

JUDGMENT SHEET

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

Cr.A No. 14-M/2013

*Alamgir son of Ibrahim (deceased).
(Appellant)*

1. *Mst. Bakht Siraja wife of Bakht Zada*
2. *The State through A.A.G*
(Respondents)

Present: *Mr. Rashid Ali Khan, Advocate.*

Mr. Adil Khan Tahirkheli, Advocate.

Mr. Haq Nawaz, Asstt: A.G.

Date of hearing: **02.03.2020**

JUDGMENT

WIQAR AHMAD, J.- This order is directed to dispose of the appeal filed by appellant namely Alamgir son of deceased Ibrahim against judgment of acquittal dated 15.12.2012 passed by learned Additional Sessions Judge Swat at Kabal, in case FIR No. 57 dated 14.03.2010 registered under sections 302,354,452 PPC at police station Kabal District Swat.

2. Patrolling party of the police headed by Muhammad Ghawas Khan, SHO police station Kabal received information, during usual patrolling of the area, that a murder had taken place in village *Manrai*. They proceeded to the spot. On reaching house of respondent/lady

namely Mst. Bakht Siraja (respondent) they found dead body of one Ibrahim son of Dilfaroz, lathered in blood. Respondent who was then shown to be complainant, lodged report of the occurrence by stating that she had been present in her room, the previous night. Her father-in-law namely Fazal Qayum, who had been old and feeble person, had been taken out of the house by her daughter Noor Zia aged about 14/15 years for urination. As soon as he sit to urinate, the deceased, then alive, was present there who caught hold of daughter of the complainant namely Noor Zia and took her to a room nearby. On hue and cry of her daughter, the complainant took her axe and as soon as she entered the room, she found her daughter in clutches of the deceased. To save her daughter from being raped, she gave a blow to the deceased with her axe, which resulted in causing injuries to him and he started trying to leave the place. The complainant repeated the axe blows, as a result of which he (deceased) fell down on the ground and died. People of the locality were informed the following morning. From identity card of the accused, he was identified as Ibrahim son of Dilfaroz, who was alleged to have entered the

house with the intention of committing rape, due to which he had been taken to death.

3. The *ibid* FIR (Ex. P-A) was registered on the basis of '*Murasila* (Ex. P-B) sent to police station by the SHO. Respondent Mst. Bakht Siraja was shown to be the complainant as well as accused in the case in hand. Subsequently, she was arrested during the course of investigation, wherein she also confessed her guilt and her confessional statement was recorded by the learned judicial Magistrate concerned. Blood soaked earth was recovered in the case in hand, beside the axe, with which deceased had been done to death. Said axe was also sent to Forensic Science Laboratory, report whereof was received and placed on file. On completion of investigation in the case, complete *challan* was submitted in Court. Initially, accused/respondent was convicted and sentenced to ten (10) years simple imprisonment under section 302 (a) PPC by the learned trial Court vide judgment dated 27.08.2010 of the Court of learned Additional Sessions Judge-II Swat. Said conviction was challenged by accused/respondent before this Court through criminal appeal No. 776 of 2010, which was allowed vide judgment dated

29.03.2012 by setting aside judgment of the learned trial Court and case was remanded to learned trial Court with the directions to frame fresh charge against the accused and parties were also allowed to produce additional evidence.

4. After remand, charge was framed against accused/respondent on 17.05.2012, to which she pleaded not guilty and claimed trial. Prosecution produced eight (8) witnesses and closed their evidence, whereafter statement of the lady accused was recorded under section 342 Cr.P.C wherein she denied killing the deceased and resiled from her earlier confessional statement recorded during the course of investigation.

5. The learned trial Court on conclusion of proceedings in the trial, acquitted the accused/respondent vide impugned judgment dated 15.12.2012 of the Court of learned Additional Sessions Judge Swat at Kabal. Feeling aggrieved therefrom, the appellant who was son of the deceased has filed the instant appeal against acquittal of accused/respondent.

6. We have heard arguments of learned counsel for the parties, learned Astt: A.G for State and perused the record.

7. Perusal of record reveals that the prosecution had mainly been relying upon confessional statement of the accused, recovery of axe on her pointation, pointation of the place of occurrence by the accused and recovery of dead body of the deceased from house of the accused, for establishing case against accused/respondent. There has not been any direct evidence in respect of commission of the offence in the shape of any eyewitness account except the confessional statement of the accused.

8. Dr. Bahadar Shah, medical officer civil hospital Kabal, who had examined dead body of the victim, was examined as APW-1, who has given detailed descriptions of the numerous wounds received by deceased in his examination-in-chief. He was cross-examined at length. One Dawa Khan was examined as APW-2, who had been marginal witness of the recovery memo Ex. Ex.APW-2/1, vide which blood soaked earth had been taken in possession. In his presence, the axe which was shown to have been recovered on pointation of the accused was also produced and exhibited as Ex. P-2 and recovery memo in that respect is Ex. APW-2/2. He was also marginal witness of recovery memo Ex. PW-2/3, vide



which the Investigating Officer had taken into possession other belongings of deceased including mobile phone, Sim and watch etc. In his cross-examination conducted before remand of the case he had stated that he was not belonging to the area where the deceased had died but had been his co-villager and belonging to same caste. Appellant namely Alamgir has testified as APW-3. He has given his account of departure of his father from their shop, before the night of occurrence. Investigating Officer of the case was examined as APW-4. APW-5 was statement of learned Judicial Magistrate, who had recorded confessional statement of the lady/accused. The Magistrate was also cross-examined who has stated in his cross-examination that after recording confessional statement of the accused, he had handed back the lady to police. He further added that she had been handed back to the police for the purpose of taking her to jail. He also admitted as correct that the certificate was pre-printed. He however denied the suggestion that he had not filled the said certificate himself. He denied the suggestion that the lady accused had been under strain and duress, at the relevant time. Lady Constable namely Yasmeen was

examined as APW-6 who had deposed in respect of recovery of the mobile Sims. Lady doctor Nagis Alam was examined as APW-7, who had examined Mst. Noor Zia, daughter of the accused. She had found a single bite mark on her left face. Muhammad Ghawas Khan, SHO, who had recorded first report of the occurrence was examined as APW-8. In his statement, the '*Murasila*' drafted by him was exhibited as Ex. APW. 8/1 and injury sheet as Ex. APW-8/3. He was also subjected to a lengthy cross-examination by the learned counsel for accused/respondent, whereafter evidence of prosecution was closed.

9. Accused/respondent had recorded her confession immediately after the occurrence, which appears to be clear from the element of any coercion or duress and got recorded by her voluntarily. Statement of Magistrate who had recorded confession has been recorded as APW-5 in support of the confessional statement and there is no plausible reason for discarding the same. Beside the confession of respondent there has been a lot of other circumstantial evidence which establishes that the murder has been committed by respondent. Such evidence includes, lodging of a report in shape of '*Murasila*' at her home as Ex.



PB, recovery of the blood stained axe on her pointation, medical examination of daughter of the lady wherein imprints of human bite was found on her cheek coupled with her defence taken in her statement recorded under section 342 Cr.P.C where she had stated that the deceased had made an attempt for raping her daughter. Dead body of the deceased had also been recovered from house of the accused/lady. All these pieces of circumstantial evidence do establish the fact that deceased had been done to the death as a result of the blows he received from this lady accused. The learned trial Court has recorded findings in the impugned judgment that prosecution has been able to prove that it was respondent/accused who had committed the offence but in exercise of right of private defence and thereby she has been given benefit of section 100 of Pakistan Penal Code, 1860 (hereinafter referred to as "**PPC**"). It is important to be noted that accused/respondent has not filed any appeal against the findings in the judgment, impugned herein.

10. Evidence of prosecution transpire
that deceased had made an attempt for raping
daughter of the accused who was about 13/14

years of age. It is also clear from evidence of prosecution that this lady was solely responsible for protecting her younger daughter at the relevant time, as her father-in-law was feeble and infirm person and there had been no male member living in her house. In normal circumstances, this fact may have been argued that due to large number of injuries on body of the deceased, it can be inferred that right of private defence had been exceeded, making the accused liable for commission of the offence, but the instant case has its own peculiar circumstances. It needs mention here that right of private defence extend to causing of death in case of an assault with the intention of committing rape, according to section 100 of PPC, which is reproduced hereunder for ready reference;

S. 100. When the right of private defence of the body extends to causing death: The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--

First: Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly: Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly: An assault with the intention of committing rape;

Fourthly: An assault with the intention of gratifying unnatural lust.

Fifthly: An assault with the intention of kidnapping or abduction.

Sixthly: An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

It is also noticeable that as per first description of the onslaught, given in the above reproduced provision of law, right of private defence is shown to have been extending to voluntary causing of death in a case where the assault may reasonably cause the apprehension that death will otherwise be the consequence of such an assault. Same was the case with the second clause which provided that such right would be available in case of a grievous hurt with an explanation given by legislature that where grievous hurt would otherwise be a consequence of such an assault. No such qualification has been provided in the case of an assault with the intention of committing rape. We can therefore safely say that right of defence can easily be claimed for neutralizing an assault with the intention of committing rape than the case of assaults with the apprehension of causing death or grievous hurt. The right of private defence, does not allow a person to inflict more harm than it is

necessary to inflict for the purpose of defence, according to section 99 of PPC, but the quantum of force required for warding off danger may not be measured in golden scales, as held by the Hon'ble Apex Court in the case of "Mashal Khan v/s The State" reported as PLD 1988 Supreme Court 25. It was sufficient that causing of death was permissible in exercise of private defence of body against an assault with the intention to commit rape in the case in hand, according to section 100 of PPC. "Once right of defence is established" as held by Hon'ble Apex Court in the case of "Muhammad Yaqoob v/s The State" reported "1992 SCMR 1983" "same cannot be defeated lightly". It has also been laid therein that force must be proportionate to the injury. Numerous blows have no doubt been caused to deceased in the case in hand, on account of which learned counsel for appellant, have been claiming that right of private defence have been exceeded, but repetition of blows may have been the result of insecurity that this lady was feeling in a state where she was confronted with assault of a grownup man and having no other capable male member in her house to protect her and her daughter. She was no doubt in an insecure

condition, was not used to such like situations and when confronted with such a predicament she would definitely have been having apprehensions of a counter attack by the deceased. The fact of chasing the accused, till the door of the house, may also be the result of some apprehension and the desire to save herself from a counter attack apprehended in the circumstances. Besides, presence of numerous injuries on body of the deceased cannot be taken as conclusive evidence of the accused/lady exceeding the right of private defence. In quite similar situation, this Court in its judgment in the case of "Mst. Gul Naz v/s The State" reported as 2011 P Cr.L J 1190 had extended the benefit of right of private defence to accused in the case, by observing as follows;

"The learned trial Judge while drawing the impugned judgment did not stop nor took a pause to think with a judicial mind that the appellant with her young daughter and two (02) minor sons were entrapped in a situation, where, they could not find any other way to wriggle out or thwart the abominable attempt the other way but to incapacitate the man, marching towards the girl to ravish her, thus, the learned Judge has failed to do justice in the matter. He has unnecessarily and without just cause laboured in drawing a judgment in favour of the prosecution, ignoring all the above facts. The appellant stood firm to her stance, taken in the F.I.R., in her confession and at the trial and despite of availability of legal

advice, she did not retrace rather, told the whole truth to assist the Court for reaching at a just conclusion, however, she was given altogether undesirable treatment, punishing her for no wrongful act."

Existence of numerous injuries on body of the deceased may not therefore be taken as a conclusive proof of disproportionate use of right of private defence by the lady accused, particularly in the circumstances narrated above.

Case of the accused/respondent had been falling in the general exception contained in sections 96 and 100 PPC and benefit of the same has rightly been extended to her by learned trial Court through the impugned judgment. We are not inclined to take a different view.

11. It is important to be noted that in the case in hand, after remand, respondent/accused had been facing trial on the charge of commission of the offence under *Ikrah-i-Tam. Denovo* charge had been framed in pursuance to earlier judgment of this Court wherein case had been remanded to the learned trial Court with the direction to frame charge *denovo* under section 303 (a) PPC, which was accordingly framed and the trial was conducted thereafter. The learned trial Court, through the impugned judgment has acquitted the

accused of the commission of offence by extending her benefit of right of private defence. There is a difference between commission of an offence under *Ikrah-i-Tam* and an act done in exercise of the right of private defence. A murder committed under *Ikrah-i-Tam* is a criminal act which ensues a criminal liability under section 303 (a) PPC, while a murder committed in exercise of valid right of private defence falls in general exceptions and carries no criminal liability. The distinguishing features between the two also include the fact that right of private defence is exercised against the assailant, while an offence committed under *Ikrah-i-Tam* is punishable for the reason that it is committed against a third person. In the latter case, the person who puts another under *Ikrah-i-Tam* or *Ikrah-i-Naqis* and the person who commits an offence under *Ikrah-i-Tam*, both are liable for commission of offences albeit with certain variations. *Ikrah-i-Tam* is a kind of coercive duress, to which a person is subjected for making him commit an offence. *Ikrah-i-Tam* is defined under section 299-G PPC as “*putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant*

death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or zina-bil-jabr". Section 303 (a) PPC provides that when a murder is committed under *Ikrah-i-Tam* the person committing the murder may be imprisoned with a term which may extend to twenty-five years but shall not be less than ten years and the person causing *Ikrah-i-Tam* shall be punished for the kind of *qatl* committed as a consequence of his *Ikrah-i-Tam*. This clearly envision a case where murder of a third person is committed and the sections of law makes both the persons, who has put another person under *Ikrah-i-Tam*, as well as the person who has been subjected to *Ikrah-i-Tam* for committing murder of another person, subjected to criminal liability and the ensuing penalty. Section 96 of PPC on the other hand provides that nothing is an offence which is done in exercise of the right of private defence. Right of private defence of body and property has been provided in section 97 PPC and the extent of private defence for causing death of another person has been provided in section 100 PPC. No criminal liability stands constituted when a person is murdered in exercise of a right of private

defence. It is thus clear that in cases where the right of private defence is available there is no applicability of section 303 (a) PPC. If murder of a person who has put another in *Ikrah-i-Tam* is committed, then the case would be covered by section 100 PPC, rather than section 303 (a) PPC. If murder of another person is committed under *Ikrah-i-Tam* then section 303 (a) PPC would be attracted to facts and circumstances of the case. In holding so, reference may also be made to judgment of the Hon'ble Lahore High Court in the case of "The State v/s Hamid Ali alias Ahmad Ali" reported as 2002 YLR 4008, where the Hon'ble Court has dealt with the issue in the following words;

"The bare perusal of section 299(g), P.P.C. shows that the culprit for the commission of this offence would be a person who puts any person, his spouses or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or Zina-bil-Jabr. In the present case, learned trial Court has accepted the defence plea that Hamid Ali alias Ahmad Ali appellant was under the instant fear of being subjected to sodomy by the deceased and his companion and in order to save himself, appellant committed the murder of Abdul Jabbar deceased and caused injury to Muhammad Afzaal P. W.11. The ingredients of section 299(g), P.P.C. were not attracted against the appellant rather in the circumstances actual culprit for the offence under section 299(g), P.P.C. read with section 303,

P.P.C. were the deceased and his companion namely Muhammad Afzaal P.W.11.

20. Be that as it may, since defence plea of the appellant that he caused injury to the deceased and Muhammad Afzaal P. W.11, as he was under instant fear of being subjected to sodomy has been accepted, this case would be covered under section 100, clause fourthly, P.P.C. and he is entitled to get the benefit of right of self-defence.”

Similar observation has also been recorded by the Hon'ble Baluchistan High Court in its judgment in the case of “Abdul Qadeer and others v/s State and others” reported as PLJ 2010 Cr.C. (Quetta) 116 as follows;

“Section 303 (a) P.P.C provides punishment for a person who commits Qatl under Ikrah-e-tam as well as for the person who causes such Ikrah-e-tam, therefore, if he commits murder of that person who had put him, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any of the organ of body or instant fear of being subjected to sodomy or Zina Bil Jabar, the said clause would not be attracted otherwise the second part would become redundant which provides punishment for the person causing such Ikrah-e-tam, in other words Qatl is in respect of another person and not the person who has cause Ikrah-e-tam as otherwise person causing Ikrah-e-tam could not be punished under the second part at-all. Furthermore; such interpretation would also negate the provision relating to right of private defence which extends to causing death in cases where such assault causes apprehension of death or grievous hurt or is with the intention of committing rap, unnatural lust or kidnapping or abduction.....”

The learned trial Court has therefore rightly acquitted the accused of the charge under section 303 (a) PPC and has rightly extended her the right of private defence as provided in section 100 PPC. The appeal in hand is therefore found to have been lacking merits and same is accordingly dismissed.

Announced
Dt. 02.03.2020


JUDGE

JUDGE

Office
08/05/2020
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