NLR.

IN THE PESHAWAR HIGH COURT, PESHAWAR

SEAL OF HIGH COURT PESHAWAR
عدالت عالیہ
پشاور

Cr.A No. 646-P/2012

Nabi Gul S/o Wazir Gul
R/o Solay Kamar, Rajjar, District Charsadda.....**Appellant**

VERSUS

1. The State
2. Sahibzada S/o Gul Muhammad
   R/o Faqir Abad, Solay Kamar, Rajjar, Charsadda.....**Respondents**

Appeal u/s 410 Cr.P.C against the order/ judgment dated 13.12.2012 of the learned Additional Sessions Judge-V, Charsadda whereby the appellant has been convicted vide FIR No.1612 dated 19.10.2012 u/s 302, 201, 203 read with 13-A.O of P.S Charsadda, and the appellant convicted and sentence u/s 302-B PPC to undergo life imprisonment with fine of Rs.100000/- or in default shall further undergo 6 months S.I and u/s 203 to undergo 1 year R.I, whereas u/s 201 he was acquitted all the sentences shall run concurrently, the benefits of Section 382-B Cr.P.C is also extended to the appellant.

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JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

Cr.A.No.646/2012

JUDGMENT

Date of hearing: 16th November, 2015.

Appellant: Nabi Gul by: Mr.Jalaluddin Akbar Azam Gara, Advocate.

Complainant(Sahibzada)by: Mr.Ghulam Mohyuddin Malik, Advocate.

State represented by : Syed Sikandar Hayat Shah, AAG

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NISAR HUSSAIN KHAN, J.- *Instant appeals have been laid before me under Section 429 of Code of Criminal Procedure, 1898, on account of difference of opinion having arisen between my two learned brothers, Justice Qaisar Rashid Khan and Justice Assadullah Khan Chammkani on the question whether the conviction of appellant Nabi Gul recorded by the trial court under Section 302(b) PPC & 13 A.O. in case FIR No. 1612, dated 19.10.2011 of P.S. Charsadda, District Charsadda, be maintained or set aside.*

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2. Resume of facts of the prosecution case is that appellant Nabi Gul initially lodged report that he on 19.10.2011 at 6.30 p.m. was on his way back home in company of his deceased wife on motor cycle from Charsadda Bazar. When they reached at the place of occurrence, an unknown person called him from sugarcane field to stop. He passed the speed-breaker, when the unknown assailant fired shots from the back which hit his deceased wife, who succumbed to the injuries at the spot and he luckily escaped. He had no enmity with anyone. On his report, case was registered against unknown assailant. In the meanwhile, Sahibzada, father of the deceased, charged the appellant in his statement under section 164 Cr.P.C. on 22.10.2011. Pursuant thereto, appellant was arrested and on completion of investigation, was sent for trial. The learned trial court after recording prosecution evidence, convicted the appellant under Section 302 (b) PPC and sentenced him to life imprisonment with payment of Rs.one lac as compensation in terms of Section 544-A Cr.P.C., to the legal heirs of deceased or in default to undergo six months S.I. He was also convicted under section 203 PPC and

sentenced to one year R.I. with benefit of section 382-B Cr.P.C., vide order dated 13.12.2012.

3. His appeal against conviction was heard by a Division Bench of this court and my learned brother Justice Qaisar Rashid Khan agreed with the appraisal of evidence and findings of the trial court, thus maintained the impugned judgment of conviction. Whereas my learned brother Assadullah Khan Chammkani did not agree and passed judgment of acquittal, sequel to his own reasoning. On account of difference of opinion about guilt of the appellant, the appeal has been referred by Honourable the Chief Justice, to this Court.

4. Before embarking on discussion of the evidence and its legal implications, it would be appropriate to elucidate the scope of section 429 Cr.P.C. which for ease of reference is reproduced as follows:-

> *"Procedure where Judge of Court of Appeal are equally divided. When the Judge composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the*

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same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

Similar language has been employed in Section 378 Cr.P.C. with only exception of omission of word "appeal". It is manifestly provided in both the Sections of law that when case is laid before another Judge, after difference of opinion between the Division Bench hearing the appeal, such Judge after hearing the case (if any) shall deliver his opinion and order or judgment shall follow such opinion. It envisages that the judgment of the Referee Judge shall be final judgment of the court. Question as to whether the case be heard afresh or not, depends on the nature of the case, for forming an opinion. It being a criminal case and varying findings of both the Honourable Judges are based on appreciation of the evidence, so the case may not be decided without considering the material pieces of evidence, for formation of a definite opinion. In view of this legal position, whole case is re-opened before the Referee Judge who after considering the evidence and its legal import, independently forms his opinion,

regardless of the dissenting opinions of the two honourbale Judges. In this backdrop, case was heard afresh.

5. Learned counsel for appellant argued that appellant was implicated by father of the deceased, after three days of the occurrence in a statement under section 164 Cr.P.C. who himself was not eye-witness of the occurrence; that bonafide of the appellant is apparent, when he himself brought dead body of the deceased to the hospital and lodged report; that the motive alleged by father of the deceased is a far-fetched theory; that Post-mortem report was received by the I.O. on 25.10.2011 after 6 days of the occurrence which creates serious doubt in the medical report; that clothes of the deceased do not bear any charring marks; that F.I.R. can only be proved by its informer; that alleged crime weapon was recovered on 26.10.2011, not from the possession of the appellant but from one Gul Rehman who has not been examined; that recovery has not been effected from the house of the appellant; that distance between the place of blood and that of empties is incompatible; that case of the prosecution is mainly based on the circumstantial evidence, chain of

which has not been successfully established; that the seat of injuries squarely corresponds with the entries of the site plan with reference to the presence of the assailant because deceased was seated cross-legged facing towards left of rider of motorbike. To augment his arguments, he placed reliance on Muhammad Hussain Vs The State (2011 SCMR – 1127), Muhammad Shah Vs The State (2010 SCMR – 1009) ,Rahat Ali Vs The State (2010 SCMR – 584) and Muhammadullah Vs The State (PLD -2001 Peshawar-132).

6. Conversely, learned counsel for complainant contended that appellant has admitted his presence with the deceased; that the proposed position of the victim, as alleged by the defence, has not been brought in the evidence; that allegation of tempering with the medical evidence is an after thought story, which has not been challenged at the proper stage; that charring marks, as pointed out in the post-mortem report, do not occur from the distance as shown by the appellant in the initial site plan; that pistol was recovered on the pointation of the appellant, the FSL report whereof is positive vis-à-vis the empties recovered from the scene of

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occurrence; that recovery effected on pointation of the accused is admissible in evidence under Article 40 of the Qanoon-e-Shahadat Order, 1984, for which compliance of Section 103 Cr.P.C. is not necessary. Learned counsel for the complainant to reinforce his submissions, placed reliance on Mir Muhammad Vs The State(1995 SCMR – 614), Muhammad Arshad Vs The State (1992 SCMR 1187), Muhammad Ishaq Vs The State (2009 SCMR – 135) and Gul Muhammad Vs The State (2011 SCMR – 670)

7. Learned Additional Advocate General adopted the arguments advanced by the learned counsel for the complainant.

8. Brief and relevant facts of the case are that deceased, wife of the appellant, sustained fire arm injuries on her back of the chest, when she was riding on the rear seat of the motor cycle and the appellant was on the driving seat. She succumbed to the injuries at the spot. She was shifted to the hospital by the appellant where he made a report to ASI at 7.00 P.M. charging unknown assailant for murder of his

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deceased wife. Time of occurrence was shown as 6.30 P.M. whereas distance between place of occurrence and that of the Police Station is 2/3 K.M. It is alleged in the report that appellant and the deceased were riding together on the motor cycle and were on their way back home from Chrsadda Bazar. When reached at the place of occurrence, some unknown person called him from the sugarcane field to stop. He crossed the speed-breaker when the said unknown assailant fired from behind which hit the deceased and she died on the spot. While he himself luckily escaped. He has stated that he has no enmity with anyone. On registration of the case, investigation was initiated during which site plan Ex.PB was initially prepared on his pointation. The blood stained pebbles and earth P/6 & P/7 were taken into possession, vide recovery Memo Ex.PW.2/1 from the venue of occurrence. Similarly, the motor cycle P/8, vide Ex.PW.2/2 was also taken into possession. Two empties of 30 bore pistol P/8 were taken into possession by the I.O. from the place of occurrence. Whereas blood stained garments, consisting of one shirt P/2, one covering sheet P/3 and trousers P/4 all stained with human

blood, containing corresponding cut marks, were taken into possession vide Ex.PW.2/4. All these recoveries were effected on 19.10.2011, the date of occurrence. One washed brown colour Burqa (veil) P/1 having bullet marks was taken into possession, vide Ex.PW.5/1 on 24.10.2011, produced by one Wazir Gul. On 22.10.2011, when investigation was in progress, Sahibzada, father of the deceased, charged appellant for her murder. Motive alleged by him was that appellant had illicit relations with another girl, on which he used to quarrel with deceased and on her protest, she was threatened of dire consequences. On the basis of this statement, appellant was arrested on 24.10.2011. On 25.10.2011, he was given in police custody for three days by the Judicial Magistrate which was to expire on 28.10.2011. In the meanwhile, appellant on 26.10.2011 led the police party to recovery of 30 bore pistol, crime weapon P/2, effected vide recovery Memo Ex.PW.8/1.

9. According to the recovery Memo, crime weapon was handed over to Saifullah, resident of Rajar, Amir Abad, by the appellant after the occurrence. He was provided the facility of phone to contact said Saifullah who in turn

replied that the said 30 bore pistol is at his home. But since he was in Lady Reading Hospital, Peshawar, in connection with treatment of his sister, so he himself was not available at home, therefore, the said pistol shall be provided by his maternal uncle Gul Rehman. Accordingly, the appellant led the police party to the house of said Saifullah at Rajar where Gul Rehman, as per direction of Saifullah produced 30 bore pistol from the house of Saifullah which was identified by the appellant as the crime weapon, used by him in murder of his wife. Pistol was taken into possession in presence of marginal witnesses. The pistol produced by appellant and the empties recovered from the place of occurrence were sent to the FSL, report Ex.PZ/1 whereof is in positive which states that both empties were fired from the same pistol. Similarly, all the clothes and blood stained pebbles and earth, according to the FSL report Ex.PZ, were stained with human blood of the same group.

10. According to Post-mortem report, deceased sustained three firearm injuries on the back of her chest which all bore charring marks, causing exit on the upper left

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quadrant and the other exit is on abdomen. The pictorial describes entry wounds which apparently seem to be within the circumference of 3 to 4 inches whereas the exit wound No.3 is on the upper part of the abdomen, just below the ribs. These injuries, apart from the injuries carrying charring marks, are of paramount importance, in circumstances of the case which shall be taken into consideration with reference to the other pieces of circumstantial evidence.

11. Admittedly it is a case which hinges on the circumstantial evidence because there is no eye witness account against the appellant. He himself was witness of the occurrence who reported the matter initially against unknown assailants but during the investigation, he was relegated as an accused and was arrested. Different pieces of circumstantial evidence which go against the appellant are: his company with the deceased at the time of murder; P.M. report which is incompatible with the site of the alleged assailant vis-à-vis inter se distance and the recovery of the crime weapon on his pointation, followed by positive FSL report. And last but not the least an infant female baby in the

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lap of the deceased who remained unscathed which factum has escaped notice of the trial court.

12. First and the foremost aspect of the case as a circumstantial evidence, is presence of the appellant in company of the deceased, which at no stage had ever been denied. So he is the only person who could reasonably and satisfactorily explain and provide the detailed account of events leading to murder of deceased. When version put forth by the appellant is found unreasonable, unsatisfactory and incompatible with the circumstances leading to the murder of the deceased, it would lead to a strong inference of his culpability for the crime.

13. On appraisal of evidence, initially collected, in the light of report of the appellant, one finds it too difficult to accept his version as sacrosanct. He has shown presence of assailant at Point No.4 of the site plan, wherefrom allegedly, firing was made while deceased was at Point No.2 where she was hit and fell at Point No.2-A. Inter se distance of Point No.2 & 4 is five paces, as per foot notes of the site plan Ex. PB which turns out to be 11/12 feet. The entry wounds bear

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charring marks. Blackening or charring cannot be caused from such a long distance, that too with a fire shot of pistol. According to Medical Jurisprudence, charring marks, with the pistol's fire can be caused from a distance of six inches. This piece of evidence belies his outset version which raises eye-brows. Another important aspect of the case is that the occurrence took place in front of the house of one Lal Muhammad but none of the inmates of the house have been called upon for help by the appellant. Had the occurrence been taken place in the mode and manner, as alleged by the appellant, he might have shouted for help and someone might have come from the house of Lal Muhammad, as it were early hours of the night (Sham qazavela) but strangely appellant single handedly managed to shift the deceased to the Hospital. Thirdly, when the deceased was hit on moving motor bike, she, apart from firearm injuries, must have received some bruises, abrasions or scratches due to her sudden fall on the ground but there is no such injury as per medical report, which suggests that she was still either sitting or standing when hit. Fourthly as per entries of site plan,

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deceased and the appellant were having a female baby Saria aged about 1-1/2 years in their company at the time of occurrence but there is no reference of any injury to the baby or even her presence in the first information report. Fifthly sugarcane field, wherefrom allegedly assailant called to stop, is lying on left side of road when appellant was riding motorcycle while, empties of crime pistol have been recovered from right side of road. In view of all these material facts, the initial report lodged by the appellant does not satisfy the judicial conscience about its veracity and truthfulness which leads the court to examine the allegations of Sahibzada, father of the deceased, levelled in his statement under section 164 Cr.P.C., on basis of which appellant has been convicted.

14. Admittedly, Sahibzada, father of deceased, is not an eye-witness of the occurrence and the whole case rests on the circumstantial evidence. The deceased at the time of occurrence was in the company of appellant. He was not only supposed but was legally obliged to plausibly and satisfactorily explain her unnatural death. The version

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advanced by him being unsatisfactory in the light of attending circumstances of the case is not believed. It is consistent law that when deceased is lastly seen in the company of the accused, and soon thereafter the death occurs, he is bound to explain time, place and mode of departure or separation of deceased from the accused. If he fails to explain, it is inferred that he is involved in the murder. Instant case is examined on the same principle because undoubtedly the deceased was not seen but admittedly remained in the company of the convict/appellant and thus, case of the prosecution rests on more stronger footing than mere last seen evidence. In case of Allah Ditta vs. The Crown (1969 SCMR – 558) deceased Mst. Sairan was seen in the company of Allah Ditta before entering into the Jungle and thereafter her dead body was found. He could not reasonably explain her separation in the Jungle so it was held that it was none else but Allah Ditta who had committed murder of the deceased and was consequently convicted. It is pertinent to mention that in that case, except last seen evidence of the deceased being in company of the convict and thereafter recovery of her dead body from the

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Jungle, there was no other evidence and the conviction was maintained by august Supreme Court.

15. With the passage of time law developed and principle for appraisal of circumstantial evidence was re-set and it was laid down that one piece of circumstantial evidence must be corroborated by the other, forming a chain, one end of which must touch the dead body of the deceased and the other end around the neck of accused. It is a rule of prudence, for safe administration of criminal justice.

16. When instant case is analysed on the rule stated above, all pieces of circumstantial evidence connect the accused with the commission of crime. First one is the medical evidence which depicts charring marks on the entry wounds which can only be caused from a close proximity of not more than six inches with pistol. Charing cannot be caused from the place of the assailant, shown by the appellant in the initial site plan. Secondly, absence of scratches, abrasions or bruises on the dead body of the deceased suggests that she was hit in a static condition. Had

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firing been made on moving motor cycle, she would have knocked down with a jerk and her jolted-fall would have certainly caused serious injuries. And last but not the least, infant baby might certainly have been in the lap of the deceased lady because appellant was riding the motor cycle. Had she been hit by any assailant other than the appellant, bullet causing wound No.3, might have hit the baby in her lap because a merciless assailant would have not taken care of safety of baby. Assuming that divine will prevailed and the baby escaped the bullet injury but even then she might have sustained injuries by falling on the ground from a moving motorcycle. There is no such indication of any injury nor is there any reference in the first report as to what happened with the baby. All these circumstances suggest that motor cycle was stopped, baby was taken from the lap of the deceased and she was fired at, from a close range from behind. Moreso, since appellant himself was the eliminator, so he did not call for any help of the house-mates of Lal Muhammad, so that his intrigue may not be exposed.

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17. Argument of learned defence counsel that deceased was sitting on motor cycle facing towards west and in cross-legged position, so she sustained injuries on her back from Point No.4. Even if this proposition is conceded, it hardly satisfies the remaining two questions that how baby escaped from the bullet causing exit in the abdomen and if so then what happened with the baby when she fell on the ground from moving motorcycle? Most importantly, how the charring marks could be caused from point 4 from a distance of 11/12 feet. He was supposed to reasonably explain the murder of deceased, when she was in his company at the time of occurrence. But when confronted with, he instead produced the crime weapon with which he committed the murder of deceased. All subsequent objections on behalf of appellant are just after thought. One fails to comprehend any other hypothesis for fall and failure of appellant's fictitious story except the one that he himself was involved in the crime. In view of unsatisfactory and unbelievable explanatory version of the appellant, he cannot escape the consequences.

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18. The inference of guilt drawn from the unsatisfactory explanation of the appellant, stand corroborated by recovery of crime weapon at his pointation. True that the crime weapon was recovered from the house of his friend Saifullah, through Gul Rehman, his maternal uncle and it is also a fact that neither Gul Rehman nor Saifullah have been examined by the prosecution. But it is equally important that Saifullah or for that matter, Gul Rehman being the friends of appellant were not supposed to support the prosecution version, so were not examined. Whereas they were not produced even by the appellant, in his defence, as well. Had the police planted a fake recovery of crime weapon, it could have been shown at the instance of the appellant from anywhere in the field, road, his house or anywhere else. Since crime weapon was in the knowledge of the appellant and it was he who led the police party to the house of Saifullah wherefrom crime weapon was recovered. It is admissible in evidence as a discovery by virtue of Article 40 of the Qanoon-e-Shahadat Order, 1984. The pistol was sent to the FSL which matched with the crime empties recovered from the venue of

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occurrence. The empties were recovered on 19.10.2011 and the crime weapon was recovered at the instance of appellant on 26.10.2011. Both were received in the FSL on 3.11.2011. There is no inordinate delay in despatch of the empties and the crime weapon which may create any doubt in the report of the FSL because both articles were sent to the FSL on 26.10.2011, vide application Ex.PW.9/2 on 7th day of the occurrence and first day of the recovery of crime weapon. This was the only possible evidence which could have been led by the prosecution to establish appellant's guilt forming a chain of circumstantial evidence, connecting the appellant with the crime.

19. In Allah Dittoo Vs The State (1968 SCMR – 378) conviction of the appellant was maintained by august Supreme Court on the basis of circumstantial evidence consisting of last seen evidence; recovery of dead body on his pointation and blood stained earth and marks of hatchet injury on the deceased, recovery of slippers from the well and the shirt and loin cloth on the person of deceased which were stained with human blood.

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20. In Bilmoria alias Muhammad Hussain Vs The State (P L D 1958 Supreme Court – 313) conviction was maintained which was recorded on the basis of circumstantial evidence of recovery of robbed articles from possession of the accused on the fourth day of murder of deceased, though there was no direct ocular account. In Khurshid Vs The State (PLD 1996 Supreme Court – 305) it was held that when the place of occurrence is a place where no witness was available and the accused had the exclusive knowledge about incident, simplicitor denial of the accused will not be sufficient to nullify the circumstantial evidence of the nature which directly connects him with the commission of offence charged with. Rather he should raise plea of the nature which on being tested on the touch stone of probabilities, warrants reasonable hypothesis of his innocence. In this case too, there was no direct evidence except last seen evidence of the deceased in the company of the convict, recovery of dead body of deceased and crime weapon on the pointation of convict and appeal was dismissed by maintaining the conviction. In case titled The State vs Manzoor Ahmad, (P L D

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1966 Supreme Court - 664) ***appeal against acquittal was allowed and accused was convicted on the basis of circumstantial evidence. The observations of Honourable Supreme Court are as follows :-***

> ***"It is no doubt true that in a case resting wholly on circumstantial evidence the Court must, as observed by Wills in his Treatise on Circumstantial Evidence, remember that the "processes of inference and deduction are essentially involved-frequently of a delicate and perplexing character-liable to numerous causes of fallacy." Mere suspicion will not be sufficient to justify conviction. Before the guilt of the accused can be inferred merely from inculpatory circumstances those circumstances must be found to be incompatible with the innocence of the accused and "incapable of explanation upon any other reasonable hypothesis than that of his guilt." It is also equally well settled that the circumstances sought to be relied upon must have been established beyond all doubt. But this only means a reasonable doubt, i.e. a doubt such as would assail a reasonable mind and not any and every kind of doubt and much less a doubt conjured up by pre-conceived notions. But once***

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the circumstances have been found to be so established they may well furnish a better basis for decision than any other kind of evidence. As Hewart, I.C.J. observed in the case of Percival Leonard Taylor, James Weaver & George Thomas Donovan (1) "it is no derogation of evidence to say that it is circumstantial."

21. In the case of Muhammad Amin Vs The State (2000 S C M R – 1784), appeal against conviction was dismissed by placing reliance on last seen evidence and recovery of dead body on the pointation of convict by holding that appellant has failed to furnish plausible explanation that on which point and where deceased was separated from him and he has failed to discharge the onus in view of the provision of Article 21 of the Qanoon-e-Shahadat Order, 1984. It is observed in the report that in such cases last seen evidence carries weight depending on varying degree of possibility vis-à-vis the facts and circumstances of each case. Before inferring guilt merely from inculpatory circumstances, such circumstances, must be incompatible with innocence of accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

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22. In Binyamin alias Khari and others Vs The State (2007 S C M R – 778) , conviction and sentence recorded by the trial court, maintained by the High Court, was upheld by the Supreme Court by placing reliance on last seen departure evidence. It is pertinent to mention that in this case nothing was recovered on the pointation or from possession of accused. Rather evidence of departure of deceased in the company of the accused and thereafter seen in his company as last seen evidence was believed. By discussing the evidence in light of Islamic jurisprudence, it was concluded that if circumstantial evidence appeals to logic and reason, it would be sufficient piece of evidence to connect the accused with the commission of crime and consequently, the appeal was dismissed.

23. In case of Muhammad Akhtar Vs The State (2007 S C M R – 876) conviction of the appellant was maintained by placing reliance on last seen evidence and recovery of blood stained Toki on pointation of accused. While dead body of the deceased was found lying in the fields

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of wheat crop. Since appellant could not furnish plausible explanation that on which point of time deceased separated and how he met his unfortunate death, his punishment for murder was upheld.

24. Similarly, in the case of Gul Muhammad Vs The State (2011 S C M R – 670), last seen evidence, corroborated by recovery of dead body were believed and conviction was maintained by the august Supreme Court.

25. In case of Jafar Ali Versus The State (1998 – SCMR – 2669), there was last seen evidence of the PWs who had seen the deceased in the company of accused/convict and thereafter her dead body was recovered from Khal. Appellant was arrested and he made confession before the Magistrate which was later on retracted. Evidence was believed and appellant was convicted by the trial court and his conviction was affirmed by the High Court and maintained by the august Supreme Court. It was observed that last seen evidence led in support of charge is so consistent and approximate of time is such that they are

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sufficient to connect appellant with the offence. The victim/deceased was taken by the appellant from her house and on the same evening she was found murdered after being rapped and in the intervening period she was seen in the company of convict by the PWs. In such circumstances, it was responsibility of appellant to give an explanation for the death of the baby but he failed to offer any explanation. Since last seen evidence was corroborated by confessional statement, though retracted, it was believed and he was convicted and sentence of death was maintained upto Supreme Court.

26. Brief survey of the case law manifestly demonstrates that conviction may well be recorded on the basis of last seen evidence, corroborated by other circumstantial evidence. If the deceased is lastly seen in the company of the accused and thereafter, in short span of time, his death is reported, it is bounden duty of accused to reasonably explain that on which point of time and where the deceased separated form him. It is well settled that in case of circumstantial evidence, before inferring guilt of accused,

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court must be satisfied that inculpatory circumstances are incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Because inference and deduction is a very delicate process, seriously affecting liberty and life of a person. Before making inference of guilt of an accused, the court must be satisfied that all the attending circumstances of the case or explanations advanced by the accused are incompatible on any hypothesis to his innocence. It is also a settled principle of criminal jurisprudence that the prosecution evidence must be of such character having no dent or stain of doubt. But the doubt must be reasonable one. Every pre-conceived or conjured doubt may not shatter the prosecution case because minor discrepancies not affecting the very fabric of prosecution case would not furnish a ground for acquittal of accused.

27. It is a matter of common knowledge and practice that minor discrepancies do occur in every criminal case and if one embark on searching such discrepancies, every criminal case would terminate into acquittal. Which is

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why the august Supreme Court in the case of Khurshid Vs The State (P L D 1996 Supreme Court – 305) has observed that though the courts are supposed to follow the well settled principle that accused is presumed to be innocent and prosecution is to prove its case against him beyond any reasonable doubt and where two views are deducible from the prosecution evidence, the one favouring the accused is to be followed. But deteriorating norms of the society may not lose sight of the court where eye-witnesses though available but refuse to appear in support of prosecution case, either because of fear or being won over. The approach of the courts in appraisal of evidence must be dynamic and not static. By evaluating the evidence, led by the parties in light of facts and circumstances of the case, if the court is satisfied that the person charged with the offence has committed the offence, it should record conviction though there be some technical lapses on the part of investigating agency or prosecution provided the same has not prejudiced the accused in his fair trial. It was further observed that people are losing faith in criminal judicial system for the reason that in most of the

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criminal cases, criminals get scot-free without being punished on technical grounds.

28. Reverting to the case in hand, which is to be examined in light of well entrenched aforesaid principles. The deceased was undisputedly in the company of the appellant when she was murdered., Though the report was lodged by the appellant but the same is untrustworthy and unsatisfactory because evidence collected at the initial stage and other attending circumstances of the case are irreconcilable with the appellant's version. He was supposed to come forward with a reasonable and justifiable explanation as; in what circumstances and how she met her unnatural death and his such explanation must fit in the frame of evidence collected during the investigation. In view of evidence of deceased being lastly in the company of appellant, corroborated by recovery of crime weapon on his pointation as well as positive FSL report of empties matching with the crime weapon supported by P.M. report demonstrating charring marks on the entry wounds are

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sufficient pieces of circumstantial evidence forming a chain which connect the appellant with the murder of the deceased.

29. So far as objection of learned counsel for appellant in the light of case of Muhammadullah Vs The State (PLD -2001 Peshawar-132), that unless informer of the FIR is examined, it cannot be relied upon, suffice it to say that in the said case, it was not merely that informant was not examined but other evidence was also of doubtful character like crime weapon recovered on the day of occurrence but sent to the FSL after one month and an other PW over heard fire shot from a distance of 2/3 K.M. and he rushed to the spot were not believed. Circumstances of the instant case are altogether different from the said case. The first report is treated as initial stance of the appellant which he persistently pleaded since the initial stage till his statement under section 342 Cr.P.C. Whereas prosecution case wholly rests on the circumstantial evidence i.e. last seen evidence, recovery of crime weapon on his pointation, positive FSL report, P.M. report and the conduct of the appellant in terms of Article 21

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of the Qanoon-e-Shahadat Order 1984. Thus this case cannot be appreciated in purview of Muhammadullah's case.

30. Unquestionably, FIR is a public document which has come on record from the proper custody. Documentary evidence may be proved by primary or secondary evidence in terms of Article 72 of the Qanoon-e-Shahadat Order 1984. Whereas primary evidence by virtue of Article 73 of the Qanoon-e-Shahadat Order 1984 is a document itself produced for inspection before the court. Original document was Murasila Ex.PA/1 drafted on the report of the appellant by Munir Khan, ASI, PW.3 who testified that the same was reduced into writing on the report of appellant by him on which he obtained thumb impression. It is pertinent to mention that no objection whatsoever was raised by the defence at the time of tendering the document in evidence. Thus it is sufficient compliance of the relevant provisions of the Qanoon-e-Shahadat Order 1984, by virtue of which initial report stands proved. It was initial version of the appellant which remained unchanged as observed earlier till his statement under section 342 Cr.P.C. which is very much

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reflected in his answer to Question No.11. Thus the objection is misconceived and misplaced, hence is not tenable.

31. Facts of Muhammad Hussain Versus The State (2011 S C M R – 1127) relied upon by the appellant are altogether different because P.M. report with reference to proximity of time was incompatible with the last seen presence of the deceased with the convict having two intervening days. Beside that the house wherefrom dead body was recovered, was not established to be in exclusive possession of the accused, so the appeal was allowed.

32. Similarly, Muhammad Shah Vs The State (2010 SCMR – 1009) proceeds altogether on different propositions. In light of this, learned counsel for appellant vehemently contended that when there are two views deducible from the prosecution evidence, the one favouring the accused is to be followed. This aspect has extenisively been dealt with in preceding Paragraphs. Hence the judgment relied upon by the learned counsel for appellant is not applicable to the facts of case in hand.

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33. Case of Rahat Ali Versus The State (2010 S C M R – 584) also proceeds on altogether different footing. In the said case, son of he deceased charged the appellant/convict after one month of the occurrence though they were allegedly abducted in his sight. This inordinate delay and his unnatural conduct of going to bed for normal sleep, after the occurrence was unbelievable. Beside that nothing incriminating was recovered on his pointation which could have been admissible under Article 40 of the Qanoon-e-Shahadat Order, 1984. Mere pointation of the place, without discovery of any incriminating articles being not admissible in evidence were not believed and appeal was allowed. The ratio of said case is not applicable to the facts of the instant case.

34. Learned counsel for appellant took serious exception to motive set up by father of deceased and contended that neither it was in existence nor proved at the trial. By now it is well settled law that mere absence of motive, or lack of its proof, once it is set up by the prosecution, would hardly be a ground for acquittal, if prosecution

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evidence, otherwise rings true and establishes the guilt of accused through evidence of unimpeachable character. The motive alleged by father of the decease was the strained relations of the couple due to illicit relations of appellant with a girl which was reported by the deceased to her father. By its nature, motive may be in the knowledge of husband and wife which may be disclosed to her confidant who would be none-else than her parents. If it is taken otherwise, one fails to understand as to why father-in-law will charge him for murder of his daughter who had two minor daughters. Circumstances prima facie suggest that there was something which prompted the appellant to eliminate the deceased, which is why father-in-law charged him after two days of the occurrence. In the circumstances, it is not an inordinate delay. This objection too is not tenable. In this regard reference may be made to Muhammad Saeed and 4 others Vs Haq Nawaz Khurram and 3 others (P L J 2008 – Supreme Court – 396).

35. On re-appraisal of evidence and minute consideration of all the circumstances, in light of law declared by the august Supreme Court, I am of the considered view

that appellant is responsible for the murder of the deceased and has rightly been convicted by the trial court. He has already been leniently treated in awarding of sentence of life imprisonment which in the circumstances is maintained and both appeals are dismissed.

JUDGE

Announced on
16th Nov., 2015

Sd/- Nisar Hussain Khan. J

CERTIFIED TO BE TRUE COPY
Examiner
Peshawar High Court, Peshawar
Authorised under Art. 87 of
The Qanun-e-Shahadat Act 1984
03 DEC 2015

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. No.646-P/2012

Date of hearing: ***22.04.2015***

Date of announcement: ***11.06.2015***

Appellant (s) : ***Nabi Gul*** ***Mr. Jalal ud Din Akbar-e-Azam Gar, Advocate.***

Respondent (s) : ***Sahibzad complainant by Mr. Ghulam Mohyuddin Malik, Advocate and the State by Mian Arshad Jan, AAG.***

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- My this common judgment shall dispose of the instant appeal as well as connected ***Cr.A. No.397-P/2013,*** as both are stemming out from the judgments of the learned Trial Court dated 13.12.2012, in same FIR No.1612 dated 19.10.2011, registered under sections 302/201/203 PPC, at Police Station Charsadda, whereby appellant Nabi Gul has been convicted and sentenced as under:-

Under Section 302 (b) PPC:- To undergo life imprisonment for committing the murder of his wife Mst. Fauzia and to pay

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compensation Rs.1,00,000/- to LRs of the deceased in terms of S.544-A Cr.P.C. or in default thereof to undergo 06 months S.I. further.

Under Section 203 PPC:- To undergo 01 yea R.I..

Under Section 13 Arms Ordinance, 1965:- To undergo 02 years R.I.

Benefit of S.382-B Cr.P.C. has been extended to him.

2. The prosecution case is that on 19.10.2011 at 1900 hours, Nabi Gul complainant (appellant-convict herein), in company of dead body of Mst. Fuzia, reported to local police in Charsadda hospital, that on the fateful day he alongwith his deceased wife was on the way back to home from Charsadda Bazaar on a motorbike registration No.0019-Charsadda and when reached on a metalled road near "Gonga Godar", some unknown persons called him to spot, but he did not and when he

crossed the breaker, a duly armed person, opened fire at them from behind, as a result, his wife Mst. Fuzia got his and died on the spot while he luckily remained unscathed. He did not disclose any motive or enmity behind the occurrence. Report of the complainant (appellant) was recorded in the shape of murasila Exh.PA/1 by Munir Khan ASI (PW.3). He also prepared injury sheet and inquest report of the deceased Exh.PW.3/1 and Exh.PW.3/2 and shifted her dead body to the mortuary under the escort of Maazullah Constable for postmortem examination and sent the murasila to Police Station on the basis of which FIR was registered against unknown accused.

3. Lady Dr. Roobi Mukhtiar SWMO (PW.1), conducted autopsy on the dead body of the deceased on 19.10.2011 at 0715 hours and found the following injuries on her person:-

1. Firearm inlet wound of about ¼ x ¼ inches on back of chest 3 in number at the level of 11th

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intercostals space, about 1 towards the left with 1" towards the right, 3rd towards the right 3" lateral and 1" below the above wound. Charring marks present.

2. Firearm exit wound of about ½ x ½ inches on the upper and medial quadrant of left breast about 2" medial to midline at the level of 3rd intercostals space.

3. Firearm exit wound of about ½ x 1/2 " on the left side of left edge of 9th intercostals space.

Thorax: Except right lung remaining organs of the thorax were found injured.

Abdomen: Walls peritoneum and diaphragm injured.

Opinion: According to opinion of the Medical Officer deceased died due to shock and haemorrhage caused to the vital organs in the chest cavities.

Probable time between injuries and death has been given as "Instantaneous" while between death and post mortem as "2 hours".

*M.Siraj Afridi P.S. D

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4. Liaqat Khan SI (PW.9) proceeded to the spot and prepared site plan Exhd.PB at the pointation of appellant then complainant. During spot inspection, he secured bloodstained earth and pebbles from the place of the deceased vide recovery memo Exh.PW.2/1. He took into possession 2 empties of 30 bore pistol giving fresh smell of discharge vide recovery memo Exh.PW.2/3. Vide recovery memo Exh.PW.2/2 he took into possession motorcycle No.0019-Charsadda from the accused, took into possession the last worn bloodstained garments of the deceased consisting of Qameez, Shalwar, Chadar, Banyan having corresponding cut marks, sent the bloodstained articles to the FSL result whereof is Exh.PZ. He also sent the empties to the Arm expert for analysis report whereof is Exh.PZ/1. He produced father of the deceased Sahibzada for record his statement under section 164 Cr.P.C. before the learned Judicial Magistrate, in which he charged the appellant for committing murder of his daughter. On 24.10.2011, he arrested appellant, obtained his physical

remand, interrogated him and on his pointation, recovered a 30 bore pistol as a crime weapon from the house of Gul Rehman, which was produced by said Gul Rehman. He took into possession the pistol vide recovery memo Exh.PW.8/1 and prepared sketch of place of recovery Exh.PW.9/5. He also prepared pointation memo on the pointation of accused Exh.PW.7/1. After completion of investigation he handed over case file to Rokhan Zeb SHO, who submitted challan against the accused/appellant.

5. On receipt of challan by the learned Trial Court, appellant was formally charge sheeted to which he pleaded not guilty and claimed Trial. To bring home the guilt of appellant, prosecution examined as many as nine witnesses. After closure of the prosecution evidence, statement of appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegation and professed his innocence. He, however, neither wished to be examined on oath under section 340 (2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial,

learned Trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above, hence, these appeals.

6. Learned counsel for the appellant argued that appellant is innocent and has been falsely implicated by Sahibzada complainant (PW.6), his father-in-law on mere suspicions; that from the very first day till his statement under section 342 Cr.P.C. appellant remained stuck on his stance furnished by him in initial report; that no ocular evidence of to the effect that it was the appellant who committed the murder of the deceased has been brought on record; that there is no circumstantial evidence to make a continuous chain of circumstances to prove the guilt of the appellant; that positive FSL report qua empties and the pistol allegedly recovered on the pointation of the appellant, would not advance the prosecution case as neither Gul Rehman who handed over the pistol to the police has been examined as witness nor Saifullah, the alleged friend of the appellant, whom he had handed over

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the pistol in question; that nothing is on the record to prove the alleged motive of strained relation of the appellant with the deceased; that conviction and sentence of the appellant has been recorded by the learned Trial Court on mere circumstantial evidence, but the same by no stretch of imagination is sufficient to make a chain that its one end touch the dead body of the deceased and other neck of the appellant, therefore, impugned judgment being against the law, facts and principles of appreciation of evidence, is liable to be reversed.

7. Conversely, learned AAG assisted by learned counsel for the complainant contended that it is a case of circumstantial evidence; that false initial report of the appellant, medical evidence in contrast of the version of the appellant; positive FSL report about the crime empties and 30 bore pistol recovered on the pointation of the appellant coupled with motive i.e. strained relation of the appellant with the deceased are strong circumstantial pieces of evidence which prove the guilt of the appellant

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up to the hilt; that conviction can be recorded even in a capital charge on the basis of circumstantial evidence; that circumstantial evidence brought on record is cogent, reliable which fully point towards the guilt of accused-appellant. They while supporting the impugned judgment sought dismissal of the appeal.

8. I have given our anxious consideration to the respective arguments advanced from either side and perused the record carefully.

9. Admittedly, this case squarely rests on circumstantial evidence. Initially, the incident had been reported by appellant Nabi Gul himself, wherein he charged unknown culprit for committing the murder of his deceased wife Mst. Fuzia. Later on, Sahibzada, father-in-law of the appellant, charged the appellant directly in his statement under section 164 Cr.P.C. recorded on 22.10.2011, for committing the Qatl-e-Amd of his deceased daughter by advancing strained relation of the appellant with the deceased, as motive behind the

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occurrence. He alleged that appellant used to quarrel with the deceased on account of his illicit relation with a girl, against which his deceased daughter had complained him and also told about the threats of dire consequence on the part of the appellant. as stated earlier, this is a case of no ocular account. The learned Trial Court while taking into consideration the initial report of the complainant in contrast with medical evidence, recovery of crime 2 empties of 30 bore from the crime venue and recovery of 30 bore pistol on the pointation of the appellant coupled with positive FSL report, as circumstantial pieces of evidence, recorded his conviction and sentence.

10. There is no cavil to the proposition that conviction cannot be recorded on the basis of circumstantial evidence and even death sentence can be awarded to an accused on circumstantial evidence, provided the circumstances constitute a continuous chain without missing any link, combined effect of which establishes the guilt of accused beyond any shadow of

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doubt. This dictum has been laid down by the august Apex court in case titled, **"Muhammad Ishaq Vs the State" (2009 SCMR 135).** The fundamental principle of universal application in cases dependent on circumstantial evidence, is that in order to justify inference of guilt of accused, incriminating fact must be incompatible with innocence of accused or guilt of any other person and incapable of explanation upon any other reason hypothesis than that of his guilt. In such cases it is imperative for the prosecution to prove the alleged circumstances as of conclusive nature to exclude every hypothesis but one proposed to be proved. The circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond all reasonable doubts and must be clearly connected with the fact sought to be inferred therefrom. In order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

*M.Siraj Afridi P.S. D

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All the links of circumstances should be so interconnected with each other as to form a continuous chain, one end of which should touch the dead body and the other end should touch the neck of the accused. One single link missing in the chain would entitle the accused to benefit of doubt.

11. Now I have to evaluate the case in hand at the touch stone of the principles settled by the apex Court referred above. The first circumstance, which goes against the appellant and relied upon by the learned Trial Court, is his initial report wherein he charged unknown culprit for committing murder of his wife. I do agree with the findings of the learned Trial Court on this aspect of the case because according to report of the appellant, he alongwith his deceased wife was on the way back to home from Charsadda Bazar and when reached the spot, some unknown culpirt called him to stop, but he did not, and when he crossed the breaker, a duly armed person, opened fire at them from behind, as a result, his deceased wife got hit and died on the spot. As per autopsy report, the

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deceased sustained three entry wounds on back of her chest with two exits on the upper and medial quadrant of left breast about 2" medial to midline at the level of 3rd intercostals space and exit wound on left side of left edge of 9th rib. Keeping in view the location of exit wounds on the person of the deceased, the appellant should have also sustained injury with the bullets causing exits in the body of the deceased, as she was sitting behind him on a motorbike, but the appellant has not received a single scratch, much less any firearm injury, therefore, medical evidence negates the version of the appellant. Similarly, the last worn bloodstained clothes of the deceased having cut marks and blackening also negates the version of the appellant and shows that the deceased was not fired at from a distance as alleged by the appellant in the site plan, rather from a very close range, because as per medical jurisprudence, blackening is caused in case of fire from a very close range. In such eventualities, it was the appellant to furnish a justifiable explanation about the murder of the

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deceased because the deceased was in his company at the time of incident, but no explanation, much less tangible has been furnished by him, therefore, this circumstance goes against the appellant.

12. Another circumstantial piece of evidence relied upon by the learned trial Court, is the recovery of 2 empties of 30 bore from the spot and 30 bore pistol, allegedly recovered on the pointation of the appellant. The recovery of 30 bore pistol has been seriously questioned by the defence in cross-examination of the Liaqat Khan SI/ I.O. (PW.9). According to his statement during interrogation accused/appellant disclosed about use of 30 bore pistol in commission of the offence and its delivery to his friend, namely, Saifullah. He deposed that he provided his personal cell phone to the appellant, on which he contacted his friend Saifullah, who told him his presence in hospital with his ailing sister and further told him that the pistol in question was lying in his house and his maternal uncle, namely Gul Rehman present in the house, will hand

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over the same; that on his information he alongwith appellant reached the said house; that on knocking the door, said Gul Rehman came out, talked with the appellant and thereafter handed over a 30 bore pistol to him/I.O., which was identified by the appellant to be the same pistol used by him in the commission of offence. In cross-examination I.O. deposed that he raided the house of the appellant on 23.10.2011, but nothing incriminating was recovered. He stated that said Saifullah had not disclosed about handing over the pistol to him by the appellant, in his statement recorded by him at first instance. He deposed that he has not initiated any proceedings under section 13 or 16 A.O or under any other section of law against said Saifullah nor has he made him as an accomplice nor interrogated him in this regard. He admitted that the pistol has not been recovered from direct possession of the appellant, but was produced by Gul Rehman. He further admitted that he had not sent the empties to the FSL soon after its recovery on 19.10.2011.

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13. About this piece of circumstantial evidence, I have serious reservations which disturb my mind to a great extent. Firstly, if the pistol was handed over by the appellant to his friend Saifullah, why did not Saifullah disclose about its availability with him in his statement recorded by the I.O. at first instance and if said Saifullah was already in the knowledge of pistol and he kept mum, why did not was he proceeded under the relevant law by the I.O. after its recovery from his house at the alleged pointation of the appellant, and thirdly, why was he not made as a witness to the said recovery. No explanation, much less plausible, has been furnished by the prosecution in respect of all these circumstances. Gul Rehman, who allegedly handed over the pistol to I.O., has also not been made as a prosecution witness nor did he appear in the witness box. The testimony of both, Saifullah and Gul Rehman, in such eventualities, was authentic and solid evidence in supports of this piece of circumstantial evidence, but neither any one of them has been examined,

nor any proceedings has been initiated against them by the I.O.. which create serious doubt about the mode and manner of the recovery as alleged by the I.O. Besides, why the empties had not been sent to the FSL on the same day of its recovery i.e. on 19.10.2011 for examination as to whether these have been fired from one weapon or more or even just for safe custody till recovery of the weapon of offence, is another disturbing aspect of the incident, which has not been plausibly explained by the prosecution. No record of the mobile data of the I.O. and Saifullah friend of the appellant qua the alleged conversation of the appellant about the weapon of offence has been brought on record to substantiate the version of the I.O. Similarly, no record of patient/sister of Saifullah with whom he was allegedly present in the hospital in connection with her treatment has been brought on record. The empties have been sent, later on, to the FSL on 12.11.2011, i.e. after alleged recovery of pistol, which cast serious doubts about the entire episode of its recovery.

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14. In view of the above, I am firm in my view, that the pistol in question has not been recovered on the pointation of the appellant rather the same has been planted against him after thought just to make a strong circumstance in favour of the prosecution case. Exclusion of this piece of circumstantial evidence certainly breaks the chain of circumstances.

15. Similar is the position of motive part of the prosecution case. The stance of father of the appellant about the motive that appellant had illicit relation with a girl, as a result, he used to quarrel with his deceased wife and had threatened her of dire consequence and that his threats had been brought by her in his notice, does not appeal to my mind. Had it been so, firstly, father of the deceased, on the very first day of the incident would have advanced this motive before the I.O. but he did not, secondly, in such eventualities, it cannot be expected that a father would let his daughter at the risk of her life to live with such husband. No shred of evidence is available on

file to show any efforts of the arbitrators or family members of the deceased between the two families in respect of the alleged strained relation of the deceased and the appellant. Rather, the peculiar facts and circumstances of the case suggest that the appellant had cordial relation with the deceased because he had taken her on motorcycle to city for the purpose of her checkup. The appellant after the incident did not abscond, rather took the dead body of her deceased wife to the hospital and reported the incident. He also participated in the funeral ceremony of his deceased wife. The conduct of the appellant after the incident is a circumstance, which goes in his favour. The circumstances, discussed above, break the chain of circumstances connecting the appellant with the commission of offence.

16. It is settled law that if the evidence does not establish a strong chain of circumstances which could not be explained away on any hypothesis other than the guilt of

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the accused, conviction in such eventualities would not be legal because circumstantial evidence should point inevitably to the conclusion that the accused and the accused only is the perpetrator of the offence and such evidence should be incompatible with innocence of the accused, which is lacking in the case in hand. Here I would refer the view of the Honble Supreme Court about circumstantial evidence in the following case:-.

"M.D. Nazir Hussain Sarkar and another Vs the State" (1969):-

> **"An accused cannot be found guilty unless all reasonable hypothesis, which are consistent with his innocence, have been excluded.**

ADVOCATE-GENERAL, GOVERNMENT OF EAST PAKISTAN-versus MAJID alias ABDUL MAJID (1970 SCMR 12)

"If the evidence does not establish strong chain of circumstances which could not be explained away on any hypothesis other than the guilt of the accused, conviction under section 302 PPC would not be legal".

"A very high quality of evidence is required and chain of events has to be completed with a view to establish guilt of accused beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight and quality of prosecution evidence. Where the prosecution fails to prove circumstances in a manner to make it beyond reasonable doubt, judgment of High Court in rejecting such evidence is in accord with principles recognized

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for safe administration of criminal justice". *(PLD 1986 SC 690).*

"Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused". (1992 SCMR 1047 and 1999 SCMR 1034)

17. It is also on record that deceased had an unfortunate minor daughter, who had already lost her mother and if the conviction of the appellant recorded by the learned Trial Court on shaky and scanty circumstantial evidence, is maintained, she would also be deprived of her father.

18. For what has been discussed above, I am firm in our view that the prosecution has miserably failed to bring home the guilt of appellant through cogent and confidence inspiring ocular or circumstantial evidence

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beyond shadow of reasonable doubt. The circumstantial evidence relied upon by the prosecution does not make a chain so that its one end touch the dead body of the deceased and other the neck of the appellant and creates doubts in the prosecution case. It is settled law that one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim " it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Wisdom in this regard can also be derived from the judgments of the apex

court in case titled, **"Muhammad Khan and another Vs the State" (1999 SCMR 1220) and case titled, "Muhammad Ikram Vs the State" (2009 SCMR 230)**.. The learned trial Court has not evaluated the evidence in its true perspective and thus reached to an erroneous conclusion by holding the appellant guilty of the offence.

19. Resultantly, I allow this appeal, set aside the conviction and sentences of the appellant and hereby acquit him of the charge leveled against him. He be set at liberty forthwith, if not required in any other case.

Announced.
11.06.2015

Sd/- Assadullah Khan Khamm Lawi. J

Assadullah.
JUDGE

CERTIFIED TO BE TRUE COPY
Examiner
Peshawar High Court, Peshawar
Authorised Under Article 87 of
The Qanun-e-Shahadat Order 1984
03 DEC 2015

*M.Siraj Afridi P.S. D

Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

(Judicial Department)

Cr.A No. 646-P/2012

JUDGMENT

Date of hearing.	22.4.2015.
Appellant (Nabi Gul)	By Mr. Jalaluddin Akbar Azam Gara, Advocate.
Complainant:	By Mr. Ghulam Mohyuddin Malik, Advocate.
State:	By Mian Arshad Jan, AAG.

******

QAISER RASHID KHAN, J. Through this single judgment we intend to dispose of Cr.A No.646-P of 2012 and Cr.A No. 397-P/2013 as both are arising out of case FIR No. 1612 dated 19.10.2011 under sections 302, 201, 203 PPC read with section 13 A.O, Police Station Charsadda.

2. Appellant Nabi Gul stood his trial in the court of learned Additional Sessions Judge-V, Charsadda for offences under sections 302, 201, 203 PPC and section 13 A.O and on being found guilty he was convicted and sentenced under section 302 (b) PPC to life imprisonment and also to pay Rs.100000/- as compensation to the legal heirs of the deceased in terms

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of section 544-A Cr.P.C or in default to undergo further six months S.I. He was further convicted under section 203 PPC and sentenced to one year R.I. and under section 13 A.O to two years R.I. The sentences were ordered to run concurrently with benefit of section 382-B Cr.P.C extended to him vide impugned judgment dated 13.12.2012, hence this appeal

3. Facts in brief as per FIR are that on 19.10.2011 the accused-appellant (then complainant) brought the dead body of his deceased wife Mst. Fauzia to Casualty Hospital Charsadda and reported the matter to the local police to the effect that on the fateful day at 18:30 hours he alongwith his deceased wife were proceeding back home from Tehsil bazaar on his motorcycle bearing registration No.0019-Charsadda and when reached the crime spot some unknown persons from the nearby sugarcane crop called him to stop and when they crossed the braker they were fired at from back side by an armed person and as a result his wife was hit and died on the spot while he escaped unhurt. He further stated to have

no enmity with anyone and charged unknown persons for the murder of his wife. The report was recorded in the shape of murasila Ex.PA/1 and sent to the Police Station on the basis whereof FIR Ex.PA was registered. Injury sheet and inquest report of the deceased were prepared and the dead body was sent for the purpose of postmortem under the escort of Constable Mazullah.

4. During investigation, on interrogation and pointation of the accused-appellant (then complainant) vide recovery memo Ex.PW-8/1, the police recovered one 30-bore pistol from the house of one Saifullah duly identified by the accused to be the weapon of offence.

5. On completion of investigation challan was submitted in the trial court against the accused-appellant. In order to prove its case, at the trial the prosecution examined as many as 9 witnesses.

6. Lady Dr. Roobi Mukhtiar SMO DHQ Hospital Charsadda (PW-1) on 19.10.2011 at 07:15 pm conducted autopsy on the dead body of the deceased

Mst. Fauzia aged 20/25 years identified by Kalimullah and Wazir Gul and found the following:

External appearance.

Normal built female wearing one Qamees, one shalwar with one Bunyan, rigor Mortis absent.

Wounds.

1. Fire arm inlet wound of about ¼" x ¼" on the back of chest 3 in number at the level of 11th incostal space about 01" towards the left & 1" towards the right and third towards the right 03" lateral and 01" below the above wound. Charring marks present.

2. Fire arm exit wound of about ½" x ½" on the upper medial quadrant of left breast about 2" medial to midline at the level of 3rd intercostal space.

3. Fire arm exit wound of about ½" x ½" on the left side of left edge of 9th rib intercostal space.

Internal appearance.

Thorax:- Except right lung remaining organs of the thorax are injured.

Abdomen: Walls, peritoneum and diaphragm are injured. Muscles, Bones and joints: injured at the site of injury.

Opinion

In my opinion the deceased died due to shock and hemorrhage caused to the vital organs in the chest cavity. Clothes handed over to the police.

Probable time between injury and death: instantaneous Between death and P.M: within two hours.

7. PW-2 namely, Sher Afzal, 786 Police Lines Charsadda is marginal witness to the recovery memo

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Peshawar High Court

Ex.PW2/1 vide which the I.O recovered and took into possession pebbles and blood stained earth from the place of the deceased. He is also marginal witness to the recovery memo Ex.PW2/2 vide which the I.O took into possession one motorcycle bearing registration No.0019, Charsadda belonging to the accused-appellant. Similarly he is marginal witness to the recovery memos Ex.PW2/3 and Ex.PW2/4 vide which the I.O recovered and took into possession two empty shells from the spot and garments of the deceased respectively.

8. PW-3 Munir Khan ASI/ Traffic Incharge Charsadda deposed that during the days of occurrence he was Incharge casualty police at PP DHQ Hospital Charsadda. He recorded the report of the accused-appellant then complainant in the shape of murasila Ex.PA/1. He prepared the injury sheet and inquest report of the deceased as Ex.PW3/1 and Ex.PW3/2 respectively and sent the dead body of the deceased to the mortuary. The murasila was sent through Ajmal

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Constable 592 to the Police Station for registration of the case.

9. PW-4 Nasrullah Khan S.I deposed that on receipt of the murasila he correctly incorporated its contents into FIR (Ex.PA) which is in his hand writing and correctly bears his signature.

10. PW-5 Zakirullah No. 151 of Police Station Charsadda deposed that he is marginal witness to the recovery memo (Ex.PW5/1) vide which the I.O took into possession one veil (Ex.P1) produced by Wazir Gul having corresponding cut mark and sealed into parcel. He is also marginal witness to the recovery memo (Ex.PW2/4) vide which the I.O took into possession blood stained garments of the deceased consisting of Qamees P-2, Chadar P-3, Shalwar P-4, Bunyan P-5 having corresponding cut mark sent by the doctor, packed and sealed into parcel.

11. PW-6 namely, Sahibzada, father of the deceased Mst. Fauzia deposed that Nabi Gul the accused-appellant was his son-in-law who on 19.10.2011

charged unknown person for the murder of his wife Mst. Fauzia. He was searching for the real culprit and when got satisfied, he came to know that his daughter Mst. Fauzia was killed by the accused-appellant. Motive for the occurrence was that his son-in-law used to quarrel with his deceased daughter who used to come to the house of her parents telling that her husband Nabi Gul had illicit relations with another girl and had threatened the deceased of dire consequences and that on the fateful date and time the accused Nabi Gul killed his daughter by firing at her with a pistol hence he charged the accused-appellant for the commission of offence.

12. PW-7 Fayaz Ali No. 366 PP Turlandi PS Nisatta deposed that during the days of occurrence he was posted at PS Charsadda. He is marginal witness to the recovery memo Ex.PW5/1 through which the I.O took into possession one veil (Ex.P1) produced by Wazir Gul having corresponding cut mark which correctly bears his signature. Similarly he is marginal witness to the pointation memo Ex.PW7/1 vide which the accused led

the police party to the spot and pointed out the place of occurrence and additions were made in the site plan with red ink.

13. PW-8 Zahid Khan ASI Police Station Tarnab deposed that during the days of occurrence he was posted at P.S Charsadda. He is marginal witness to the recovery memo Ex.PW8/1 vide which the I.O took into possession one pistol 30-bore (Ex.PZ) produced by one Gul Rahman on the pointation of accused Nabi Gul.

14. PW-9 Liaqat Khan S.I P.S Battagram then posted at PS Charsadda deposed that on receipt of copy of the FIR and murasila he proceeded to the spot and prepared the site plan (Ex.PB) at the instance and pointation of the accused then complainant. During spot inspection he recovered and took into possession blood stained earth and pebbles vide recovery memo (Ex.PW2/1). He also recovered and took into possession two empties of 30-bore freshly discharged from the place of the accused vide recovery memo Ex.PW2/3. He also took into possession the motorcycle bearing No. 0019 Charsadda

belonging to the accused then complainant vide memo Ex.PW2/2. He took into possession blood stained garments of the deceased sent by the doctor vide recovery memo Ex.PW2/4. He sent the blood stained garments, blood stained earth, pebbles to the F.S.L vide application Ex.PW9/1 and the report thereof is Ex.PZ. He also sent the empties to the Arms Expert for analysis vide application Ex.PW9/2 and the result is Ex.PZ/1. He produced father of the deceased namely Sahibzada for recording his statement under section 164 Cr.P.C vide application Ex.PW9/3 and accordingly his statement was recorded. On 24.10.2011 after the arrest of the accused-appellant he produced him before the court for obtaining police custody vide application Ex.PW9/4. He interrogated the accused and during interrogation the accused told him abut 30-bore pistol used in the commission of offence being handed over to one of his friends namely, Saifullah. The accused-appellant contacted Saifullah who in turn told him on his cell phone that the crime pistol lying at his house would be

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handed over to him by his maternal uncle. On the pointation of the accused-appellant, the police reached the house where Gul Rehman handed over the pistol to the I.O duly identified by the accused-appellant to be the crime weapon. He also prepared the sketch of the place of recovery of pistol as Ex.PW9/5. He also took into possession his mobile phone Nokia 1110 and Nokia 1100 having two sims No. 0336-9578313 and No.0333-9234009 which he sent to the quarter concerned for obtaining its data vide application Ex.PW9/6. During interrogation the accused made pointation on the spot and to this effect he made addition in the site plan with red ink which is Ex.P.B/1. He also prepared the pointation memo as Ex.PW7/1. Vide application Ex.PW9/7 he produced the accused before the court for recording his confessional statement under section 164/364 Cr.P.C which the accused refused and thus he was sent to the judicial lockup. He further stated that the accused was arrested by Fazle Khaliq ASI vide arrest card Ex.PW9/8. After completion of investigation, he

handed over the case file to Rokhan Zeb S.H.O who submitted challan against the accused.

15. On close of the prosecution evidence, statement of the accused under section 342 Cr.P.C was recorded wherein he professed innocence and alleged false implication. He did not wish to be examined on oath under section 340 (2) Cr.P.C or to produce defense.

16. Learned counsel for the appellant argued that the accused-appellant is innocent and has been falsely roped in the case; that the appellant has been charged only in the statement under section 164 Cr.P.C recorded by Sahibzada, father of the deceased though he was not eye-witness of the occurrence; that the impugned judgment is the result of mis-appreciation and non-appreciation of evidence available on record; that the learned trial court has not appreciated the evidence in its true perspective and thus has arrived at a wrong conclusion in the shape of the impugned judgment, that the prosecution case is full of doubts and contradictions and conviction cannot be based on such sketchy and

shaky evidence and thus requested that the impugned judgment be set aside and the accused-appellant be acquitted of the charge levelled against him.

17. To the contrary the learned AAG assisted by the learned counsel for the complainant firmly defended the impugned judgment on almost similar grounds as mentioned therein.

Arguments heard and record perused.

18. Initially it was the appellant who brought the dead body of his wife Mst. Fauzia to Casualty Hospital Charsadda and reported to the police that while on his way back home on his motorcycle with his wife seated behind him, at 18:30 hours he was called by unknown person at the crime spot to stop and was then fired at from back side with which his wife was hit and died on the spot. His report was reduced into murasila (Ex.PA/1) and on its basis FIR (Ex.PA) was registered, injury sheet and inquest report prepared and the dead body sent for postmortem examination to the DHQ Hospital Charsadda. During postmortem examination the lady

Dr. Roobi Mukhtiar (PW-1) noticed fire arm entry wound of about ¼" x ¼" on the back of chest 3 in number at the level of 11th incostal space about 01" towards the right and 3rd towards the right 3" lateral and 01" below the above wound and also noticed **charring marks present** on the body of the deceased. So far so good.

19. At that point of time, being a husband in pain, still he led the police to the spot and at his instance the site plan was prepared wherein he assigned points 1, 2, A1 and A2 to himself and his wife while travelling on a motorcycle and then his wife being hit with a bullet and thereafter fell down. He assigned point 3 to the unknown accused who allegedly called him to stop and point 4 to the unknown assailant with whose firing his wife was hit and died on the spot and point 'C' is the place wherefrom two empties were retrieved.

20. It was thereafter when Sahibzada (PW6) father of the deceased Mst. Fauzia came up with his statement under section 164 Cr.P.C before the learned Senior Civil

Judge/ JM on 22.10.2011 and directly pointed an accusing finger at the appellant for the murder of his daughter and even stated the motive for the occurrence to be the sporadic quarrels between the spouses and the visit of his daughter to her parents house, complaining about some relations of the appellant with another girl and the threats hurled to her. Such statement of Sahibzada alerted the police and spurred them into action in view of the new development and in the process the appellant was arrested on 24.10.2011.

21. During interrogation, he disclosed about the weapon of offence i.e. 30-bore pistol which he had given to his friend Saifullah resident of Rajar and on being given the phone facility by the police, he talked to Saifullah who on his turn told him to collect the said pistol from his uncle Gul Rehman. On the pointation of the accused-appellant, the house of Gul Rehman was visited who handed over the 30-bore pistol to the police and was identified by the appellant to be the same crime weapon with which he had done to death his wife. The

said 30-bore pistol alongwith two crime empties recovered from the spot were sent to the Forensic Science Laboratory and its report (Ex.PZ) confirmed that the crime empties were fired from the same very pistol. Though the appellant denies the recovery of the pistol at his pointation, but he appears to be on a weak wicket in this regard. Had the recovery been effected from his house, then he could have pleaded that the same was planted against him but in the present case it was recovered on his pointation from the house of his friend Saifullah and thus, the recovery of the crime weapon as well as its ownership stands abundantly proved against the appellant beyond any shadow of doubt.

22. Invariably like in all criminal cases, the accused never admits his guilt and pleads innocence and feign ignorance even about the crime weapon recovered on his pointation, the additions made in the site plan at his instance and holds the prosecution for his false implication and the same holds true about the appellant

as well who simply denies and disowns everything and even the recovery of the crime weapon at his pointation. Similarly, like several criminal cases, this is also one such case where barring the statement of the complainant who too, attributed the murder of his wife to unknown assailants, there is no ocular account pointing towards the guilt of the appellant for the commission of the offence. In such a situation, it is the circumstances and the circumstantial evidence which have to be weighed and judged while assessing the guilt or otherwise of an accused.

23. According to the medical evidence in the shape of postmortem report (Ex.PW1/1), the deceased lady received three entry wounds of ¼" x ¼" on the back of her chest and keeping in view the locale of injuries which are close to each other and the doctor's opinion about the presence of **charring marks** on the wounds, the assailant must have fired from a very close range and certainly not from a distance shown by the complainant in the site plan i.e. five paces between the

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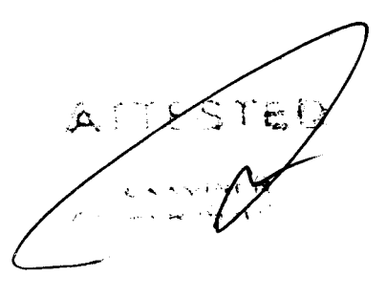
deceased at point No.2 and point No.4 assigned to the unknown assailant. Furthermore, according to the FIR, the deceased lady while riding the motorcycle with the appellant and travelling towards northern side was hit with the fire shots of the assailant and died on the spot. The natural consequence of such event whereby the deceased was hit with a volley of fire shots, could be that she must have fallen down from the motorcycle. However, the postmortem report does not show any bruises or injury caused to the deceased on account of falling down from a moving motorbike.

24. Another intriguing aspect of the matter which strikes at the roots of the appellant's version forwarded in the FIR is again the site plan prepared at his instance wherein he appears at point No.1, the deceased lady at point No.2 and the assailant at point No.4. With such positions, the appellant could have been the first target of the assailant at point No.4 rather than the deceased lady at point No.2. Moreover, the injuries caused **"at the back of the chest"** could not be caused by the



unknown assailant at point No.4 keeping in view his position as he was placed at North-East of the deceased lady and could at best have caused injuries to her on the right frontal side of her body but certainly not at the back of her chest. Moreover, as per the postmortem report, the three fire arm injuries have two exit wounds as well. Even by a layman's approach, in such a situation where the deceased lady was closeted to her husband both riding a motorcycle, then certainly on the exit of the bullets from the body of the deceased lady, the appellant should have received serious injuries, but most surprisingly, he comes out unscathed during such firing. Since the story forwarded by the appellant does not appeal to prudence, therefore, the accusing finger certainly turns towards him.

25. According to the murasila, on the fateful day the deceased was admittedly in the company of the accused and the story put forth by the accused-appellant in the FIR that some unknown persons from a nearby sugarcane crop called him to stop, does not appeal to

reason because according to the site plan (Ex.PB) prepared at the instance of the appellant, the sugarcane crop is shown in the field of one Zair Ullah on western side of the scene of occurrence while the accused (then complainant) has shown the unknown person at point No.3 wherefrom he was called to stop and then from point No.4, which falls on the northern side, they were allegedly fired at. On the said side, no sugarcane crop has been shown but rather the house of one Lal Muhammad is mentioned. Similarly, it is also surprising that how the accused (then complainant) escaped unhurt from the firing when he was also in the firing range as per the site plan coupled with the fact that nothing was snatched from the accused nor he has shown any resistance to justify the firing by the unknown accused.

26. Keeping in view the site plan, the medical report showing **charring marks** on the body of the deceased, the recovery of two crime empties from the spot, the recovery of the crime weapon at the pointation of the appellant, the positive FSL report regarding crime

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empties and the crime weapon certainly point towards the guilt of the appellant for the commission of the gory incident. Undoubtedly, after the commission of the offence, the appellant craftily tried to build up a story probably taking cue from some Hollywood thriller, but such edifice caved in brick by brick as the investigation in the case progressed. All these circumstances are so closely interlinked, interconnected and intertwined that they form a continuous chain with its one end touching the dead body and the other the neck of the appellant. The villainous role and act of the appellant for killing his wife in cool blood stands proved beyond any shadow of doubt. It reminds us of a couplet which truly depicts and portrays such incident and its aftermath.

جو چُپ رہے گی زُبانِ خنجر
لہو پُکارے گا آستیں کا

For what has been discussed above, we dismiss this appeal and maintain the conviction and sentence awarded to the appellant by the learned trial Judge vide impugned judgment dated 13.12.2012.

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EXAMINER
Peshawar High Court

So far as the Cr.A No. 397-P/2013 is concerned, since in view of our detailed discussion in the preceding paras, the recovery of pistol at the pointation of the accused-appellant stood proved, therefore, this appeal also stands dismissed.

Announced:

Sd/- Qaiser Rashid Khan - J

JUDGE

JUDGE

Qaseem

CERTIFIED TO BE TRUE COPY

Examiner
Peshawar High Court, Peshawar
Authorised Under Article 87 of
The Qanun-e-Shahadat Order 1984

03 DEC 2015