JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR
(*Judicial Department*)

Cr.A No. 848-P/2018
With Cr.M 323/2019

JUDGMENT

Date of hearing: 23.12.2019

Appellant:- (Muhammad Hanif) by Muhammad Amin Khattak Lachi, Advocate.

Respondent:- (The State) by Syed Sikandar Hayat Shah, Addl:A.G and (Complainant) by Aziz-ur-Rahman, Advocate.

******

WIQAR AHMAD, J.- My this order is directed to dispose of appeal filed by the convict/appellant namely Muhammad Hanif against his conviction and sentence awarded to him vide judgment dated 24.09.2018 of the learned Additional Sessions Judge-III, Kohat in the criminal case registered vide FIR No. 88 dated 20.03.2017 under sections 324/ 337-F(iii) PPC at Police Station Gumbat, District Kohat.

2. Report of the occurrence was lodged by the complainant namely Mst. Bismillah Jan daughter of Kabir Khan in the emergency room of Rural Health Center (hereinafter referred to as **'RHC'**), Gumbat stating therein that she along with her daughter namely Tania Bibi had been going to the house of her mother-

in-law for the purpose of extending her, an invitation for the marriage of her son namely Sakhawat Ali, on the day of occurrence. When they reached near Basic Health Unit, Parshai (hereinafter referred to as **'BHU'**), at 08:45 AM her ex-husband namely Muhammad Hanif (appellant/convict) appeared, took out his pistol and started firing at her with the intention of committing her murder. The complainant got injured as a result of the firing. She stated that motive for the occurrence was the impending marriage of her son Sakhawat Ali which had been taking place against the wishes of the convict/appellant. The occurrence was also witnessed by daughter of the complainant and the convict namely Tania Bibi.

3. Investigation in the case proceeded. Beside other formalities, blood stained clothes of the complainant were recovered and sealed vide recovery memo Ex PC. Blood soaked earth and three empties of 30 bore pistol were also recovered vide recovery memo Ex PC/1. The report of medical examination of the complainant was brought on record as Ex PM. The accused was arrested on 23.04.2017. He was shown to have made pointation of the place of occurrence, and on his pointation, 30 bore pistol was also recovered, whereafter section 15-A.A was added to the case of

prosecution. On completion of investigation in the case, complete challan was put in Court on 08.06.2017. Charge was framed and prosecution was allowed to produce its evidence, whereafter they produced eight (08) witnesses and closed their evidence. Statement of accused was recorded under section 342 Cr. PC. He however did not opt for giving statement on oath. The learned trial Court at the conclusion of the trial, convicted the accused/appellant for the commission of offence and sentenced him as follows;

> ***"Under section 324 PPC to ten (10 years rigorous imprisonment with fine of Rs. 50,000/- (rupees fifty thousand) or in default thereof to suffer six (06) months S.I.***
>
> ***Under section 337-F(iii) PPC to three (03) years rigorous imprisonment with fine of Rs. 50,000/- (rupees fifty thousand) as daman to be paid to the injured/complainant as compensation for the expenses borne by her on her treatment or in case of default in payment of daman, he will be dealt with in a manner prescribed by section 337-Y(ii) PPC.***
>
> ***Both the sentences shall run concurrently with extension of benefit of section 382-B Cr. PC to the convict/appellant."***

4. Learned counsel for the convict/appellant contended during the course of his arguments that Mst. Bismillah Jan (complainant) stated in her statement recorded in the Court that her statement was recorded by the police after two days of the occurrence and that Mst. Tania Bibi (eye-witness PW-8) had stated that her

statement had been recorded immediately after statement of the complainant, therefore the statement of the witness i.e. Mst. Tania Bibi was recorded under section 161 Cr. PC at a delay of two days and her statement for the said reason could not be relied upon. He further added that the occurrence had taken place near BHU but the injured/complainant had straight away been taken to RHC, which fact has made the place of occurrence doubtful. He further added that the distance from which the complainant had been fired upon does not seem to be real. Had it been so, then the bullet would have passed the body of the complainant through and through. He has raised particular objection regarding non-sending of empties earlier and keeping it in the police station till recovery of the weapon of offence. He added that no reliance can be placed upon such a recovery.

5. Learned counsel for the complainant submitted in rebuttal that a BHU does not have the facility of treating persons with bullet injuries and that's why the complainant has been taken straight to the RHC, which was a relatively larger hospital with better facilities. He further added that the prosecution has been able to prove the case through the testimony of both the eye-witnesses, who have remained

consistent in their stance throughout. He further added that the complainant had no reason for substituting the sole accused/appellant nor any other enmity could be shown to have been existing, providing a cause for any other person to have made firing upon the complainant. The prosecution in such circumstances, according to learned counsel for the complainant, had fully proved the case beyond reasonable doubt. Regarding the quantum of sentence, the learned counsel stated that the convict had repeated the firing which fully established his intention of killing the lady and that the learned trial Court had rightly awarded him the full dose of 10 years.

6. The learned Addl:A.G adopted the arguments of private counsel for the complainant.

7. I have heard arguments of learned counsel for the parties, the learned Addl:A.G appearing on behalf of the State and perused the record.

8. Perusal of record reveals that two eye-witnesses of the occurrence were produced by the prosecution. One was the injured/complainant herself while another was her daughter namely Mst. Tania Bibi, who also happened to be the real daughter of the appellant. Complainant was examined as PW-7, who has narrated her account, as given in the FIR, in her

examination-in-chief. She had been cross examined by learned counsel for the appellant but nothing prejudicial to the case of prosecution could be brought out from her mouth, except a sentence in her statement, wherein she had stated that after lodging of FIR, the local police had recorded her statement after 2/3 days of the occurrence in the KDA hospital. The daughter of the complainant/injured namely Mst. Tania Bibi was examined as PW-8, who has also fully supported the case of the complainant during her examination-in-chief. She had not only stood the test of cross examination but has remained consistent with the statement of other eye-witness i.e. PW-7. Learned counsel for the appellant has particularly raised objection regarding her part of statement given in cross examination, where she had stated that her statement had been recorded by the police after recording the statement of her mother (PW-7). The learned counsel tried to build an argument that since the mother had stated in her cross-examination that her statement had been recorded by the police after 2/3 days of the occurrence in KDA hospital, therefore, statement of the eye-witnesses should also be taken to have been recorded under section 161 Cr. PC after 2/3 days of the occurrence. While developing such an argument, the learned counsel, I am afraid, was not having a holistic

picture of the whole statements of both the eye-witnesses. The relevant part of the statement of Mst. Tania Bibi (PW-8), is reproduced hereunder for ready reference;

> ***"After receiving injuries we shifted my mother to RHC Gumbat and thereafter to KDA hospital Kohat by both of us. My mother reported the matter at RHC Gumbat. Our other relatives also visited my mother at KDA hospital Kohat. My uncle Shabbir and brother also reached KDA hospital. When we reached KDA hospital, my uncle Shabbir and brother were already present there. My statement was recorded by the police after recording my mother statement. My 161 statement was recorded on the day of occurrence. I do not remember the exact time of recording my 161 statement. I spent one day with my mother in the hospital."***

It is quite clear that this lady was referring to the lodging of report by the complainant in RHC, Gumbat, the moment she reached there. She accordingly stated that her statement was recorded after recording the statement of her mother. Lodging of the report to the police at RHC, Gumbat on the relevant time had not otherwise been disputed by the appellant. Same stand proved from the statements of PW-3 and PW-6 as well as statements of the eye-witnesses, particularly the part reproduced above. Both the eye-witnesses have remained consistent in this regard. So far as the statement of complainant that her statement was recorded by the police after 2/3 days of the occurrence in KDA hospital, is concerned; it is

important to be noted that the said sentence opens with the word *"after lodging of FIR"*. FIR had been lodged on her report. May be that the investigating officer had discussed certain aspects of the case in the hospital after 2/3 days of the occurrence but no other statement of the complainant had ever been recorded after lodging of her first report. The said statement cannot therefore be construed that her statement had actually been recorded after 2/3 days and that statement of other eye-witness was recorded thereafter. The objection of learned counsel is therefore found to be misplaced.

9. The Hon'ble Supreme Court of Pakistan had held in a number of judgments that the worth of the injured eye-witness cannot be lightly disbelieved, if it remains consistent with the other particulars of the case and evidence produced. Reiterating the said ratio, the Hon'ble Supreme Court of Pakistan in its judgment rendered in the case of **Farooq Khan vs The State** reported as ***2008 SCMR 917***, has observed as follows;

> ***"9. As to the argument of learned counsel for the appellant that the solitary statement of injured P.W.8 was the basis of conviction, suffice it to observe that the injured prosecution witness had given the number of injuries caused to the deceased in the incident by attributing the responsibility to the appellant. Evidence of this witness has been c supported by medical evidence furnished by Dr. Muhammad Maqsood***

P.W.6 who conducted post-mortem examination on the dead body of the deceased Zahir Khan. The evidence of injured witness is worthy of credence, independent and natural and there was no lawful justifiable cause to discard his evidence. The credence of statement of solitary witness has already been examined by this Court in a number of cases. In this context reference can be made to Mali v. The State 1969 SCMR 76; Muhammad Ashraf v. The State 1971 SCMR 530, Muhammad Siddique alias Ashraf alias Achhi and 3 others v. The State 1971 SCMR 659 and Muhammad Mansha v. The State 2001 SCMR 199. Moreover, conviction in any murder case can be based on the testimony of a single witness, if the Court is satisfied that the witness is reliable. In other words, the "emphasis" is on quality of evidence, and not on its quantity. In this behalf reliance can be placed on the case of Allah Bakhsh v. Shammi PLD 1980 S C 225."

10. The lady Doctor has been examined as PW-3, who has given detail of the injuries on the person of the complainant. In cross examination, she stated that the medico-legal report Ex PM had also been partially written by Dr. Arshad Sohail in blue ink. She admitted that the said report has not been signed by the said Dr. Arshad Sohail. She had repeated in her cross examination that as per observations, there were three firearm entry wounds on the body of injured, while one was exit wound on the back of the body of the injured. Perusal of report Ex PM reveals that the general entries regarding name, address, time etc had been entered with blue ink by Dr. Arshad Sohail while the description of injuries had entirely been given by

the lady Doctor Syed Gul Bhar, who has been examined as PW-3. It is obvious that since the complainant was a lady, therefore the lady Doctor had examined her and she has so stated in her examination-in-chief as well as in cross examination. Dr. Arshad Sohail may have helped in preparing the report but so far as the description of the injuries is concerned, same has been examined and scribed by the lady Doctor (PW-3) in black ink. Therefore, non-examination of Dr. Arshad Sohail would not reflect adversely on the case of prosecution.

11. Learned counsel for the convict/appellant also contended that the occurrence was stated to have taken place near BHU but the complainant has straight away been taken to another Health Unit commonly known as RHC, Gumbat which makes the place of occurrence doubtful. This fact has been clarified by the complainant in her cross examination, wherein she stated that she had not visited BHU, Parshai as there had been no facility there. She had further stated that they reached Gumbat hospital in 20 to 25 minutes. It is common knowledge that Basic Health Unit does not possesses Operation Theaters for surgical procedures and does not entertain patients with bullet injuries. The decision to shift the complainant to RHC was for

obvious reason and has expressly been clarified by her in her statement. Besides, blood soaked earth had also been recovered from the spot vide recovery memo Ex PC/1, which also corroborate the fact that the spot of occurrence was the same as narrated by the complainant and the other eye-witness.

12. Though the weapon of offence has been recovered on the pointation of the convict/appellant vide recovery memo Ex PW 2/4 on 24.04.2017 but it is apparent that the empties had not been sent to the FSL earlier. It was sent to the FSL along with recovered pistol on 05.05.2017. The Hon'ble Supreme Court of Pakistan in its judgment given in the case of **Israr Ali vs The State** reported as ***2007 SCMR 525*** observed as follows;

> ***"Crime empty was not sent to the expert immediately after taking into possession and the weapon of offence was recovered from the convict/appellant after his arrest as borne out from the statement of P.W.16. P.W.15 Muhammad Arshad had taken possession of Crime-empty Exh.P.7 vide memo. Exh.P.H. on 10-10-1999. His statement is silent to whom he had given the said memo. P.W.14 Muhammad Akhtar stated in his examination-in-chief that Muhammad Arshad S.-I. handed over to him sealed parcel containing crime-empty for safe custody in the Malkhana. This fact was not mentioned in his statement which was recorded by Investigating Officer under section 161, Cr.P.C. thrice on 10-10-1999 and 23-10-1999 as evident from cross-examination which is to the following effect:--***

> ***"I narrated to the Investigating Officer that parcel containing crime empty was handed over to him by Investigating Officer confronted with Exh.D.C. where it is not so recorded."***
>
> ***It was also admitted by him in cross-examination that he did not state before the Investigating Officer in his statement Exh.D.C. that the parcel containing crime empty was handed over to Khadim Hussain P.W.4. He also admitted that he did not send crime empty to expert till 1-12-1999. Khadim Hussain P.W.4 stated in examination-in-chief that he received parcel containing empty bullet on 3-11-1999 from Muhammad Akhtar P.W.14. He handed over to Muhammad Ramzan for onward transmission in the office of Forensic Science Laboratory. P.W.16 Khalid Rauf arrested appellant on 5-12-1999. He also got recovered the pistol from him on his pointation. Thereafter he had handed over pistol to P.W.4 Khadim Hussain. This type of recovery of crime empty does not provide strong corroboration qua the prosecution version."***

It has also been held by the Hon'ble Supreme Court of Pakistan in its judgment given in the case of **Nizamuddin vs The State** reported as ***2010 SCMR 1752*** that the delay in sending of the crime weapon and crime empties shall not overweigh the ocular evidence. The relevant part of the observation is reproduced hereunder for ready reference;

> ***"6. Coming to the question of delay in sending crime weapon and crime empties, admittedly, the crime empties were recovered on the day of incident and the crime weapon was recovered on 17-7-1996. It appears that the same were, however, sent to Chemical Examiner on 24-7-1996 with considerable delay but such delay shall not, in the facts and circumstances of this case, overweigh the ocular evidence found in line***

with and supported by the medical evidence."

Similar view has also been expressed by the Hon'ble Supreme Court of Pakistan in its judgment rendered in the case of **Nizamuddin vs The State** reported as ***2010 SCMR 1752.*** The recovery of weapon of offence and its matching report with the empties cannot therefore by relied upon, but it has equally been held by the Hon'ble Apex Court in its judgment rendered in the *ibid* case of **Ranjha vs The State**, that when the prosecution succeeds in proving the case through direct testimony, then the corroborative piece of evidence like non-recovery of weapon of offence lose its significance.

13. In the case in hand, since the prosecution has been able to prove its case through direct evidence, where not only the complainant but the real daughter of the convict/appellant had testified against him and both of them have remained consistent on material particulars of the case. Motive for the occurrence has not only been established by the prosecution through the statements of two eye-witnesses but has been admitted by the appellant in answers to questions No. 13 & 14 of statement recorded under section 342 Cr. PC. In such circumstance, the prosecution has been able to prove the case against the appellant

beyond any reasonable doubt and he has therefore rightly been convicted by the learned trial Court.

14. So far as the sentence awarded to the appellant is concerned; it is apparent that the maximum sentence provided for an offence under section 324 PPC is 10 years. The complainant has been fortunate that all her vital organs had escaped the brunt of the bullets fired by the convict/appellant. The existence of the motive also suggests that the appellant may have been prodded by some problems created by his ex-wife which were related to his son and daughter, both being supposed to be nearer to his heart despite separation between the spouses. In such circumstances, the convict/appellant did not deserve a full dose. A sentence of 7 years rigorous imprisonment under section 324 PPC is found reasonable in the circumstances of the case.

15. Though the appellant has neither agitated in the memo of appeal nor at the bar that he had been convicted by the learned trial Court under section 337-F(iii) PPC for undergoing a sentence of three (03) years R.I and Rs. 50,000/- as Daman, without being specifically charge sheeted for an offence under the said section of law, yet the said fact was found readily noticeable on the face of record. Charge had only been framed under

section 324 PPC and the allegation of the commission of offence under section 337-F(iii) PPC had not been specifically stated in the charge. This aspect of the case requires determination despite the fact that it had not been agitated by the appellant as a ground of appeal. Such like questions have come up before the Hon'ble Supreme Court of Pakistan time and again and stand well settled. In the case of **Muhammad Aslam vs The State** reported as ***1970 P Cr. LJ 987***, the Hon'ble Supreme Court of Pakistan was dealing with the case of the appellant who had been convicted under section 302 PPC as well as under section 307 PPC (now 324 PPC). One of the questions before the Hon'ble Court was that charge had not been framed against the accused under section 307 PPC (now 324 PPC) by the learned trial Court. The Hon'ble Apex Court resolved the said question in the following manner;

> ***"The next contention of Dr. Tassadduque Hussain was that the learned Judges erred in convicting Raja under section 307 of the Pakistan Penal Code as no charge under that section was framed against him. It is true that no specific charge under section 307 was framed against Raja; but it appears that he was clearly accused of having made an attempt to commit the murder of Mehdi Khan by pistol shot. The prosecution evidence was led to that effect. It appears that Raja was asked both in the committing Court and the trial Court if he had fired a pistol shot at Mehdi Khan as he shouted out because of Aslam's firing at Nur Dad. Raja, of course, answered this question in the negative in both the Courts, but he was***

clearly aware of the definite accusation levelled against him personally. The trial Court's judgment shows that the trial was held for several offences including the offences of murder and an attempt to commit murder under sections 302 and 307, respectively. The appeal preferred on behalf of the State was one against r the trial Court's order acquitting Raja of an offence under section 307 of the Pakistan Penal Code. Lastly, Raja himself made a petition for special leave to appeal against his conviction and sentence under section 307. Thus, Raja was all along award that he was tried for an offence under section 307 of the Pakistan Penal Code, although no charge under that section was expressly framed against him. This was nothing but an omission of a formal charge under section 307 of the Pakistan Penal Code in respect of Raja. As he was already aware of the exact nature of the accusation against him, no prejudice was caused to him by the omission of a charge under section 307 against him. In view of the provisions of section 535 and clause (b) of section 537 of the Code of Criminal Procedure, as introduced by the Code of Criminal Procedure (West Pakistan Amendment) Act, 1964, the omission to frame a formal charge under section 307 against Raja is of no consequence, and his conviction and sentence under that section cannot be called in question only on the ground of that omission. As Raja was found to have fired a pistol shot at Mehdi Khan in an attempt to kill him, his appeal against his conviction and sentence under section 307 of the Pakistan Penal Code is liable to be dismissed."

In the said case, conviction under section 307 PPC (now 324 PPC) was maintained, despite the fact that charge had not been specifically framed under the said section of law.

16. In the case of **Zafar Iqbal vs The State** reported as ***PLD 2015 Supreme Court 307***, the convict had been sentenced under section 7 (a) of the Anti-

Terrorism Act, 1997 (hereinafter referred to as **'the Act'**). The Hon'ble Apex Court found that section 7 (a) of the Act was not attracted to the case of the appellant and that he should have been sentenced under section 302 PPC only. The Hon'ble Apex Court altered the sentence accordingly without remanding the case back to the trial Court. While disposing of the said case, the Hon'ble Apex Court recorded the following observations;

> ***"16. The appellant knew what he was being charged for and was also charged under both the said provisions of law. The learned judge, however, committed an error in dropping the charge under section 302, P.P.C. at the time of pronouncement of judgment and in convicting the appellant under section 7(a) of the Act as at the relevant time the Act had not been promulgated. Section 38 specifically provides for punishment, "as authorized by law at the time the offence was committed", which would mean that the appellant could only be punished under section 302, P.P.C. The question that requires consideration is whether as a consequence of the said error the trial was vitiated or was materially defective.....***
>
> ***17. That a sentence can be reversed and altered provided it has occasioned a failure of justice. If the appellant was convicted under section 302(b), P.P.C. it would have left him with a window of opportunity to effect a compromise with the heirs of a deceased, therefore to such extent his conviction under section 7(a) of the Act could be categorized as a failure of justice. Moreover, though not applicable in the present case, a conviction under the Act excludes the earning of remission (section 21F of the Act). Consequently, exercising our powers under section 537 of the Code we alter the conviction of the appellant from section 7(a) to one under section 302(b),***

> ***P.P.C. as ta'zir, whilst maintaining the compensation of one hundred thousand rupees payable to the heirs of each deceased under section 544-A of the Code and in default thereof to undergo simple imprisonment of six months. With this alteration in sentence the appeal is dismissed."***

Similar view was also expressed by a five member Bench of the Hon'ble Apex Court in its judgment rendered in the case of **Talal Ahmed Chaudhry vs The State** reported as ***2019 SCMR 542***, wherein the Hon'ble Court held;

> ***"Further, it has been settled by this Court in a number of cases, that since there is no yardstick available to fix the essential factors which a charge must contain, therefore, an omission or defect in charge which does not mislead or prejudice the right of the accused could not be regarded as material and made the basis to vitiate a trial on the ground of error or omission in framing charge, it does not even make a case of remand. Reference can readily be made to the case of Nadir Shah v. The State (1980 SCMR 402), S.A.K. Rehmani v. The State (2005 SCMR 364), M. Younus Habib v. The State (PLD 2006 SC 153) and Malik Muhammad Mumtaz Qadri v. The State (PLD 2016 SC 17). The argument, therefore, fails."***

17. The appellant in the case in hand knew very well that he had been put to trial, after his indictment, for an attempt to commit qatl-i-amd of the complainant Mst. Bismillah Jan by firing at her effectively and thereby committing an offence under section 324 PPC. It also stood embedded in later part of section 324 PPC that a person committing an

offence there-under shall also be liable to punishment provided for causing hurt to any person. The appellant had therefore not been materially prejudiced in his defence and the irregularity is therefore curable under section 535 read with 537 of the Criminal Procedure Code, 1898.

18. In light of what has been discussed above, the appeal of the appellant against his conviction is dismissed, while it is partially allowed to the extent of reducing his sentence awarded under section 324 PPC from ten (10) years R.I to seven (07) years R.I. Rest of the sentences are also kept intact but all the sentences shall be running concurrently. Benefit of section 382-B Cr. PC is also extended to the appellant.

Announced
Dt: 23.12.2019

JUDGE