JUDGMENT SHEET

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

Cr.A No. 15-M/2019

Anwar Syed.....(Appellant)

vs

The State & 1 other.....(Respondents)

Present: *Mr. Ayaz Muhammad, Advocate for the appellant.*

Mr. Rahim Shah, Asst:A.G for the State.

Syed Aziz-ud-din Kaka Khel, Advocate for the complainant.

Date of hearing: 16.10.2019

JUDGMENT

WIQAR AHMAD, J.- My this order is directed to dispose of Criminal Appeal bearing No. 15-M of 2019 filed by the appellant/convict namely Anwar Syed as well as the connected Cr.R No. 4-M/2019 filed by the complainant.

2. The appellant is aggrieved of his conviction and sentence recorded vide judgment dated 04.01.2019 of the Court of learned Additional Sessions Judge, Dir Lower at Samarbagh, whereby he was convicted and sentenced as follows;

i. Under section 334 PPC to undergo 4 years simple imprisonment and to pay Arsh within the meaning of section 337-X PPC amounting to Rs. 10,27,968/- half of the

existing Diyat amount which shall be paid to the injured/complainant in lump sum.

ii. The appellant was also extended the benefit of Section 382-B Cr. PC.

3. Report of the occurrence was lodged by the injured/complainant namely Imran Khan at Munda Hospital, District Dir Lower on 19.05.2017 at 20:15 hours. The complainant stated in his initial report that he left his house for his fields on the day of occurrence at evening time. Their neighbor Anwar Syed son of Hakim Syed (appellant/convict) appeared in the meanwhile and came close to the complainant at the place of occurrence. He started verbal altercation with the complainant and was further alleged to have caught his left ear, cut it with a knife and fled away along with severed ear of the complainant. The occurrence was stated to have been witnessed by father and brother of the complainant namely Asadullah beside other people present on the spot. The momentous verbal altercation was stated to have been motive behind the occurrence and the accused/appellant was charged for the commission of the offence. After receiving opinion of the Doctor Zeeshan (Medical Officer, Munda Hospital PW-9), F.I.R bearing No. 306 was registered on 19.05.2017 under section 334 of the Pakistan Penal Code, 1860 (hereinafter referred to as **'PPC'**) at Police Station Munda, District Dir Lower.

4. Investigation in the case was kicked off. The knife used in the occurrence was produced by father of the victim/complainant before the police, which was taken into possession vide recovery memo Ex PW 6/1. Same was also sent for report of forensic experts, which report was received in affirmative and was produced in evidence as Ex PW 10/4. The accused was arrested and after conducting other necessary proceedings, investigation was completed and complete challan was put in Court. On submission of complete challan in the Court, charge was framed against the appellant/convict on 11.07.2017. The case was then posted for evidence of the prosecution. The prosecution recorded statements of eleven (11) witnesses. Statement of Wahidullah Constable (PW-3) was recorded for the second time also. On conclusion of prosecution evidence, statement of accused was recorded under section 342 Cr. PC. At conclusion of proceedings in the case, the learned trial Court convicted the accused/appellant and awarded him punishment as per the sentence reproduced above.

5. Learned counsel for the accused/appellant submitted during the course of his arguments that statements of the eye-witnesses were contradictory to each other, which have caused substantial dents in the case of prosecution and therefore the accused/appellant

was entitled to acquittal. Learned counsel laid stress on the fact that PW-4 had not stated in his statement that how was his ear taken back from the accused/ appellant, which makes the case doubtful. Learned counsel added that PW-4 as well as PW-5 had stated in their statements that they had been working in their fields at the relevant time but same has not been mentioned in the site plan and therefore, both the eye-witnesses were not believable. Learned counsel further stated that father of the victim/complainant namely Shah Wazir Khan was not produced and therefore, this witness was withheld, which would carry an adverse inference under Article 129 of the Qanoon-e-Shahadat Order, 1984. Learned counsel also drew attention of this Court towards statement of the Doctor recorded as PW-9 and stated that the whole organ of hearing had not been chopped off, therefore an offence of *Itlaf-i-udw* under section 334 PPC was not made out of the record and conviction of the accused/appellant under the said provision was not justified.

6. Learned counsel for complainant submitted in rebuttal that the prosecution has been able to prove the case against the accused/appellant beyond any shadow of doubt. He further added that both the eye-witnesses have stood the test of cross-examination and no discrepancy could be found in their statements.

He further submitted that the prosecution has not only proved the case against the accused/appellant but would also pray for enhancement of the sentence for the reason that the crime had been committed in a cruel and gruesome manner. The learned Asst:A.G appearing on behalf of the State also supported the arguments of the private counsel for complainant.

7. I have heard arguments of learned counsel for the parties as well as the learned Asst:A.G for the State and perused the record.

8. Perusal of record reveals that the injured/ complainant was examined as PW-4 in support of the case of prosecution, wherein he has narrated the episode of the occurrence in his examination-in-chief. He was extensively cross-examined but nothing substantial could be extracted from his mouth during the course of cross-examination. Same was the case with the other eye-witness examined as PW-5, who has also stood the test of cross-examination successfully. Both the witnesses have also stood consistent and no contradiction could be pointed out in the two statements on the material aspects of the case. The assertion of learned counsel for the accused/appellant that PWs 4 & 5 had not been shown in the site plan to be working in the fields, is concerned; it is important to

be noted that presence of the PWs have duly been shown in the site plan. Every detail of the activities of PWs was not supposed to have been recorded in the site plan. This is sufficient that their presence at the time and place gets support from the site plan. The complainant has only stated that he had been present in the fields, but had not stated anything about his work in the fields. In such a situation, the object of the learned counsel is not found well placed.

9. It is true that it had not been brought in evidence as to how was the severed ear retrieved from the convict/appellant. The learned trial Court has observed in its judgment that the said fact had been mentioned in the statements of PWs Ahmadistan and Bakht Rawan recorded under section 161 Cr. PC but they had been abandoned, therefore the said fact could not be brought in evidence. Doctor namely Nadar Khan (ENT Specialist) was examined as PW-11, who has given the detail of injuries caused to the victim/complainant. The statement of Doctor fully supported the version of complainant viz-a-viz cutting of the left ear of the victim/complainant. The description of the surgical procedure given in Ex PW 11/1 however makes mention of an effort for implanting the ear, which could not succeed. The discharge slip Ex PW 11/2 also contains mention of

some surgical procedure in the said respect. Retrieval of the ear and its patching up was though a relevant fact but not that much material so as to dislodge the otherwise proved case of the prosecution. It was an act after the commission of the offence and the same would not therefore adversely effect the case of prosecution. The offence was complete with cutting of the ear which stands proved from the statements of eye-witnesses as well as Doctor and other corroboratory pieces of evidence.

10. Learned counsel for the accused/appellant had referred to the statement of Doctor Nadar Khan (PW-11), wherein he had given details of the parts of ear canal. Part of the said statement of Doctor given in cross-examination is reproduced hereunder for ready reference;

"میں ہسپتال DHQ تیمر گرہ میں سال 2015 سے بطور ENT سپشلسٹ تعینات ہوں۔ یہ درست ہے کہ کان کے بنیادی تین حصے ہوتے ہیں جو کہ اندرونی، درمیانی اور بیرونی حصوں پر مشتمل ہوتا ہے۔ Ear Canal بیرونی حصہ میں شامل ہوتا ہے۔ بیرونی حصہ کان میں pinna، tragus اور external ear canal شامل ہوتے ہیں۔ کان کے درمیانی حصہ میں Tympanic membrance، Ossicle، Eustachian tube شامل ہیں۔ یہ درست ہے کہ انرائیر، میڈل ائیر اور اوٹرائیر تینوں مشترکہ طور پر ایک عضو کان پر مشتمل ہے۔ از خود کہا کہ تینوں ایک عضو ہوتا ہے تاہم اگر مذکورہ تینوں اعضاء میں ایک زخمی یا نہ ہو تو تمام اعضاء متاثر ہوتے ہیں۔ جسکو میڈیکل زبان میں Augmentation کہا جاتا ہے۔"

The contention of learned counsel for the accused/appellant that the entire hearing system had

not been amputated, therefore the same does not amount to an offence under section 334 PPC, is difficult to be agreed with. There is no doubt that the outer part of the organ of ear is a component of the entire system of hearing gifted to humankind by Almighty Allah, but for constitution of an offence of *Itlaf-i-udw* under section 334 PPC, it is not required that the entire system of hearing, is rooted out. The offence of *Itlaf-i-udw* has been defined under section 333 PPC. The said definition is relevant for the present discourse, it is therefore, reproduced hereunder for ready reference;

> ***"333. Itlaf-i-udw:***
>
> ***Whoever dismembers, amputates, severs any limb or organ of the body of another person is said to cause Itlaf-i-udw".***

In the said definition, the legislature has cautiously used the words dismembers, amputates and severs (any limb or organ of the body). The three connotations are of void amplitude and cover all cases of dismembering of an organ or amputation of an organ of human body. The word 'dismembers' indicates that an organ is not completely chopped off but is disfigured materially and part of it may then remain on the body. This shows that for constitution of *Itlaf-i-udw,* it is not essential that it has to be established that the entire system of hearing is

destroyed. The word any limb or organ of the body is also significant in this respect, which would no doubt include an ear. The definition does not require that an entire faculty is made ineffective or all the components forming the system are rooted-out. The connotations "any limb or organ of the body" have been used in normal english meaning and cannot be given scientific definition of an entire system of a human body performing a particular function. An ear as it is taken in common parlance and as it exists in its visible form has always been taken to be an independent limb or organ by its dictionary meaning. In ***Al-Munjid*** (المنجد) Arabic Dictionary, meaning of *Udw* (عضو) has been given as follows;

"العضو والعضو: بدن کا حصہ۔ عضو۔ کسی جماعت یا کمیٹی کا ممبر۔"

Similarly, the word **'limb'** used in section 333 PPC carries the following meaning, according to Webster's New World Dictionary (Fourth Edition);

> ***"a part that extends from the trunk of a body, as an arm, leg, or wing"***

The word **'organ'** has been defined in the same dictionary as follows;

> ***"In animals and plants, a part composed of specialized tissues and adapted to the performance of a specific function or functions."***

The wordings of section 333 PPC is thus of void amplitude and would no doubt cover the cutting of an ear which would also mean the outer and visible part of the system of hearing. The word 'ear' shall also be taken in this case in its normal etymological meaning and cannot be given its medical or scientific meaning.

11. In the case of **Saifullah vs the State** reported as ***2003 SCMR 496***, nose of the victim had been chopped off and mutilated with the knife by the appellant in the case, and the sentence of conviction under section 334 PPC was maintained by the Hon'ble Apex Court. Reliance in this respect is also placed on the case of **Abdul Wahab and others vs The State and others** reported as ***2019 SCMR 516.***

12. Motive could not be established by the prosecution in the case. The complainant has stated in his first report as well as his testimony in the Court that motive for the occurrence was momentous verbal altercation. It has also been stated by him that the accused/appellant had brought the knife with him before coming to the spot, and thus whatever motive had been existing, it was prior to the occurrence and was not developed at the time of occurrence. The said motive remained hidden but non-existence and non-

disclosure of the motive has been held by the august Supreme Court of Pakistan to be digestible and not fatal to the case of prosecution. The Hon'ble Apex Court in the case of **Nawaz Ali and another vs The State** reported as ***2001 SCMR 726***, held as follows;

> ***"8. It has been held time and again by this Court that in case of lack of motive altogether or if the prosecution is unable to prove motive for murder, it does not affect the imposition of normal penalty of death in murder case, if the prosecution otherwise has been able to prove its case against the accused beyond reasonable doubt. Reference may be made to Ahmad Nisar v. The State (1977 SCMR 175) wherein this Court observed as follows:--***
>
> ***"Generally speaking motive, more or less, is a guess on the part of the prosecution witnesses. What truly motivates an accused person to commit a crime is best known to him and not to others. Absence of motive or failure on the part of the prosecution to prove it does not, therefore, adversely affect the testimony of the eye-witnesses if they be otherwise reliable."***

Reliance in this respect is also placed on the case of **Talib Hussain and others vs The State** reported as ***1995 SCMR 1776*** and the case of **Muhammad Akbar and another vs The State** reported as ***PLD 2004 Supreme Court 44*** as well as the case of **Khurram Malik and others vs The State and others** reported as ***PLD 2006 Supreme Court 354.***

13. The prosecution has been able to prove the case against the accused/appellant through reliable

and confidence inspiring evidence. The two eye-witnesses of the occurrence i.e. PW-4 and PW-5 were found believable. The statement of Doctor recorded as PW-11 also fully supported the version of the prosecution. The corroboratory pieces of evidences also lend an additional support to the case of prosecution. The prosecution was not under an obligation to produce all of its witnesses as held by the Hon'ble Apex Court in the case of **Khushi Muhammad vs The State** reported as ***1983 SCMR 697***. The learned trial Court has therefore rightly found the accused/appellant guilty of the commission of offence and has rightly convicted him under section 334 PPC, but the sentence awarded to him requires reconsideration. The accused/appellant was given a sentence of four (04) years imprisonment as Ta'zir along with payment of amount of Arsh as Rs. 10,27,968/-, half of the existing Diyat amount of Rs. 20,55,936/-.

14. Sub section 2 of section 337-N PPC provides for the cases, where the sentence of imprisonment may be awarded in addition to payment of Arsh. The said provision being relevant is reproduced hereunder for ready reference;

> ***337-N. Cases in which qisas for hurt shall not be enforced:***

(1) .....

(2)Notwithstanding anything contained in this Chapter, in all cases of hurt, the Court may, having regard to the kind of hurt caused by him, in addition to payment of arsh, award ta'zir to an offender who is a previous convict, habitual or hardened, desperate or dangerous criminal or the offence has been committed by him in the name or on the pretext of honour;

Provided that the Ta'zir shall not be less than one third of the maximum imprisonment provided for the hurt caused if the offender is a previous convict, habitual, hardened, desperate or dangerous criminal or if the offence has been committed by him in the name or on the pretext of honour.

15. The non obstante clause contained in subsection 2 of section 337-N PPC gives the said provision an overriding effect over all the other provisions dealing with the offences of hurt contained in Chapter XVI of the PPC. The wordings of the reproduced provision of law is itself clear and lays down in express words that in all cases of hurt, the normal punishment to be awarded to an offender is payment of Arsh or Daman and a sentence of imprisonment can only be awarded in the case, where an offender is found to be a previous convict, habitual or hardened, desperate or dangerous criminal or an offence has been committed by him in the name or on the pretext of honor. In quite a similar case of **Abdul Wahab and others vs The State and others** reported

as ***2019 SCMR 516,*** the Hon'be Apex Court held as follows;

> ***"It was alleged that Abdul Wahab appellant had then cut the right ear of Ahmed Ali (PW2) with the use of a knife and there was some doubt available on the record as to whether the ear was cut off through the use of a knife or it was bitten off by the said appellant. Be that as it may, there was no serious motive on the part of the appellants and the asserted motive had never been proved through any independent evidence. Admittedly the appellants were not previous convicts and there was no evidence of previous involvement of the appellants in any criminal case. It is not denied that no issue of honour was involved in commission of the relevant offence by the appellants. In this view of the matter in terms of section 337-N (2) the appellants could not have been punished with imprisonment by way of Ta'zir."***

In this respect, reliance is also placed on the case of **Haji Maa Din and another vs The State and another** reported as ***1998 SCMR 1528*** and the case of **Mazhar Hussain vs The State and another** reported as ***2012 SCMR 887.*** The prosecution has failed to bring on record any previous involvement of the accused/appellant in any offence whatsoever. He is a man of 60 years old. Real motive has not been disclosed by the prosecution as well. In such circumstances, the accused/appellant cannot be alleged as habitual or hardened, desperate or dangerous offender. The sentence of imprisonment of four (04)

years awarded to him by the learned trial Court is therefore not found justified. Whereas, criminal revision bearing No. 4-M of 2019 filed by the complainant for enhancement of conviction is also found meritless and accordingly dismissed.

16. In light of what has been discussed above, the appeal in hand is partially allowed to the effect that the accused/appellant is found liable to payment of half of the amount of diyat as Arsh amounting to Rs. 10,27,968/-. The sentence of imprisonment of four (04) years awarded to him by the learned trial Court is set aside.

17. These are the reasons for my short order of even date, which read as follows;

> ***"For reasons to be recorded later, vide my detailed judgment of today, the appeal in hand is partially allowed to the extent of modifying the sentence to the effect that the accused/appellant is found liable to payment of half of the amount of Diyat as Arsh amounting to Rs. 10,27,968/-. The sentence of imprisonment of four (04) years awarded to him by the learned trial Court is set aside. The accused/ appellant, who had been released on bail and is present in Court is ordered to be taken in custody and be kept in jail till the realization of the amount of Arsh, which is equal to half of the Diyat."***

Announced
Dt: 16.10.2019

JUDGE

Office 20/12/2019 W/R