

JUDGMENT SHEET

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

Cr.A. No. 33-M/2011.

JUDGMENT

Date of hearing: 15.5.2017.

Appellant:- (Haji Qasim Khan) by
M/S Muhammad Raziq and Aziz
Muhammad Advocates.

Respondents:- (the State & 1 another) by Mr. Rahim
Shah, A.A.G and. Sahibzada
Assadullah, Advocate.

MOHAMMAD IBRAHIM KHAN, J.- Haji Qasim

Khan lodger of the First Information Report has preferred this Criminal Appeal against Kabir Khan and his brother Ghafoor Khan. The latter being acquitted by a judgment of the learned Additional Sessions Judge/Izafi Zila Qazi Malakand at Batkhela dated 21.06.2011 after a detailed discussion termed the deceased Mst. Fatima to have committed suicide and her death is not the outcome of *Qatl-i-amd* as the medical evidence does not support the prosecution case.

2. By a charge dated 19.07.2010 the accused/Respondents Kabir and Ghafoor Khan were jointly tried under the allegation that on 14.4.2010 at 9.30 A.M Kabir Khan at the instance of his brother

Ghafoor Khan has killed his wife Mst. Fatima daughter of the complainant Qasim Khan by firing at her with fire arm (اسلحہ آتشین).

3. The prosecution was given free hand to adduce evidence in order to prove the charges. Thereby PW-1 Muhammad Sahid Sepoy No. 4691 appeared, who is marginal witness to the recovery memo Ex. PW-1/1, which pertains to blood stained clothes of the deceased in shape of Qameez Ex. P1, blood stained *Dupatta* green colour having cut marks of bullet and signs of burn Ex. P2. Followed by PW-2 Muhammad Hanif Khan No. 5144, who took over the '*Murasila*' for lodging of the First Information Report. He is also witness to the recovery memo Ex. PW-2/1, vide which the Investigating Officer has taken into possession 30 bore pistol (country made) P-3 alongwith its charger P-4 and live cartridges P-5. In his presence the Investigating Officer has also taken into possession one spent bullet of 30 bore pistol P-3 vide recovery memo Ex. PW-2/2 and he being marginal witness to the recovery memo Ex. PW-2/3 though which from place of deceased Mst. Fatima blood stained earth as Ex. P-7 was taken into possession by the I.O. PW-3 is Zia-ur-Rahman Muharir who chalked-out the FIR Ex. PW-3/1. PW-4

is Lady Dr. Fauzia Qadeem, who examined the corpus of deceased Mst. Fatima and conducted its postmortem on 14.4.2010 at 10.00 A.M. and found the following:-

" Young lady of an average built has got the following postmortem examination carried-out on 14.4.2010 at about 10-20 A.M.

Entry wound on the left temporal-occipital region of the skull irregular inverted margins. Charring marks measuring approximately.

Exist wound on the right parietal region of the skull about the right ear having irregular averted margins measuring 7.5 x 7.5 cm wit brain matter seen protruding the wound.

Other injuries:- There are linear bruise marks on the back.

Cause of death: Fire-Arm Injury causing collapse of the vital centre i.e. brain bleeding to instantaneous death.

Time since death:- 1-2 hours approximately.

Rigor marks not yet developed

Kind of weapon : FA1.

Personal belonging.

Green Qameez (printed)

Shalwar (plain)

White chader.

PW-5 is Saleem Khan Post Commander, who has submitted complete *challan* against the accused/Respondents. PW-6 is Qasim Khan, lodger of the First Information Report, who has narrated the

occurrence in the mode and manner on receiving information about the death of his daughter Mst. Fatima. PW-7 is Mst. Ajab Sultana who is step-mother of the deceased and she also narrated her presence in the house of the accused/Respondent Kabir Khan in order to patch up the matter between husband and wife. PW-8 is Aziz-ur-Rahman IHC, who on receiving the information rushed to the DHQ Hospital Batkhela, where he found corpus of the deceased Mst. Fatima. Her father Qasim Khan reported him the matter. He then referred '*Murasila*' Ex. PA to PS concerned for registration of the case. He prepared injury sheet Ex. PW-8/1 of the deceased Mst. Fatima alongwith site plan of the place of occurrence Ex. PW-8/2. Corpus of deceased Mst. Fatima was handed over to the LRs through an agreement Ex. PW-8/3. After arrest of the accused/Respondent Kabir, he has further improved the site plan Ex. PW-8/4. He has taken into possession 30 bore pistol Ex. P-3, alongwith its charger Ex. P-4 and live rounds Ex. P-5 through recovery memo Ex. PW-2/1. In a way being Investigating Officer he has conducted all the proceedings by preparing exhibited documents from Ex. PW-8/5 to Ex. PW-8/7. He has also recorded

statements of the PWs under section 161 Cr.P.C and has referred 30 bore to the FSL vide an application Ex. PW-8/6, report received whereof was placed on the record as Ex. PW-8/7.

4. After closure of the prosecution evidence, accused/Respondents were separately examined under section 342, Cr.P.C, wherein they denied the charges, posed innocence and stated to have falsely been implicated in the case. They however wished to produce no defence, not to examine themselves on oath as required under section 340(2), Cr.P.C.

5. On conclusion of the trial, the learned Additional Sessions Judge/Izafi Zila Qazi Malakand at Batkhela acquitted the accused/Respondents from the charges of murder levelled against them through the judgment impugned herein.

6. Having heard arguments of the learned counsel for the complainant/Appellant, learned counsel for the accused/Respondents and learned A.A.G, record gone through with their valuable assistance.

7. Learned counsel for the complainant/Appellant relied on 2015 SCMR 710 “Saeed Ahmed vs the State”, 1991 P Cr. LJ 113 (Lahore) “Afzaal Hussain Shah vs the State”, 2008 SCMR 917 “Farooq Khan vs the State”, 2017 P Cr. LJ 325 (Peshawar High Court Bench Mingora) “Bakht Shad vs the State”, 2011 P Cr. LJ 701 (Lahore) “Umar Shahid vs the State”, 2011 SCMR 492 “Zulfiqar Ahmad and another vs the State”, 2011 SCMR 4960 “Muhammad Ilyas and others v s the State”, 2016 P Cr. LJ 89 (Peshawar) “Abdul Hameed vs the State”, 2016 YLR 1013 (Peshawar) “Nabi Gul vs the State and another”, 1986 SCMR 156 “Jehangir Khan vs the State” and 2003 P Cr. LJ 1946 (Quetta) “Allah Dinna vs the State. In the light of these dictums of the Hon’ble superior Courts prayed for utter acceptance of the appeal as the accused/Respondents have murdered the deceased Mst. Fatima in pre-planned manner and then giving it the colour of suicide in order to save their skins

from the clutches of law. On the other hand, learned counsel for the accused/Respondents vehemently opposed the submissions/arguments advanced by learned counsel for the complainant/Appellant by contending that the learned Trial Court has rendered a detailed well-reasoned judgment by reaching to an irresistible conclusion that the version of prosecution has not been proved in view of the medical evidence, thus prayed for dismissal of the present appeal being meritless.

8. We have given conscious thoughts to each and every argument heard by us, while appreciating determined points for acquittal of the accused/Respondents. We are able to recognize that on the one hand complainant of this case being father by the name of Qasim Khan has charged both accused/brothers Kabir Khan husband of the deceased and Ghafoor Khan brother of said Kabir Khan. The latter is said to have hatched the conspiracy and on his instance/behest the deceased

Mst. Fatima has been killed by firing at her by Kabir Khan. When the statement of Qasim Khan recorded as PW-6 is to be given weight on the basis of few lines in his examination-in-chief, he stated that his daughter Mst. Fatima was married to Kabir Khan. Witness Ajab Sultana is his wife while PW Rozi Khan is his brother. On the day of occurrence he was present in his house when received information that Mst. Fatima was killed by Kabir Khan. He rushed to the hospital and found his daughter dead. Motive behind the occurrence is land dispute as the said Kabir Khan accused/Respondent time and again asking his wife Mst. Fatima to seek her share in the property owned by his father, so he has made the *ibid* report in shape of First Information Report on the strength of *Murasila*. In this whole statement he has referred Mst. Ajab Sultana his wife and Rozi Khan PW as his brother, but he has never disclosed that who informed him by communicating the death of Mst. Fatima. In this statement, in the cross-

examination although this witness PW-6 Qasim Khan stated that it was Rozi Khan who had informed him about the demise of his daughter Mst. Fatima and the time was 9.30 A.M. There is no disclosure as to in-fact while receiving the call his wife Mst. Ajab Sultana was present at the scene of occurrence alongwith brother of the complainant Rozi Khan. The accused/Respondent Kabir Khan is very close to the complainant Qasim Khan but even being aggrieved with him has charged him for the murder of his daughter Mst. Fatima. The relationship is to the extent that Kabir Khan's two real sisters are married to his sons. When we go through the statement of Mst. Ajab Sultana appeared as PW-7, we have noticed she has been introduced just to link in chain the occurrence happened in the mode and manner as besides Mst. Ajab Sultana no other witness has come forward to have seen the occurrence with naked eyes. In her examination-in-chief she has stated about the occurrence that she

alongwith brother-in-law Rozi Khan had gone to the house of Kabir Khan to patch up the dispute in between husband and wife and during the course of compromise proceedings Mst. Fatima went inside Godown and Kabir Khan went after her being infuriated holding a pistol and fired at her. The site plan Ex. PW-8/2 would not reveal any point where the compromise proceedings were taken place and Mst. Ajab Sultana has not disclosed that right at the point when the deceased Mst. Fatima was killed she was present in this Godown. If PW-7 Mst.Ajab Sultana was present in the house there is a way passing to Godown from the sitting place "*Baitak*" where she could not witness firing upon the deceased Mst. Fatima by her husband Kabir Khan accused/Respondent.

9. There is no disclosure of the fact by Mst. Ajab Sultana as to how Ghafoor Khan co-accused/Respondent has instigated his brother Kabir Khan to kill his own wife. This statement is also

silent to this effect. Another important witness could be the statement of Rozi Khan, but for reasons best known to the prosecution he has been abandoned. There is however joint statement of Salah-ud-Din SPP and Mr. Raziq Jan, Advocate appearing on behalf of the complainant that if the statement of PW Rozi Khan could be recorded it would be the verbatim statement like PW Mst. Ajab Sultana, therefore he was abandoned. Thus, it can be said with certainty that the prosecution withheld its best piece of evidence. Even otherwise, it is settled principle of law that if a best piece of evidence is available with the party and the said party fails to produce the same before the Court then a presumption under Article 129 (g) of Qanun-e-Shahadat Order, 1984 can be drawn that had the said piece of evidence been produced before the Court it would have been unfavourable to the said party. Such presumption can fairly be drawn in the present case had PW Rozi Khan produced in the Court he

would have not supported the prosecution case. Non-examination of this material witness has materially affected the prosecution case. Reliance is placed on ***Darwesh & others Vs The State (2014 YLR 2233).***

10. Whether this case falls to be suicidal attempt as Mst. Fatima has killed herself or she has been killed by someone else. The evidence of prosecution to this effect is not convincing to bring home the charges. Medical examination was conducted by Lady Doctor Fauzia Qadeem, she was examined as PW-4. She disclosed an entry wounds on the left temporal occipital region of the skull irregular inverted margins, charring marks measuring approximately, exist wound on the right parietal region of the skull about the right ear having irregular averted margins measuring 7.5 x 7.5 cm wit brain matter seen protruding the wound and noted the kind of weapon fire arm. The medical report suggests that Mst. Fatima was fired upon from very close range i.e. 2/3 inches. If at all the

accused/Respondent Kabir Khan fired upon the deceased from a very close range then there may be some resistance on behalf of the deceased Mst. Fatima as no one has witnessed the firing upon her and even the statement of Mst. Ajab Sultana is also silent to this effect. As it has rightly been held by the learned Trial Court that human is not a statute or when she was to be fired upon she could at least show some resistance at that time and there must be further chance of miss fire shots. If at all there was presence of *Dupatta* on the head of the deceased then the attempt to commit suicide was in-fact made in the relaxed manner.

11. In view of the Modi Medical Jurisprudence and Toxicology favorite sites of suicidal fire-arm are:- A suicidal firearm wound is usually a contact wound situated on the side of the temple, depending on which hand was used to shoot himself, in the center of the forehead, the roof of the mouth, in the chest or epigastrium in front or left side

and sometimes under the chin. The firearm is usually fired at close range. A small weapon like a revolver or a pistol is held in the hand, while a rifle or a shot gun is supported on the ground or against the wall. Sometimes, the firing is done by pulling a string tied to the trigger by the big toe. The skin around the entry wound shows characteristics blackening.

12. If the arguments of the learned counsel for the complainant/Appellant are taken meaningful that Mst. Fatima deceased had received bullet marks on left temporal occipital region then it is not possible for a woman to commit suicide by holding a pistol and fired upon one herself with left hand. He further added that in all probabilities it is a pre-planned murder. Then in such scenario keeping the above analogy in mind, whether any question has been put to any of the witnesses or for that matter to the Medical Officer for the reason that the deceased was left handed, but there is no evidence to this effect available on the file, rather statement of the

so called eyewitness Mst. Ajab Sultana being step-mother of the deceased is completely silent in this regard coupled with the fact that medical evidence is also not in conformity with the version advanced by the prosecution.

13. We have given deep thoughts to all aspects of this case including arguments of learned counsel for the complainant/Appellant, medical evidence and oral evidence of the deceased father Qasim Khan appeared as PW-6 and Mst. Ajab Sultana PW-7. In all probabilities it hardly bring the case within the ambit of conviction for which appeal would liable to be accepted, rather the evidence of the prosecution suggest that the learned Trial Court after proper appreciation and appraisal of the record rendered the impugned judgment of acquittal, to which no exception could be made out.

14. Even otherwise, it is the duty of the prosecution to prove its case beyond any shadow of doubt and now it has been settled by the Hon'ble apex Court that a single circumstance creating reasonable doubt is sufficient for acquittal of the accused and if any single and slightest doubt is created, its benefit must go to the accused, so, the trial court has rightly extended the benefit of doubt to the accused on valid and cogent reasons based on proper appreciation of evidence and the acquittal of respondent does not call for any interference by this Court. Moreover, criterion of appraisal of evidence in an appeal against acquittal is quite different than an appeal against conviction, because in case of acquittal double presumption of innocence lies in favour of the accused. Even if another view is possible, the view favourable to the accused is to be preferred. Reliance in this regard can be placed on the case of **Muhammad Iqbal vs. Abid Hussain alias Mithu and 6 others, 1994 SCMR 1928**. Learned counsel for the complainant Appellant failed to point-out any misreading or

non-reading of the evidence on record and on the contrary the evidence was appreciated and assessed on the settled principles of law by the learned Trial Court.

15. In view of the above, this appeal being short of merits stand dismissed.

Announced.

Dt: 15.05.2017.

JUDGE

JUDGE