

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Jail Cr.A. No.163-P/2023

Mst. Shakira wife of Habib Ullah,
r/o Sawal Dher District Mardan.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>Mr. Shakil Ahmad Khan, Advocate.</u>
For State :-	<u>Mr. Muhammad Nisar AAG.</u>
Respondent No.2.	<u>in person.</u>
Date of hearing:	<u>01.06.2023</u>

JUDGMENT

ISHTIAQ IBRAHIM, J.- This Jail Criminal Appeal, filed by Mst. Shakira, the appellant, is directed against the judgment dated 05.12.2022, passed by learned ASJ/Judge Model Criminal Trial Court, Mardan, whereby the appellant having been found guilty of committing the *Qatl-e-Amd* of Mst. Marjina and Azkan, has been convicted under section 302 (b) PPC and sentenced to imprisonment for life as *Ta'azir* on two counts and to pay Rs.4,00,000/- as compensation under section 544-A Cr.P.C., to legal heirs of the deceased and in default thereof to further undergo six months simple imprisonment, vide case FIR No.78 dated 16.01.2019, registered under sections 302/34 PPC, at Police Station Jabbar, District Mardan. Benefit

of Section 382-B Cr.P.C., has been extended to the appellant.

2. The prosecution's case as per First Information Report (FIR) Exh.PA is that on 16.01.2019 at 1900 hours, Kiramat Ullah complainant (PW.12), in company of dead bodies of his daughter, namely, Mst. Marjina and grandson, namely, Azkan aged 2/3 years, reported to Abdul Sattar Khan SI (PW.11) in Casualty Hospital Mardan to the effect that on 16.01.2019 he was present in his house, situated in Sawal Dher Mardan, when received information about murder of his daughter and grandson named above in the house of Habib Ullah (acquitted co-accused), on which he rushed to the spot where he learnt that her deceased daughter and grandson had come to the house of Habib Ullah for *Khatmul Quran*, where they were done to death by Mr. Shakira (appellant) with firearm. He alleged that the incident is witnessed by Mst. Madiha and other inmates of the house. His report was recorded into the shape of Murasila Exh.PA/1 on the basis of which FIR Exh.PA was registered against the appellant and co-accused Habib Ullah.

3. On completion of investigation challan was submitted against both the accused. After facing regular trial, accused Habib Ullah was acquitted while

appellant was convicted and sentenced as mentioned in the initial paragraph of this judgment, hence, this appeal.

4. During arguments it came to limelight that on 13.06.2019 when the case was fixed for framing of charge, the appellant submitted an application before the learned Trial Court that she being suffering from mental disorder, she be examined through Standing Medical Board. The learned trial Court instead of allowing her request, placed on file the application with the observation the appellant will be medically examined at proper time, either on the request of learned defence counsel or APP for the State and framed charge against the appellant, where question **“Do you plead guilty to the charge?”** was replied by the appellant in the following words:-

“Yes I plead my guilt. I have committed the offence but **at the time of commission of offence I had lost my senses**. Moreover, I was apprehending death at the hands of deceased Mst. Marjina, therefore, I committed the offence due to said apprehension.”

Stance of the appellant regarding her mental illness is also manifest from her reply to the charge but the

learned trial Court despite that, invited the prosecution's evidence and proceeded with the trial.

5. The matter does not end here; on 30.11.2019 learned counsel for the defence once again submitted an application for postponement of proceedings against the appellant due to her mental illness under section 465 Cr.P.C. Notice of the application was given to the State and case was fixed for arguments on the said application for 14.12.2019, nevertheless, no order was passed thereafter on the application, rather the trial against the appellant was concluded and she was ultimately convicted and sentenced.

6. The claim of mental illness of the appellant has been categorically admitted by complainant Kiramat Ullah (PW.12) in his examination in chief in the following words:-

“Stated that Mst. Marjina deceased was my daughter and deceased Azkan was my grandson. I was informed by my son Amanat Gul through mobile that his (Amanat Gul's) wife and minor son have been murdered by Mst. Shakira, **who is mentally retorted.**”

7. Even at this stage when the complainant himself admitted the mental illness of the appellant; the learned Trial Court did not bother to refer the appellant to the Standing Medical Board for

examination and thereafter to proceed with the case in accordance with law, rather opted to conclude the trial without adverting to the provisions of section 465 Cr.P.C. which provides that if any person before a Court of Sessions or a High Court appears to the court at his trial to be of unsound mind and consequently incapable of making his defence the court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case and the trial of the fact of unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the court. In this case despite repeated requests of the appellant regarding her mental incapacity as well as admission of complainant about illness of the appellant, the mandatory provisions of section 465 Cr.P.C. were not complied with. The Hon'ble Supreme Court while dealing with identical controversy in case titled, **“Sirajuddin Vs Afzal Khan and another” (PLD 1997 Supreme Court 847)** has held that:-

“Whenever question of insanity is brought to the notice of the court it shall satisfy itself in the manner provided under the law as to whether the person is capable of understanding the trial and defending himself. Medical evidence is

of utmost importance for such satisfaction”.

In the recent past the Hon’ble Supreme Court in its authoritative judgment rendered in case titled, **“Mst. Safia Bano and another Vs Home Department Government of Punjab through Secretary and others” (PLD 2021 Supreme Court 488)**, after elaborate discussion on section 84 PPC and sections 464 and 465 Cr.P.C. and referring to precedent settled by the Hon’ble Supreme Court in the past, has answered questions ***“How should the trial court deal with the claim that due to mental illness, an accused is incapable of making his/her defence? and “Whether the trial court can form a prima facie subjective view regarding the incapability of the accused to make his/her defence without seeking the opinion of the medical expert?”*** in the following manner:-

“Once the court has formed a *prima facie* tentative opinion, that the accused may be incapable of understanding the proceedings of trial or make his/her defence, **it becomes obligatory upon the court to embark upon conducting an inquiry to decide the issue of incapacity of the accused to face trial due to mental illness.** Medical opinion is sine qua non in such an inquiry. For this purpose, the Court must get the accused examined by a

Medical Board, to be notified by the Provincial Government, consisting of qualified medical experts in the field of mental health, to examine the accused person and opine whether accused is capable or otherwise to understand the proceedings of trial and make his/her defence. The report/opinion of the Medical Board must not be a mere diagnosis of a mental illness or absence thereof. It must be a detailed and structured report with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment and insight. The head of the Medical Board shall then be examined as Court witness and such examination shall be reduced in writing. Both the prosecution and defence should be given an opportunity to cross-examine him in support of their respective stance. Thereafter, if the accused wishes to adduce any evidence in support of his/her claim, then he/she should be allowed to produce such evidence, including expert opinion with the prosecution given an opportunity to cross-examine. Similarly, the prosecution may also be allowed to produce evidence which it deems relevant to this preliminary issue with opportunity given to the defence to cross-examine. It is upon the

consideration of this evidence procured and adduced before the Court that finding on this question of fact i.e. the capability of the accused to face trial within the contemplation of sections 464 and 465 Cr.P.C. shall be recorded by the Court.”

8. Deriving wisdom and placing reliance on the judgments (supra) of the Hon’ble Supreme Court, we without dilating upon merits of the case, set-aside the conviction and sentences of the appellant recorded by the learned trial court vide judgment dated 05.12.2022, and remand the case to the learned trial Court with direction to conduct an inquiry regarding mental illness of the appellant after examining her through Standing Medical Board consisting of qualified medical experts in the field of mental health, who shall opine whether the appellant is capable or otherwise to understand the proceedings of trial and make her defence. The head of the Medical Board shall then be examined as Court witness and both, the prosecution and defence, should be given an opportunity to cross-examine him in support of their respective stance. Thereafter, if the appellant wishes to adduce any evidence in support of her claim, she should be allowed to produce such evidence. Similarly, the prosecution may also be allowed to produce evidence which it deems relevant to the controversy with

opportunity given to the defence to cross-examine prosecution evidence. After considering the evidence procured and adduced, the learned trial court shall determine fact i.e. the capability of the appellant to face trial and proceed with the case in accordance with law. During proceedings before the learned trial court, the appellant shall be treated as an under trial prisoner.

9. The Additional Registrar (Judicial) of this court, after obtaining permission of Hon'ble the Chief Justice, shall send copy of this judgment to the learned Sessions Judges of each District of the Province of the Khyber Pakhtunkhwa, who shall onward circulate copy thereof amongst all the criminal Courts/Special Courts in his/her concerned District for guidance and strict compliance in the future.

Announced:

01.06.2023.

M.Siraj Afridi CS

JUDGE

JUDGE

**DB of Hon'ble Mr. Justice Ishtiaq Ibrahim; and
Hon'ble Mr. Justice Sahibzada Asadullah**

