

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No. 194-P of 2016.

With

Murder Reference No.06-P/2016

JUDGMENT

Date of hearing.....18.09.2017.....

Appellant(s)...(Nihar Alam) by Mr. Altaf Khan,
Advocate.....

Respondent(s)...(The State etc) by, Mr. Mujahid Ali Khan AAG, with
Suliman and Mst.Shah Jehana legal heirs of
deceased Mst. Pashmina and Tajbar, legal heir of
deceased Sartaj.



QALANDAR ALI KHAN, J:- Complainant-

turned -accused, Nihar Alam son of Niaz Ali
reported in Police Station Mandani, Charsadda,
after having brought dead body of his
deceased wife Mst. Pashmina daughter of

Suliman and also in the presence of other co-villagers, to the effect that his marriage was solemnized with deceased Mst. Pashmina about 11/12 years back, and out of the wedlock, three sons were born, who were still alive. According to the complainant/accused, he saw his deceased wife with Sartaj son of Khanzad Gul in compromising position some 9/10 months back, whereupon, he tried to stop them from such immoral activities, but the said Sartaj continued to visit his house and indulge in immoral relations with his wife, Mst. Pashmina; therefore, after informing his brother Sardar Alam, about illicit relations of his wife with the said Sartaj, they started keeping vigil on Sartaj, who was found in objectionable condition with deceased Mst. Pashmina in one bed; therefore, he and his brother, Sardar Alam, opened fire at them with their weapons, causing their death, and that he also hit Sartaj with Axe blows. According to the FIR, Mst. Pashmina was brought by him to the P.S, while

Sartaj was taken by his relatives to Charsadda Hospital. The FIR was signed by the complainant/accused and also verified by Sher Zaman Khan son of Naeem Ullah Khan and Fazal Rabi son of Itbar Shah. The occurrence, which reportedly took place at 1930 hours on 21.01.2014, was reported in P.S Mandani, Charsadda, at 2045 hours, vide FIR No.18 dated 21.01.2014; and case was registered against both the complainant/accused and his brother, Sardar Alam, under Sections 302/34 PPC

2. The Postmortem examination of deceased Mst. Pashmina at 7.30 AM on the following day of the occurrence i.e. 22.01.2014 revealed four firearm entry wounds of the same size and dimension i.e. $\frac{1}{2}$ x $\frac{1}{2}$ cm. Likewise, the postmortem examination of the other deceased, Sartaj, indicated 8 firearm entry wounds, with corresponding exit wounds, of the same size of 1 x 1 cm, but with the exception of fire arm entry wound No.3 which was found 1.5 x 1.5 cm in size, with charring marks, suggesting fire from

close range; and also 3 incised wounds of almost the same size of 2 inch x 2 inch, with slight variation in the size of injury No.10, showing the same as 1 ½ inch x 2 inch. The Medical Officer, in the case of deceased Sartaj, also reported sharp injury besides firearm injuries as cause of death of the deceased.

3. During spot (House of the complainant/accused) inspection the I.O secured blood from the pillow on the bed in the room where deceased Mst. Pashmina was reportedly present and fired at by the complainant/accused and his brother and co-accused, Sardar Alam. Likewise, blood was secured from the place assigned in the site plan to deceased Sartaj, wherefrom four spent bullets were also recovered by the I.O. Similarly, while showing places of both the complainant/accused and his brother and co-accused, Sardar Alam, in the site plan, the I.O recovered empty shells of 30 bore lying in the room in scattered condition and also 7 empties

of 7.62 bore, giving smell of fresh discharge; besides recovering a small size axe from the room, and also pistol 30 bore loaded with five rounds of 30 bore. The site plan was prepared on the pointation of the complainant/accused, and photographs of the scene of occurrence were also taken, and placed on file. The I.O also placed on file statements of legal heirs of deceased Sartaj, showing their intention not to charge the complainant/accused for the offence. Their statements bear their thumb impressions/signatures; wherein, they, nevertheless, verified report of the complainant/accused. The blood stained cotton and earth and garments of both the deceased were sent to the FSL, Peshawar, wherefrom the opinion of chemical examiner was received in the affirmative. The eleven 30 bore and seven 7.62 MM crime empties were also sent to the firearms expert, who furnished his report to the effect that eleven 30 bore crime empties were fired from two 30 bore weapons and that seven 7.62 MM bore crime empties were fired from one and the

same 7.62 MM bore weapon. After collection of evidence, recording statements of PWs under Section 161 Cr.PC and completion of investigation, complete challan was submitted in the case, leading to commencement of trial in the learned trial Court/Additional Sessions Judge, Charsadda at Tangi.

4. Since co-accused Sardar Alam, was absconding, he was proceeded against under Section 512 Cr.PC on the basis of statement of Hussain Shah DFC No.1014 (SW.1); and formal charge was initially framed under Sections 302/34 PPC on 02.04.2015, followed by formal charge on 19.11.2015 under Sections 302/338-C/34 PPC, with addition of '*Asqat-i-janin* of fetus'; and thereafter an-other formal charge under Sections 302/338-C/34 PPC and Section 13 AO was framed on 26.01.2016. During trial, the prosecution examined the following seven Pws.

- Dr. Adil, DHQ Hospital, Charsadda (PW1), conducted autopsy of deceased Sartaj and furnished his report;

- Madni-Ullah No. 349 (PW1-A-PW2), marginal witness to the recovery memos;
- Dr, Afsha, RHC, Jamal Abad (PW.1-A-PW.3 conducted autopsy of deceased Mst. Pashimina;
- Qaiser Khan IHC (PW4), registered FIR on the report of the complainant/accused;
- Muhammad Ayaz S.I (PW5), the investigating officer;
- Muhammad Zaman Inspector (PW.6) prepared injury sheet and inquest report of deceased Sartaj; and
- Rashid Khan S.I (PW.7) submitted complete challan against the accused facing trial.

5. After prosecution closed its evidence, statement of the accused was recorded three times, firstly, on 26.10.2015, then, on 12.01.2016 and, finally, his additional statement on 22.02.2016. The complainant, though, denied allegations of the prosecution against him, but neither produced defence evidence nor recorded his statement on oath. The learned trial Court/Additional Sessions Judge, Charsadda at Tangi, then, heard arguments of

learned APP for the State and learned defence counsel; and rendered the impugned judgment dated 10.03.2016, whereby, the complainant/accused, Nihar Alam, was convicted under Section 302 (b) PPC and sentenced to death on two counts as *tazir* with compensation of Rs.500000/- which, when recovered, was to be paid to the legal heirs of deceased as compensation under Section 544-A Cr.PC. The complainant/accused was also convicted under Section 338-C PPC and sentenced to seven years R.I as *Tazir*. He was further convicted under Section 13 A.O and sentenced to one year R.I with fine of Rs.5000/- or in default of payment of fine to one month S.I. The benefit of Section 382-B Cr.PC was extended to him. Simultaneously, the learned trial Court declared co-accused, Sardar Alam, as a proclaimed offender; and perpetual non-bailable warrant of arrest was issued against him; hence the instant appeal against the

conviction and sentences awarded to the convict/appellant.

6. Arguments of learned counsel for the appellant and learned AAG, also on behalf of legal heirs of the deceased, as they expressed their inability to engage counsel, heard; and record perused.

7. In this case, not only complainant himself brought the dead body of his wife, Mst. Pashmina, to the Police Station and lodged report there about her murder as well as *qatl-i-amd* of her paramour, Sartaj, by him and his brother and absconding co-accused, Sardar Alam; while disclosing motive for the offence as illicit relations of deceased Sartaj with his deceased wife, Mst. Pashimina, which was in his knowledge for the past 9/10 months, and was shared by him with his brother, Sardar Alam. The FIR was signed by the complainant and thumb impressed by Sher Zaman Khan son of Naeem Ullah Khan and also signed by Fazal Rabi son of Itbar Shah as token of its

correctness. The report was lodged in Police Station Mandani, Charsadda, at a distance of 5/6 kilometers from the house of the complainant/accused, where the occurrence took place. The occurrence reportedly took place at 1930 hours, and the report was lodged on the same day i.e.21.01.2014 at 2045 hours i.e. within one hour and 15 minutes of the occurrence.

8. The postmortem reports of both the deceased confirmed the FIR by showing not only multiple firearm injuries on the bodies of both the deceased but also sharp edged wounds on Sartaj, in total conformity with statement of the complainant/accused in the FIR to the effect that first he and his brother and absconding co-accused, Sardar Alam, fired at both the deceased with their firearms and then he caused axe blows to deceased Sartaj. The recovery of a small size axe from the scene of occurrence i.e. residential room of the complainant/accused and a loaded 30 bore pistol with five rounds of

30 bore from the same place, notwithstanding absence of blood stains etc on the axe and absence of smell of fresh discharge from the 30 bore pistols, which would lose significance as we proceed to further examine evidence available on the case file, would substantiate case of the prosecution initiated on the basis of FIR promptly lodged in the P.S by the appellant himself.

9. During spot inspection, which is admittedly residential room in the house of the complainant/accused, not only blood was secured from the pillow where dead body of deceased Mst. Pashmina was lying but also blood stained earth and four spent bullets were recovered from the place where dead body of deceased Sartaj was found; and the I.O also recovered 11 crime empties of 30 bore and 7 crime empties of 7.62 bore lying in the room in scattered condition. The firearms expert found eleven 30 bore crime empties having been fired from two different 30 bore weapons, and seven 7.62 MM bore crime empties fired from one and the same 7.62 MM bore weapon. The 30 bore pistol was not sent to the firearms expert as,

according to the I.O, the same was not giving smell of fresh discharge, indicating that no fire was made from the said recovered pistol. Likewise, the small size axe recovered from the spot was not sent to FSL for chemical analysis due to the fact that the same was not having any blood stains. Anyhow, the chemical analysis of blood stained cotton, blood stained earth and blood stained garments of both the deceased confirmed the scene of occurrence as residential room in the house of complainant/accused, who also never denied the same to be the place of occurrence; but nowhere explained the presence of dead body of his wife and a stranger in his living room having been murdered with firearm by the assailants. The belated denial of the complainant/accused, without disputing his signature on the FIR and without furnishing any explanation for the presence of dead bodies of both his deceased wife and a stranger deceased, Sartaj, in his living room, would not absolve him

of the charge of *qatl-i-amd* of his wife and her paramour at late night time i.e 1930 hours on 21.01.2014. The two Pws namely Sher Zaman Khan and Fazal Rabi, who verified FIR lodged by complainant/accused, and thumb impressed/signed the same as token of its correctness were, though, abandoned by the prosecution for having been won over by the defence, yet none of the legal heirs of both the deceased have, so far, exonerated the complainant/accused of the charge of *qatl-i-amd* of the deceased, and even legal heirs of deceased Sartaj, who expressed their intention not to pursue case against the complainant/accused, nevertheless, verified the FIR. Needless to say that the defence, nevertheless, had the opportunity to produce the abandoned PWs as defence witnesses; but it did not avail this valuable opportunity, neither seriously challenged the report/FIR lodged and also signed by the appellant/accused himself, and further

substantiated by the circumstantial evidence brought on record by the prosecution.

10. The learned counsel for the appellant, during his arguments, focused on that part of statement of Qaiser Khan IHC (PW.4) whereby he deposed that he confined the accused in the lockup and that he was not taken by any person away from the lockup; whereas, according to the learned counsel, the I.O (PW.5) stated that site plan was prepared by him at the instance and pointation of the appellant, who, according to the PW, was brought out of the lockup and accompanied the I.O to the spot for pointation. Apart from the fact that PW.4 never explained that 'any person' mentioned during his cross examination also included the I.O. the apparent inconsistency in the testimony of both the PWs on this single point, would not be sufficient to dislodge the otherwise overwhelming circumstantial evidence, receiving unqualified support from the

promptly lodged report of the complainant/accused about the so-called honour killing by him and his absconding brother, Sardar Alam. Besides, the charge of *Askat-i-Janin* of Fetus under Section 338-C PPC also stands proved through the un-rebutted deposition of Dr. Afsha (PW.1-A/PW3); together with the charge under Section 13 A.O. owing to recovery of 30 bore pistol loaded with 5 rounds of 30 bore. As such, there is nothing on record to warrant setting aside conviction of the appellant/accused on two counts under Section 302 (b) PPC with compensation payable to the legal heirs of the deceased under Section 544-A Cr.PC, and his conviction under Section 338-C PPC and also his conviction under Section 13 A.O. Therefore, the appeal against the conviction stands dismissed.

11. However, keeping in view the fact that the three minor sons have already lost their mother and, if death sentence is maintained, they would also be losing their father, the

penalty of death is commuted and converted into that of imprisonment for life on two counts, with reduced compensation of Rs.100000/100000/- for legal heirs of each of the two deceased under Section 544-A Cr.PC. The rest of sentences under Section 338-C PPC for seven years R.I as *Tazir* and under Section 13 A.O to one year R.I with fine of Rs.5000/- or in default of payment of fine to further one month S.I, with benefit of Section 382-B Cr.PC are hereby upheld. The sentences of imprisonment shall run concurrently.

12 Murder reference No.06-P/2016 sent by the learned trial Court for confirmation of the sentence is answered in the negative.

Announced.
18.09.2017.

J U D G E

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Ayub

(D.B) Hon'ble Mr. Justice Lal Jan Khattak, Judge.
Hon'ble Mr. Justice Qalandar Ali Khan, Judge.

