

**JUDGMENT SHEET**

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

**Cr.A No. 395-M/2018**

*Noor ul Haq son of Ghulam Rahman (Appellant)  
Versus*

- (1) *The State through A.A.G.*  
(2) *Qasim Jan son of Muhammad Ullah Kisan Khel.*

*(Respondents)*

**Present:** *M/S Malak Jehangir and Ashgar Ali, Advocates.  
Mr. Inayat Ullah Khatir, State counsel.  
Mr. Jawad Ahmad Tajak, Advocate.*

**Cr.A. No. 26-M/2019**

*Zakir Ullah son of Muhammad Zarin  
Versus* *(Appellant)*

- (1) *The State through A.A.G.*  
(2) *Qasim Jan son of Muhammad Ullah.*  
*(Respondents)*

**Present:** *Mr. Muqadar Khan, Advocate.  
Mr. Inayat Ullah Khatir, State counsel.  
Mr. Jawad Ahmad Tajak, Advocate.*

Date of hearing: **24.09.2020**

**JUDGMENT**

**WIQAR AHMAD, J.-** This order is directed to dispose of the two criminal appeals, one filed by appellant namely Noor Ul Haq (Cr.A No. 395-M of 2018) and the other filed by appellant namely Zakir Ullah (Cr.A No. 26-M of 2019). Both the appellants are aggrieved of their convictions and

sentences recorded vide judgment dated 17.12.2018 of the Court of learned Additional Sessions Judge-1 Dir Upper, whereby they have been sentenced as follows;

**Accused/appellant Noor Ul Haq;**

***U/S 302 (b) PPC to life imprisonment as Ta'zir along with payment of compensation of Rs. 500,000/- under section 544-A Cr.P.C, payable to legal heirs of deceased, or in default thereof, accused shall further undergo six months simple imprisonment.***

***Benefit of section 382-B Cr.P.C has also been extended to the appellant.***


**Accused/appellant Zakir Ullah;**

***U/S 496-A PPC to seven years rigorous imprisonment along with fine of Rs. 100,000/-, or in default thereof accused shall further suffer six months simple imprisonment.***

***Benefit of section 382-B Cr.P.C has also been extended to the appellant.***

2. FIR No. 89 dated 23.04.2017 under sections 302,311,322,496-A PPC read with section 15 of Arms Act, 2013, has been registered at police station Kalkot District Dir Upper on the basis of 'Murasila' sent by Bahader Zaib Khan, ASI. On receipt of information that a lady had been killed in the name of honour at village Beshoo, the ASI proceeded to the place of occurrence along with other members of the

police party whose names were mentioned therein. He found dead body of the deceased namely Mst. Hajira Bibi, in the house of appellant Noor Ul Haq. Complainant namely Qasim Jan who was present there, lodged report of the occurrence, by stating that the deceased Mst. Hajira Bibi had been his daughter. She was stated to have married the appellant (his nephew) namely Noor Ul Haq in the month of December last. The other appellant namely Zakir Ullah was alleged to have enticed her away on 22.04.2017 at 23:55 hours. Appellant Noor Ul Haq was stated to have chased and found both of them at 11:00 P.M and fired at them, as a result of which Mst. Hajira Bibi got hit and died on the spot, while appellant Zakir Ullah escaped from the scene. The unlawful act of Zakir Ullah was stated to have been root cause of the occurrence, which was also witnessed by Ahmad Jan and one Musafir.



3. Investigation in the case ensued. Blood soaked earth (Ex-P-3) has been recovered from the spot vide recovery memo Ex. PC/3 along with empty shell of 30 pistol vide recovery

memo Ex. PC/4. A 30 bore pistol (Ex. P-2) was also shown to have been recovered on pointation of the appellant namely Noor Ul Haq vide recovery memo Ex. PC/2. Same was also sent to Regional Forensic Science Laboratory (hereinafter referred to as "*RFSL*") for the purpose of matching it with the empty recovered from the spot, report whereof was received in affirmative (Ex. PK/3).

4. On completion of investigation in the case, complete *challan* was put in Court. Separate charge was framed against both the accused on 20.11.2017, whereafter prosecution was invited to produce evidence. Prosecution examined ten (10) witnesses and closed its evidence. Statements of the accused were recorded under section 342 Cr.P.C. On conclusion of proceedings in trial, accused/appellants were convicted for commission of the offences vide judgment dated 17.12.2018 of the Court of learned Additional Sessions-1 Dir Upper, as stated earlier.

Accused/appellants impugned their convictions and sentences through the instant appeals.

5. Learned counsel for appellants submitted during the course of their arguments that there has been no direct evidence with the prosecution against the appellants and mere fact that the deceased had been killed by her husband namely Noor Ul Haq on the alleged pretext of honour could not be treated to be a circumstance sufficient to connect the appellant with commission of the offence. He placed reliance upon judgments of Hon'ble Apex Court rendered, in the case of "Nazeer Ahmad v/s The State" reported as 2016 SCMR 1628, in the case of "Nasrullah alias Nasro v/s The State" reported as 2017 SCMR 724 and the case of "Muhammad Pervaiz v/s The State and others" reported as "PLD 2019 Supreme Court 592". The learned counsel further stated that recovery of weapon of offence i.e. 30 bore pistol on pointation of the appellant Noor Ul Haq was not believable as the Investigating Officer had kept crime empty in wait for recovery of pistol and had not sent it to RFSL immediately, which fact vitiated the evidentiary value of matching report of RFSL.

6. Learned State counsel relied upon judgments of Hon'ble Apex Court, in the case of "Arshad Mehmood v/s The State" reported as 2005 SCMR 1524, the case of "Saeed Ahmad v/s The State" reported as 2015 SCMR 710 and submitted that when the deceased was murdered by the appellant Noor Ul Haq on the pretext of honour, and he could not offer any explanation for such a murder, the Court would be justified in drawing an inference against him under Article 122 of the Qanun-e-Shahadat Order, 1984. He also supported the conviction and sentence awarded to appellant namely Zakir Ullah by the learned trial Court through the impugned judgment.

7. We have heard arguments of learned counsel for the parties, learned State counsel appearing on behalf of State and perused the record.

8. Perusal of record reveals that the spot of occurrence has been shown as a thoroughfare leading towards village *Beshoo* at a place known as *Damazai* (دمہ زے), in the site plan. Investigating Officer had recovered blood

soaked earth and an empty of 30 bore pistol therefrom. Complainant namely Qasim Jan has been examined as PW-1 in the case in hand, who disowned his story as narrated in first report of the occurrence. In his examination-in-chief he stated that it was appellant Zakir Ullah who had enticed and taken away the deceased Hajira Bibi and had killed her subsequently. He also stated that the appellant Noor Ul Haq had been innocent. PW-2 namely Muhammad Ayub had deposed regarding recovery of wearing apparel of the deceased as well as the fact that appellant Zakir Ullah had made pointation of the spot of occurrence. Similarly, Lal Muhammad Constable No. 1311 has testified in support of recovery of 30 bore pistol from a place shown in the recovery memo Ex. PC/2 on pointation of appellant Noor Ul Haq. Investigation Officer has been examined as PW-6 who has mainly narrated the steps taken in investigation of the case, which included recovery of an empty from the spot, recovery of

pistol on pointation of appellant Noor Ul Haq, sending it to RFSL for the purpose of comparison and receipt of its report (Ex. PK/3) which was found matching with an empty recovered from the spot. The doctor who had conducted external examination of the deceased was examined as PW-7. Lodger of the report namely Bahader Zaib Sub Inspector was examined as PW-8 who has narrated the story as mentioned in the FIR. Prosecution witness mentioned in first report of the occurrence namely Ahmad Jan was examined as PW-9, but he also resiled from his earlier statement and stated that local police had acquired his signature on a blank paper. He was declared as hostile witness and prosecution was allowed to cross-examine him, who was accordingly cross-examined. During his cross-examination he had been disowning the statement shown to have been got recorded by him under section 161 Cr.P.C. Similar was the case with other prosecution witness namely Musafar Khan, who had also resiled from his statement recorded under section 161 Cr.P.C. He was also declared



as hostile witness but during his cross-examination nothing beneficial could be brought out from his mouth.

9. From the above reproduced survey of the evidence recorded by prosecution, it is evident that no direct evidence of the occurrence is available. So far as the appellant namely Noor Ul Haq, is concerned, the PWs mentioned in the first report have not supported contents of the report. All the three eyewitnesses have resiled from their earlier statements. The prosecution is then left with circumstantial evidence. The circumstantial evidence in the case has not been found netted together. It comprised of mostly isolated pieces of evidence which could not be considered as sufficient for connecting the appellant namely Noor Ul Haq with commission of the offence.

10. The only piece of evidence that prosecution may rely, in the given situation, has been recovery of a 30 bore pistol on pointation of appellant Noor Ul Haq and its matching report with the empty shown recovered from the spot. An empty of 30 bore pistol has been

recovered from the spot on 23.04.2017 vide recovery memo Ex. PC/4. A 30 bore pistol was shown recovered on pointation of appellant namely Noor Ul Haq on 27.05.2017 vide recovery memo Ex. PC/2. Both the empty and pistol have been sent to RFSL on 01.06.2017. Report received therefrom and produced in evidence as Ex. PK/3, no doubt shows that the empty had been fired from the pistol sent to RFSL, but such a report cannot be relied upon as the empty had not earlier been sent to RFSL and had been kept by the Investigating Officer in wait of recovery of the 30 bore pistol, whereafter both the empty and pistol had been sent to RFSL together at much belated stage. Hon'ble Apex Court in the case of "Israr Ali v/s The State" reported as "2007 SCMR 525" have found such a delay in sending of empty to the laboratory as vitiating the force of a matching report of the laboratory. Relevant findings of the august Court, in this respect, are reproduced hereunder for ready reference;

*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. 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."*

Further reliance in this respect may be also placed on judgment of Hon'ble Supreme Court of Pakistan in the case of "Jehangir v/s Nazar Farid and another" reported as "2002 SCMR 1986".

Recovery of the pistol and its matching report with 30 bore empty shell cannot therefore be relied upon safely. Besides, there has been no reliable evidence against the appellant namely Noor Ul Haq on the basis of which his conviction by the learned trial Court for an offence carrying a capital punishment, may be justified, and maintained.

11. No doubt Hon'ble Apex Court has held in its judgment in the case of "Saeed

Ahmad v/s The State” reported as 2015 SCMR

710 that with regard to vulnerable members of society, such as children, women and the infirm, who were living with the accused or were last seen 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. But it has also been noted therein that it did not mean that the burden of proof had shifted on to the accused as it is for the prosecution to prove its case, however, in respect of the helpless or weak that require protection or care it would not be sufficient for the accused to stay silent in circumstances which tend to incriminate him. Ratio of the judgment of *Saeed Ahmad Supra* cannot however be applied to the case in hand for the reason that prosecution have not been able to discharge its onus as explained above. Initial burden of proof always lies on the prosecution, which though may get shifted to accused under Article 122 of the Qanun-e-Shahadat Order 1984, under circumstances justifying such shifting of burden, but in the

case in hand, it is noticeable that prosecution has not been able, even to discharge its initial burden of proof. Hon'ble Supreme Court of Pakistan in the case of "Nasrullah alias Nasro v/s The State" reported as 2017 SCMR 724 had observed, in this respect;

*" It has been argued by the learned counsel for the complainant that in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) this Court had held that where a wife of a person or any vulnerable dependent dies an unnatural death in the house of such person then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. The learned counsel for the complainant has maintained that the stand taken by the appellant regarding suicide having been committed by the deceased was neither established by him nor did it fit into the circumstances of the case, particularly when the medical evidence contradicted the same. Be that as it may holding by this Court that some part of the onus lies on the accused person in such a case does not mean that the entire burden of proof shifts to the accused person in a case of this nature. It has already been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that the prosecution is bound to prove its case against an accused person beyond reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts presence of some eye-witnesses and such claim of the prosecution is not established by it there the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and none else who would have committed that murder."*

A somewhat similar findings have also been recorded by Hon'ble Apex Court in its judgment in the case of "Nazeer Ahmad v/s The

State” reported as 2016 SCMR 1628, which are reproduced hereunder for ready reference;

*“It may be true that when a vulnerable dependant is done to death inside the confines of a house, particularly during a night, there some part of the onus lies on the close relatives of the deceased to explain as to how their near one had met an unnatural death but where the prosecution utterly fails to prove its own case against an accused person there the accused person cannot be convicted on the sole basis of his failure to explain the death. These aspects of the legal issue have been commented upon by this Court in the cases of Arshad Mehmood v. The State (2005 SCMR 1524), Abdul Majeed v. The State (2011 SCMR 941) and Saeed Ahmed v. The State (2015 SCMR 710).”*

Likewise, in the case of “Muhammad Jamsheed and another v/s The State and others” reported as 2016 SCMR 1019, Hon’ble Apex Court had observed that suspicion howsoever grave or strong could never be a proper substitute for proof, beyond reasonable doubt, required in a criminal case.

12. So far as the case of appellant in criminal appeal No. 26-M of 2019 namely Zakir Ullah, is concerned, it is noticeable that complainant namely Qasim Jan stated in his first report that Zakir Ullah had enticed away the deceased Mst. Hajira Bibi for the purpose illicit intercourse, which became root cause of her death at the hands of Noor Ul Haq, his son.

While appearing in Court as PW-1 he took a totally different stance and stated that the lady had been enticed away and killed by appellant Zakir Ullah. Learned trial Court has relied upon statement of this witness for holding that appellant Zakir Ullah had been seen by him while enticing away the deceased Hajira Bibi at the time of her death. Statement of this witness has not been of any worth, due to the fluctuating stances he has been offering during the course of investigation and then trial of the case. Besides him there has been no evidence against the appellant that the lady had been enticed away or killed by the appellant namely Zakir Ullah. Prosecution have not been able to prove case against him beyond reasonable doubt.

13. In light what has been discussed above, convictions and sentences of the two appellants recorded by learned trial Court vide its judgement dated 17.12.2018, in the instant case, are set aside by allowing both the appeals and extending benefit of doubts to the respective appellants. These were reasons for our short orders of even date whereby both the appellants

have been directed to be released from jail, if not required in any other case.

14. These are reasons for our short orders of even date.

Announced  
Dt. 24.09.2020



JUDGE



JUDGE

Office  
17/10/2020  
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