respondent be taken into custody and may be kept in Jail until the payment of *Diyat* and *Daman*. However, he may apply to the learned trial Court for his release on bail in terms of sections 331/337-Y P.P.C.

12. Above are the reasons of my short order of the even date.

Announced
Dt. 12.09.2019


JUDGE

Office
23/9/18
WR