

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

**Cr.A No. 259-M/2017**

*(1) Qabil son of Bakhtiar (Appellant)*  
*Versus*

*(1) The State through Additional Advocate General*  
*(2) Fazal Ghani son of Muhammad Habib*  
*(Respondents)*

**Present:**

*Mr. Sher Muhammad Khan, Advocate for the appellant.*

*Mr. Wilayat Ali Khan, A.A.G. for the State.*

*Muhammad Hayat Khan, Advocate for the complainant/respondent No. 2.*

**Cr.R No. 4-M/2018**

*(1) The State (petitioner)*  
*Versus*  
*(1) Qabil son of Bakhtiar (Respondent)*

**Present:**

*Mr. Wilayat Ali Khan, A.A.G. for the State.*

*Mr. Sher Muhammad Khan, Advocate for the respondent/convict.*

Date of hearing: - **08.01.2019**

**CONSOLIDATED**  
**JUDGMENT**

**SYED ARSHAD ALI, J.-** Through this single judgment, we intend to decide this criminal appeal bearing No. 259-M/2017 as well as connected Cr.R. bearing No. 4-M/2018 as both these matters emanate from one and the same judgment dated 27.11.2017 handed down by learned Additional Sessions

Judge/Izafi Zila Qazi Matta Swat, whereby the appellant was convicted under section 302 (b) of the Pakistan Penal Code (“*PPC*”) for the murder of his wife Mst. Salma and sentenced to life imprisonment along with a compensation of Rs. 200,000/- (two lacs) under section 544-A Cr.P.C and in default thereof to further undergo simple imprisonment for six (6) months. He was also convicted under section 15 of the Arms Act and sentenced to 2 years simple imprisonment, however, it was ordered that both the sentences shall run concurrently. Benefit of section 382-B Cr.P.C was also extended to the accused/appellant. Whereas the co-accused Aqil, brother of the appellant and Bakhtiar, father of the appellant were acquitted from the charges leveled against them.

2. Briefly stated facts of the case as reflected from the record are; that on 02.9.2016 at about 20:00 hours the police official Sher Bahader Khan, ASI, PW-10, on receipt of information regarding the incident,

came to the spot which is the house of the present appellant and there he found the deceased Mst. Salma dead and a pistol unlicensed was also lying along with her dead body. The same was recovered by the said police official. At the spot, the complainant Fazal Ghani, PW-3 who is father of the deceased reported the matter to the effect that on the eventful day, he was informed by the present appellant through his cell phone No. 03488476803 that the deceased had committed suicide. On such information, when he reached at the place of occurrence, he found his daughter; the deceased Mst. Salma dead. The complainant charged the present appellant for the murder of his daughter whereas the acquitted co-accused Aqil and Bakhtiar were charged for abetment.

3. The above-referred report of the complainant was incorporated in '*Murasila*' Ex. PW-10/1 which culminated into FIR bearing No. 296, Ex. PA dated 02.09.2016 being registered against the present

accused/appellant and other co-accused at 23:00 hours under sections 302,109,34 PPC and 15 Arms Act at Police Station *Shaheedan Waina* Matta District Swat. Investigation was started in the case, the appellant as well as his father Bakhtiar was arrested on the following day i.e. 03.09.2016 at 17:00 hours through card arrest Ex. PW-9/2. The Investigation Officer prepared the site plan Ex. PW-9/1 and also made recoveries of the incriminating articles from the spot.

4. On completion of the investigation, complete *challan* was submitted before the competent Court. At trial, the prosecution examined as many as 12 witnesses whose statements were recorded and placed on file. On closure of the prosecution evidence, accused were examined under section 342 Cr.P.C, wherein they denied the charges, claimed innocence and stated to have been falsely implicated in the case.

5. On conclusion of the trial, the learned Additional Sessions Judge/ Izafi Zilla

Qazi Matta Swat, convicted and sentenced the accused/appellant, vide the judgment impugned herein, whereas the other co-accused Aqil and Bakhtiar were acquitted from the charges, hence these connected matters.

6. Arguments were heard and record of the case was perused with the able assistance of learned counsels for the parties as well as the learned Law Officer representing the State.

7. It appears from the FIR, Ex. PA that the occurrence has taken place at the house of the appellant situated within the local limits of village *Kareenoona Wargar Bala Sur* which is at a distance of 9/10 KMs from the police station. The time of occurrence according to the FIR is *Dupher Vela* (noon) and the '*Murasila*' Ex. PW-10/1 was drafted at 20:00 hours on the same day i.e. 02.09.2016 whereas the FIR, Ex. PA was registered at 23:00 hours.

8. As per postmortem report of the deceased Ex. PW-1/1 furnished by lady doctor Sidra, PW-1, the deceased has sustained the following injuries: -

Wounds, bruises, position, size, nature:-

- Bruise about 4-5 cm on length on right leg slightly above right ankle joint.
- Single entry wound present on back on left side of chest at the level of apex of scapula about 0.5-1 cm in length with no charring marks.
- Exit wounds present on front at upper abdomen at the level of epigastrium about 3-4 cm in length with irregular margins and fresh bleeding.

Thus it is established on record that it is the case of homicide and not suicide.

9. It is also evident from record that on the following day of the crime i.e. 03.09.2016 the Investigation Officer has also recorded the statements of Hameedullah who is the paternal cousin of the deceased who

latter appeared as PW-4 and Shakirullah another maternal cousin of the deceased who was latter examined as PW-5 during the trial. Both the said PWs have claimed that they have witnessed the occurrence.

10. According to the FIR, the time of occurrence is noon time, the '*Murasila*' was drafted on 02.09.2016 at 20:00 hours. The postmortem on the body of the deceased was conducted on 10:25 P.M. (22: 25 hours) and the FIR was registered at 23:00 hours. According to the postmortem report the time between death and the postmortem report is 7/8 hours, whereas the distance between the police station and the place of occurrence is 9/10 hours. Hence, the prosecution had ample opportunity to conduct a preliminary investigation. The prosecution case is completely silent about the reasons for delay in registration of FIR and conducting of the postmortem report with such delay. Even strangely to note that the '*Murasila*' was drafted at 20:00 hours and the FIR was



registered at 23:00 hours, hence this fact also renders the time of drafting of the '*Murasila*' doubtful. Thus there is an inherent dent in the prosecution story, hence the other evidence i.e. ocular and circumstantial evidence is to be looked into very carefully and with utmost caution.

11. Admittedly, the complainant Fazal Ghani, father of the deceased lady who appeared as PW-3 is neither the eyewitness of the occurrence nor he has stated in his report/ FIR that the occurrence was witnessed by Hameedullah and Shakirullah. The motive was stated to be that the present appellant who is the husband of the deceased had sold the dower ornaments of his deceased wife, which was a continuous reason of quarrelling between the spouses. However, the said motive could not be established by the prosecution in its evidence. Thus, the entire prosecution case rests on the testimony of PW-4 Hameedullah and PW-5 Shakirullah alongwith the circumstantial evidence that



admittedly the deceased was the wife of the appellant and she died on account of unnatural death i.e. was fired through firearm and her dead body was found in the house of the present appellant.

12. Hameedullah, while appearing as PW-4 has stated in his statement that on 02.09.2016 which was Friday he alongwith his cousin Shakirullah after *Juma* prayers paid visit to the nearby mountain for entertainment. They stayed there for about 1-1/2 hours and while coming back when reached near the house of the appellant; they heard noise and commotion from the house of the present appellant and when they went inside the house; there Qabil the present appellant was holding a pistol in his hand and he fired at the deceased, they being empty-handed hence returned. On their way, they found the complainant and thereby informed him about the incident. On the following day, the Investigation Officer prepared site plan on their pointation. In his cross-examination, he



has admitted that his house is situated at a distance from the house of complainant which can be covered within a 3 minutes, whereas the distance between his house and Shakirullah is almost 1 KM. They went towards the mountain at about 2-1/2 hours hence they reached at the mountain on 03:00 P.M. There they stayed for about quarter past one hour and the distance from the said mountain and the house of the appellant can be covered within 10/15 minutes. It is pertinent to note that the complainant in his statement has stated that the distance between his house and the house of the appellant can be covered within 30/45 minutes while walking on foot.

13. Similarly, another alleged eyewitness Shakirullah appeared as PW-5 and has recorded somewhat similar statement.

14. As stated above, the said two witnesses were neither cited as eye-witnesses in the FIR nor their statement was recorded on the same day. Indeed their statement was

recorded on the following day. It is settled law that the credibility of a witness becomes highly suspicious if his statement is recorded with delay without offering any plausible explanation. In this regard, reliance can be placed on "Muhammad Sadiq vs the State" (PLD 1960 Supreme Court 223), "Tariq Gul vs Ziarat Gul (1976 SCMR 236), "Muhammad Iqbal vs the State" (1984 SCMR 930), and "Haroon alias Harooni vs the State and another" (1995 SCMR 1627), wherein it has been that:- *"The general rule of appreciation of evidence is that statement of a witness must be in consonance with the probabilities fitting in the circumstances of the case and also inspire confidence in the mind of a reasonable prudent man. If these elements are present, then the statement of the worst enemy, of an accused may be accepted and relied upon without corroboration, but if these elements are missing, then the statement of a pious man may be rejected without second thought.*

Similarly, it has been settled by the august Supreme Court of Pakistan in "Muhammad Khan's case vs Maula Bakhshah" (1998 SCMR 570) that: - *"It is settled law that credibility of a witness is looked with serious suspicion if his statement under section 161 Cr.P.C is recorded with delay without offering any plausible explanation."*

15. The complainant has stated in the 'Murasila' as well as in his court statement that he was informed by the present appellant through his cell number that the deceased had committed suicide, whereas the Investigation Officer Amir Zaib, SI while appearing as PW-9 in his cross-examination has confirmed that according to the CDR of the cell phone mentioned in the 'Murasila' the complainant did not receive any call from the appellant at the relevant time. The said statement of the complainant was also contradicted by the PWs wherein they have stated that indeed it was them who informed the complainant about the

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occurrence. However, despite the complainant had ample opportunity for deliberation and consultation he has not mentioned in the '*Murasila*' that the occurrence was seen by the eyewitnesses Hameedullah and Shakirullah. Therefore, the presence of the aforesaid two eye-witnesses become very doubtful. Furthermore, the conducted of the alleged eyewitnesses of the occurrence is also unnatural because according to their statements the deceased was killed in their presence who is their close relative but they were not available when the police reached the place of occurrence. They even did not accompany the deceased to the hospital. Their statements regarding the time of occurrence which comes around 4 P.M. is also contradicted by the statement of the complainant and the time provided in the postmortem report. Besides, their places of residence are situated at considerable distance from the place of occurrence, hence they being the chance witnesses, therefore, they were

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supposed to justify their presence at the place of occurrence at the relevant time which they had failed. In this regard reliance is placed on the case of "Mst. Rukhsana Begum and others vs. Sajjad and others" (2017 SCMR 596) wherein it has been held that:- *"Chance witness was one who, in the normal course was not supposed to be present on the crime spot unless he offered cogent, convincing and believable explanation, justifying his presence there."*

Therefore, all these circumstances render their testimony untruthful, hence, the statements of both the alleged eyewitnesses are to be excluded from consideration.

16. Thus, the only circumstance which exists against the appellant is that admittedly the deceased was his wife and she died unnatural death at the house of the appellant. However, it discerns from record that apart from deceased, his father, brother and other female members of his family were

residing in the said house. True that it has been settled by the august Supreme Court of Pakistan in number of judgments that with regard to vulnerable members of the society, such as children, women and the infirm, who were living with the accused or was last seen in his company before their death, the accused ought to offer some explanation as to what happened to them and when instead offering explanation if the accused remains silent or offers a false explanation he casts a shadow upon himself. In such cases the immediate conduct of the accused is relevant. However, mere this circumstance that the deceased remained in custody of her husband and dies unnatural death was never alone considered a sufficient proof for conviction of an accused. In this regard reliance can be placed on the case of "Saeed Ahmad vs the State (2015 SCMR 710)", wherein the august Supreme Court of Pakistan while upholding the conviction of the appellant therein has held:-

*"That with regard to vulnerable members of society,*

*such as children, women and the infirm, who were living with the accused or were last in his company the accused ought to offer some explanation of what happened to them. If instead he remains silent or offers a false explanation he casts a shadow upon himself. This does not mean that the burden of proof has shifted onto the accused as it is for the prosecution to prove its case, however, in respect of the helpless or the weak that require protection or care it would not be sufficient for the accused to stay silent in circumstances which tend to incriminate him, and if he elects to do so he lightens the burden of the prosecution. Article 122 of the Qanun-e-Shahadat Order too stipulates that if a particular fact is especially within the knowledge of any person the burden of proving that fact is upon him. In the present case the prosecution had established its case against the appellant; two eye-witnesses had deposed against him and the medical evidence confirmed strangulation of the deceased. The appellant did not attend to the last rites of his wife who had died whilst residing with him, he also did not inform the police nor took his wife to a hospital and disappeared for two months, such circumstances corroborate the prosecution case in the absence of the appellant offering a reasonable explanation for his unnatural conduct."*





However, in the above-referred case all the Courts had believed the testimony of the eyewitnesses who have witnessed strangulation of the deceased at the hands of the appellant and the brother of the appellant who had facilitated her strangulation by holding her down and the statements of the said eyewitnesses were also corroborated by the medical evidence. Furthermore, the Honourable Supreme Court has also drawn adverse inference from the immediate abscondance of the accused after the occurrence.

In the recent judgment reported as *“Arshad Khan vs the State (2017 SCMR 564)”*, the august Supreme Court of Pakistan has elaborately held in Para 4 of the judgment that:- *“It may be true that it has been held by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) that in such cases some part of the onus lies on the accused person to explain as to how and in which circumstances the accused person's wife had died an unnatural death inside the confines*

*of the matrimonial home but at the same time it has also been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that where the prosecution completely fails to discharge its initial onus there no part of the onus shifts to the accused person at all.”*

The said view was also re-affirmed by the august Supreme Court of Pakistan in “Nazir Ahmad vs The State (2018 SCMR 787).

17. In the context of the present case, the accused and his father was arrested on the following day of the occurrence from their own house. And obviously they could not register the case in presence of the father of the deceased. Therefore, there is no circumstance to infer adversely from the conduct of the present appellant.

*Syed?*

18. The upshot of the above discussion is that when we have excluded from consideration the statements of both the alleged eyewitnesses and have reached at the conclusion that the only circumstance that

the deceased was the wife of the appellant and died unnatural death in his house alone is not sufficient for his conviction, when their were other family members both male and female were jointly residing in the said house, the present appellant did not abscond from the place of occurrence as he was arrested on the following day of the crime, no incriminating material was recovered from his possession after his arrest, lead us to the conclusion that the Appellant is entitled to the benefit of doubt. Hence, we accept this appeal and set-aside the impugned judgment passed by the learned trial Court. Resultantly, the appellant is acquitted of the charges leveled against him. He is in custody and be set free if not required in any other case.

19. These are the reasons of our short order of even date.

20. Likewise, the connected criminal revision bearing No. 4-M of 2018

preferred by the State (petitioner) for enhancement has become infructuous, which is also accordingly dismissed.

Announced  
08.01.2019

  
JUDGE  
  
JUDGE

Office  
26/02/2019  
WIR