JUDGMENT SHEET

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

Cr.A No. 88-M/2020
With M.R No. 1-M/2020

Muhammad Shafiq*.....*(Appellant)

vs

The State & another*.....*(Respondents)

Present: *Mr. Abdul Munim Khan, Advocate for the appellant.*

Mr. Sohail Sultan, Asst:A.G for the State.

Mr. Iftikhar Ali Khan, Advocate for the respondent No. 2.

Date of hearing: 25.11.2020

JUDGMENT

WIQAR AHMAD, J.- Appellant has called in question judgment of his conviction and sentence dated 26.02.2020 through the instant appeal, whereby he has been handed down the following penalty;

i. **Death penalty as Ta'zir for causing murder of Mst. Shazia Begum under section 302 (b) PPC.**
ii. **Death penalty as Ta'zir for causing murder of Mst. Shahida Parveen under section 302 (b) PPC.**
iii. **To pay Rs. 10,00,000/- to legal heirs of deceased Mst. Shazia Begum and Mst. Shahida Parveen under section 544-A Cr. PC or in default thereof, he was ordered to undergo simple imprisonment for six (06) months;**

2. Appellant has faced trial in a case initiated vide report of Commander-III Wing Bajaur Levies,

wherein he has stated that he had received information on 29.08.2018 at 12 noon that somebody had killed two ladies at village Umaray Mamund District Bajaur. On receipt of such information, he had proceeded to the spot of occurrence along with Quarter Master Subdear-I wing and other levies personnel, where he found that appellant namely Muhammad Shafiq bearing built No. 803580 in Bajaur Scouts, had killed his wife namely Mst. Shazia Begum who had been teaching at Primary School Umaray as PST teacher, as well as her sister namely Mst. Shahida Bibi, by firing at both the ladies with his pistol. Appellant had been encircled and arrested by people of the local village, who was handed over to the levies officials and was taken to lock-up at Khar. The pistol along with its magazine were deposited in official Maal Khan (مال خانہ). The appellant was further alleged to have disclosed before arresting officer that he had married Mst. Shazia Bibi about two years ago but due to strained relations between the spouses, she had been divorced two months before the occurrence, under the compelling influences of Major Sheraz and Hawaldar Raees. It was disclosed that Hawaldar Raees had been talking to his wife via telephone, in his presence due to which he had killed the lady. Sister of his former wife

was stated to have been killed for the reason that she had been instrumental in bringing disharmony in the wedlock.

3. Initially, appellant was handed over to Bajaur Scouts (a paramilitary force) for trial. After thorough investigation, he was recommended for imposition of penalty under the disciplinary rules of his service. The competent authority i.e. Inspector General Frontier Corps (North) also issued direction to Bajaur Scouts for handing back the appellant to Political Administration under section 8(2) of Frontier Corps Ordinance, 1959 for undergoing trial. The Assistant Commissioner, Nawagai then took cognizance of the case under the erstwhile FATA Interim Governance Regulation, 2018 (hereinafter referred to as **'FIGR'**). He referred the matter to *jirga*/council of elders for their opinion as per the terms of reference framed vide order dated 11.10.2018. The case was then referred to regular Court for trial in the backdrop of merger of the area of Bajaur Agency into Province of Khyber Pakhtunkhwa on promulgation of 25th Constitutional Amendment, wherein prosecution submitted final report (complete documents) before the trail Court. Charge was framed against him on 15.07.2019 to which he pleaded not guilty and claimed trial. The case

was then posted for prosecution evidence. The prosecution examined six (6) witnesses. 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 appellant and awarded him punishment as per the sentence reproduced above.

4. Arguments heard and record perused.

5. Perusal of record reveals that prosecution has mainly been relying upon confessional statement of the accused recorded before Naib Tehsildar Bakht Jehan (PW-1), statement of complainant recorded as Pw-3, and statement of a local elder namely Malak Faqir Muhammad recorded as PW-4 as well as statement of brother of the deceased ladies recorded as PW-6.

6. We would first deal with confessional statement of the accused/appellant. Prosecution has produced Bakht Jehan formerly Naib Tehsildar Mamund as PW-1. He has stated in his examination-in-chief that on receipt of information of the occurrence, he had proceeded to the spot along with other personnel of Levies, where he had found appellant tied with a tree being apprehended by people of the locality

after commission of the offence. Appellant had been released there-from and taken in custody by him. He has further stated that on same day, the appellant had been produced before him for recording his confessional statement, where he had given a time of 15-20 minutes to accused for reflections and had thereafter recorded his confessional statement, which was exhibited as Ex PW 1/1. Appellant had then been handed over to Bajaur Scouts. He had been returned back to the custody of the PW on 29.09.2018, whereafter he had recorded statement of complainant namely Laal Zada and had submitted record of the case before Assistant Commissioner Nawagai for further proceedings. In the opening line of his cross-examination, he submitted that he had also conducted partial investigation in the case. The main question that lies lurking on the face of record is, "whether a confession recorded before a Naib Tehsildar on 29.08.2018 may be read as evidence against the appellant?" In this respect, learned counsel for complainant as well as learned Asst:A.G have vehemently contended that since investigations in the case had been conducted under the repealed FIGR, wherein continuity had been given to all the *fora* existing in the FCR, therefore the Naib Tehsildar being

a Magistrate in the erstwhile regime, had fully been competent to record confessional statement of an accused. They also placed reliance on Article 264 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as **'Constitution'**) and submitted that the investigations which had taken place under the repealed regime of laws should be deemed protected and must be considered in the context of the earlier system.

7. There has been no cavil with the proposition that Article 264 of the Constitution gives protection to investigations conducted under a repealed statue when the repeal takes place as a result or on the dent of the Constitution. FCR stood repealed with repeal of Article 247 of the Constitution by 25th Constitutional amendment, therefore Article 264 of the Constitution may be referred in a case, where certain proceedings have taken place under the repealed FCR, and it has also been so held by this Court in its earlier judgment given in the case of **Shah Zal vs. the State (J .Cr.A No. 1184-P/2019)** in the following words;

> **"The criminal liability incurred by the appellant has been expressly saved by the wordings of Article 264 of the Constitution. The repeal of the FCR cannot be deemed to have been affecting the punishment imposed on the appellant and upheld upto the august**

Supreme Court of Pakistan. In the case of Muhammad Arif and another vs. The State and another reported as *1993 SCMR 1589*, the Hon'ble Apex Court had cited with approval the judgment of the House of Lords of England given in the case of Wicks vs. Director of Public Prosecutions (1947), whereby the conviction of the appellant had been upheld under the Emergency Powers (Defence), Act, 1939, because of existence of section 11(3) in the said Act. The ibid section of law provided that the expiry of the Act should not affect its past operation, as respects things previously done or omitted to be done. The Hon'ble Court further held in the said judgment as follows;

> **16. From the above cited cases, it is evident that there is judicial consensus that where a law is repealed, it will not inter alia affect any investigation, legal proceedings or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the law had not been repealed."**

Further ahead in said judgment, it was also held;

> **"Thus there remains no doubt that the punishment awarded to the appellant had attained finality before the promulgation of 25th Constitutional Amendment on 31.05.2018 and same shall be deemed to be protected under Article 264 of the Constitution, despite repeal of the FCR."**

8. It is important to be noted that FIGR had been promulgated by the President of Pakistan in exercise of the powers vested in him by clause 5 of Article 247 of the Constitution on 25th May, 2018. Article 247 of the Constitution was repealed by

promulgation of 25th Constitutional Amendment on 31st May, 2018. Not only FCR but the FIGR also stood repealed on said date, on 31.05.2018. Neither of the two regulations had been holding the field at the date of commission of the offence i.e. 29.08.2018.

9. The Naib Tehsildar Mamund was therefore not having any legal capacity to exercise the powers of a Magistrate. Statement of the accused recorded before him cannot therefore be considered as a valid confessional statement recorded before a Magistrate. Same has therefore been inadmissible in evidence. Proceedings conducted by political authorities under erstwhile FCR or FIGR may be given protection under Article 264 of the Constitution, provided it had taken place during currency of the FCR or FIGR and not after its repeal. It has amply been made clear by the Hon'ble Apex Court in the case of **National Commission on Status of Women through Chairperson and others vs Government of Pakistan through Secretary Law and Justice and others** reported as ***PLD 2019 Supreme Court 218,*** that on promulgation of 25th Constitutional Amendment, all the laws of land had become applicable in erstwhile FATA. Relevant part of observation of august Court is reproduced hereunder for ready reference;

"After the 25th Amendment, all the residents of the Province of KPK are similarly placed, there is no rational basis on which the people of FATA can be distinguished from the people of the rest of the province of KPK and thus the application of the FATA Interim Regulation to one part of KPK while the rest of the province enjoys the protection of the provincial laws is absolutely unjustified, grossly discriminatory and in contravention of the fundamental right to equal protection. Whether they be residents of FATA on one hand or of Peshawar or Mardan, etc. on the other, they cannot be discriminated against and any classification between them despite being residents of the same province, with no obvious or reasonably deducible distinction between them, will be arbitrary and against the recognized principles of natural justice and the rule of law. Thus, with the merger of FATA in the Province of KPK, by applying the ratio of Azizullah Memon's case (supra), it becomes expedient to ensure that all the residents of the Province of KPK (including the people of the erstwhile FATA) do not face any discrimination of the basis of their residential location and are accorded equal protection of the law, and their right to fair trial, access to courts and due process are secured."

We can therefore safely held that on the date of recording confessional statement of the accused/appellant, Criminal Procedure Code, 1898 had been applicable in the case and a confessional statement not recorded before Magistrate, cannot be considered as a valid piece of evidence.

10. When the confessional statement is taken out of consideration, then no direct evidence of commission of the offence by the appellant, has been available with the prosecution. There has been

evidence of facts occurring after the incident, but no evidence of the actual occurrence has been available with the prosecution.

11. Naib Tehsildar while recording his statement as PW-1 as well as complainant while recording his statement as PW-3 had stated that on receipt of information, they had proceeded to the place of occurrence where appellant had been tied by the local people with a tree whereafter he had been unfastened and taken in custody. None of the two witnesses have been eye-witnesses of the occurrence. Same was the case with Malak Faqir Muhammad, who had also reached the spot after receipt of information of the occurrence when people had already tied appellant with a tree. He had not been an eye-witness of the occurrence also. Statement of another witness namely Anwar-ul-Haq Assistant Political Agent Nawagai has been recorded as PW-5 but he has also narrated the proceedings conducted after arrest of the accused/appellant. Statement of PW-6 may be considered in the context of existence of motive but no more than that. It is thus clear that there had been no direct evidence regarding commission of the offence by the appellant. Some people of village Umaray might have seen the occurrence but none of them have been

produced in evidence. The deficiency of ocular evidence of the actual occurrence cannot be deemed supplied by the subsequent evidence of arrest of the appellant. In the case of **Muhammad Anwar vs. The State** reported as ***1997 P Cr. L J 2075***, when the Hon'ble Lahore High Court disbelieved presence of two eye-witnesses, the corroboratory evidence of recovery of blood-stained dagger etc were not found sufficient for sustaining conviction on a capital charge. Relevant part of observation of the Hon'ble Court is reproduced hereunder for ready reference;

> **"The other evidence incriminating the appellant is the recovery of the blood-stained dagger and the medical evidence indicates that there were sixteen injuries on the person of the deceased. Be that as it may, all this evidence would not be collectively or individually sufficient to form basis of conviction unless the presence of the two eye-witnesses is established and credence could be attached to their testimony. We agree with the submissions made by the learned counsel for the appellant that the presence of the eye-witnesses at the time of incident has not been established beyond doubt. The present occurrence was unwitnessed one and the appellant cannot be saddled just on account of very strong motive or other incriminating connected evidence. Had the presence of eye-witnesses been accepted then the connecting evidence would have been a very strong incriminating corroborative piece of evidence but since we are of the mind that the presence of these witnesses at the spot at the relevant time is doubtful and not established. Hence it is but natural that the**

benefit of doubt would flow in favour of the appellant."

"Conviction must be founded on unimpeachable evidence and certainty of guilt" as held by the Hon'ble Apex Court in its judgment given in the case of **Muhammad Khan and another vs. The State** reported as ***1999 SCMR 1220*** *"hence any doubt that arises in the prosecution case must be resolved in favour of the accused."* It was also held therein that it was imperative for the Court to examine and consider all the relevant events preceding and leading to the occurrence so as to arrive at a correct conclusion.

12. In the case in hand, where evidence of prosecution is deficient in respect of the actual occurrence of killing of the two deceased, the benefit of doubt shall naturally go to the appellant, particularly in circumstances, when such evidence had been available and could have been gathered during the course of investigation, but have not been so gathered and produced before learned trial Court. An adverse inference may therefore be drawn against the prosecution. In such circumstances, it cannot be held that prosecution have been able to prove case against the accused/appellant beyond reasonable doubt.

13. In light of what has been discussed above, we allow the instant appeal, acquit the appellant of the charges leveled against him by extending him benefit of doubt. He be released if not required in any other case. The Murder Reference No. 01-M of 2020 sent by learned trial Court is answered in negative.

14. These are reasons for our short order of even date, which read as;

> **"For reasons to be recorded later in the detailed judgment, this appeal is allowed, the impugned judgment dated 26.02.2020 rendered by learned Additional Sessions Judge-I, Bajaur at Khar, in case DSR dated 29.08.2018 under section 302 P.P.C registered at P.S Nawagai, District Bajaur, is set aside and the appellant-convict Muhammad Shafiq son of Muhammad Sadiq is acquitted of the charge leveled against him in the aforesaid case. He be released forthwith from jail if not required in any other case. Murder Reference No. 01-M/2020 is answered in negative."**

Announced
Dt: 25.11.2020

JUDGE

JUDGE

Office 23/12/2020 W/P