JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Jail Crl. Appeal No.64-P/2012

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- Through the instant Jail Criminal Appeal, appellant Muhammad Alam alias Muhammad Ali, has questioned the judgment dated 07.12.2011, passed by learned Trial Court/ Sessions Judge, Peshawar, whereby the appellant having been found guilty of committing the Qatl-e-Amd of Riaz and his wife Mst. Fauzia, has been convicted under section 302 (b) PPC and sentenced to undergo imprisonment for life as Ta'azir qua murder of Riaz deceased and to pay a sum of Rs.2,00,000/-, as compensation in terms of S.544-A Cr.P.C. to LRs of the deceased or in default thereof, to undergo 06 months S.I. further. He has been further convicted under proviso-III to Section 308 PPC for murdering his wife Mst. Fauzia deceased and sentenced to pay Diyat

to LRs of the deceased. Benefit of S.382-B Cr.P.C. has been extended to him.

2. Brief account of the prosecution case is that on 20.08.2008 at 23.25 hours, complainant Mst. Nasreen (PW.3), reported to Gul Shahzada S.I. on the spot that on the fateful day her parents had proceeded to Rawalpindi. She alongwith her brothers and sisters including her deceased brother Riaz, was present in her house. Her brother Riaz, who had illicit relation with Mst. Fauzia, went out of the house to see her in the house. Muhammad Alam (appellant-convict herein)/ the husband of Mst. Fauzia present on the roof top of his house duly armed with firearm, on seeing Riaz in his house his house, came down, first opened fire at his wife Mst. Fauzia and then chasing her brother Riaz, committed his murder near the door of her house with firearm; that both the deceased died on the spot. Thereafter the appellant duly armed, entered her house, and forcibly took her out, however, let her free in the way. Illicit relation of the two deceased with each other has been alleged as motive behind the incident. In addition to complainant, her other brothers are stated to have been witnessed the incident.

3. Report of the complainant was reduced into writing in the shape of murasila Exh.PA by Gul Shahzada

SI, consequent whereupon, FIR No.645 dated 20.08.2008 Exh.PA was registered against the appellant.

4. Dr. Arshad Hussain (PW.6) conducted autopsy on the dead body of deceased Riaz on 21.08.2008 at 8.30 a.m. and found the following injuries on his person:-

1. Firearm entry wound on left side of face 2.5 x 2 cm in size, one cm from the left angle of mouth, 4 cm below the left eye with tattoing on the left face and left years in an area of 6/3 cm.
2. Firearm exit wound on right back of neck ½ cm in size, 1 cm from mid line and 4cm above the back of neck.
3. Tattoing on the left wrist 4/3 cm in size.

Opinion: According to his opinion, the deceased died to vital neck structure due to firearm.

Lady Dr. Fauzia Habib (PW.8) conducted postmortem examination of deceased Mst. Fauzia on 21.08.2008 at 8.30 a.m. and found the following injuries on her body.

1. Firearm entry wound in middle of forehead on mid line, 1/1 cm with tattooing on face 9/8 cm, entry wound 2 cm above root of nose.

2. Firearm entry wound on outer aspect (lateral) of left thigh 1/0.5 cm, 18 cm below iliac crest, 27 cm above knee.

3. Firearm exit wound on right side back of skull, 4/2 cm, 3 cm from mid line, 10 cm below and behind right ear.

4. Firearm exit wound on inner aspect (Medial) thigh 2/1 cm, 4 cm below left gluteal fold and 18 cm above knee.

5. Tajmir Shah S.I. proceeded to the spot and prepared site plan Exh.PB, on the pointation of eyewitnesses. During spot inspection, he secured blood from the places of two deceased and 2 empties of 30 bore pistol vide recovery memos Exh.PC and Exh.PC/1. He also took into possession bulb Exh.P.3, installed on outer door of the house of complainant and another bulb Exh.P.4 installed in the veranda of the house of the accused vide recovery memo Exh.PC//2. Vide recovery memo Exh.PW.2/1, he took into possession the last worn garments of the deceased, sent the bloodstained articles to the FSL, report whereof is Exh.PW.7/2, recorded statements of the PW, initiated proceedings under sections 204 and 87 Cr.P.C. against the appellant and on

completion of investigation submitted challan in terms of S.512 Cr.P.C. against the appellant.

6. On arrest of the appellant, supplementary challan was submitted against the appellant before the learned Trial Court, where he was formally charge sheeted, to which he pleaded not guilty and claimed trial. To prove its case prosecution led its evidence. After closure of the prosecution evidence statement of the appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegations and professed his innocence. He, however, declined to be examined on oath or to produce evidence in defence. On conclusion of trial, learned Trial Court, after hearing both the sides, convicted and sentenced the appellant, as mentioned above, hence, this appeal.

7. Learned counsel for the appellant argued that the occurrence is unseen as evident from the statement of solitary alleged eyewitness Mst. Nasreen complainant; that there is neither any ocular nor circumstantial evidence, much less tangible and concrete, to prove the guilt of the appellant, therefore, the findings of the learned Trial Court qua the guilt of the appellant being based on surmises and conjectures, are liable to be set at naught.

8. None appeared on behalf of the complainant despite service. The learned AAG while supporting the impugned judgment, sought dismissal of the appeal.

9. Heaving heard the arguments and going through the evidence on record, we may observe that occurrence is nocturnal having taken place at 22.20 hours in the month of August. Though, in her report Mst. Nasreen complainant in addition to her, has mentioned her other brothers and sisters to have witnessed the incident but none of them appeared in the witness box. Only complainant appeared as a solitary eyewitness. Cross-examination of her statement is of much significance which squarely shatters the whole edifice of the prosecution case. We would like to reproduce the same as under for ready reference:-

> **"The occurrence has taken place at night time. It was dark. At the time of occurrence we all brothers and sisters were present in the house and taking evening meal. It is correct that Mst. Fauzia is not known to me. I do not know if she resided in our street. I don't know if my deceased brother and Fauzia had any relationship of any kind or not. We are pathans and do not go outside the house. Similarly, at the time of**

occurrence I had not gone out of the house. Facts attributed to me in the report Exh.PW.3/1 were told to me by the police. It is correct that accused was not previously known to me".

In light of the statement of the alleged eyewitness Mst. Nasreen there remains no case of the prosecution. However, for the sake of arguments if we presume that she on account of compromise outside the court might have extended concession to the appellant, even then we have strong reservations qua her stance. She alleged in her initial report that she was present inside her house when her deceased brother Riaz went out to see Mst. Fauzia lady deceased/wife of the appellant in her house. The two deceased have been done to death on two separate places, one inside the house and the other near the door of his house. The two houses are separate, having separate boundary walls and entrance door, as shown in the site plan. Question arises as to how Mst. Nasreen the alleged eyewitness, noticed the husband of lady deceased i.e. the appellant on the roof top of his house where no source of light has been shown and how she observed all the subsequent events of his coming down, committing the murder of his wife first and then chasing her brother Riaz followed by his murder near the door of her house.

Similarly, how her other brothers and sister present in their own house, witnessed the occurrence. All these disturbing aspects of the case are sufficient for believing that Mst. Nasreen had not witnessed the incident.

10. Over and above, we do not find any circumstantial evidence, much less of high value and degree, to connect the appellant with the commission of crime and incompatible with his innocence. It is settled principle of law that prosecution is primarily bound to establish the guilt of an accused through evidence of unimpeachable character beyond reasonable doubt and if any reasonable doubt arises in the prosecution case benefit of the same must be extended to the accused not as a matter of grace or concession but as a matter of right. In the instant case, the prosecution evidence is pregnant with doubts and as per to golden principle of benefit of doubt; one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim " it is better that ten guilty persons be acquitted rather than

one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".

11. For what has been discussed above, the learned Trial Court failed to appreciate the available evidence in its true perspective and thus reached to erroneous conclusion by holding the appellant guilty of the offence, therefore, we by allowing this appeal, set aside his conviction and sentences recorded by the learned Trial Court vide impugned judgment dated 07.12.2011 and hereby acquit him of the charges. He be set at liberty forthwith, if not required in any other case.

12. Though we have set aside the conviction and sentences of the appellant, however, for future guidance of the learned Trial Judge, we would like to dilate upon section 302 PPC and 308 PPC, as in the instant case, he besides convicting the appellant under section 302 (b) PPC for Qatl-i-amd of deceased Riaz, also convicted him under section 308 PPC for murder of lady deceased Mst. Fauzia (the wife of the appellant) and sentenced him under proviso-III to Section 308 PPC to pay Diyat. Section 308 PPC contemplates punishments for Qatl-i-Amd not

liable to Qisas or where the qisas is not enforceable under section 307 (c) PPC. The first punishment provided for Qatl-i-Amd under section 302 (a) PPC is death as Qisas. Section 304 PPC contemplates proof of qatl-i-amd liable to Qisas, in the following form, namely,

> (a) the accused makes before a court competent to try the offence a voluntary and true confession of the commission of offence; or
>
> (b) by the evidence as provided in Article 17 of the Qanun-e-Shahadat Order, 1984.
>
> (2) The provision of sub-section (1) shall, mutatis mutandis, apply to a hurt liable to qisas.

In the instant case, neither the appellant had made before the Trial Court a voluntary and true confession of the commission of offence nor the procedure and formalities of Article 17 of the Qanun-e-Shahadat Order, 1984, have been complied with, as provided under section 304 PPC. Thus, in absence of the proof of qatl-i-Amd liable to qisas as enunciated under section 304 PPC, the learned Trial Court proceeded on wrong premises while recording conviction under proviso-III to section 308 PPC. Had the case been proved against the appellant in light of proof of

qatl-i-Amd liable to qisas, as provided under section 304 PPC, then to the extent of murder of Mst.Fauzia being the wife of the appellant, falling within the ambit of section 307 PPC, which speaks about the cases in which qisas for qatl-i-Amd shall not be enforced, the learned Trial Court would be justified to inflict punishment under proviso-III to Section 308 PPC. The findings of the learned Trial Judge are self contradictory because on the one hand he convicted the appellant for murder of deceased Riaz, under section 302 (b) PPC and inflicted punishment of imprisonment for life as Ta'azir upon him, which means that the learned Trial Judge was satisfied that the prosecution has not proved the case against the appellant within the meaning of S. 304 PPC, but on the other hand, he astonishingly inflicted the sentence of payment of Diyat under Proviso-III to section 308 PPC in respect of murder of the lady deceased Mst. Fauzia (wife of the appellant).

13. The Additional Registrar (Judicial) of this Court is directed to circulate copy of this judgment among the Additional Sessions Judges, of District Peshawar for future guidance, with intimation to this Court, as the then learned Trial Judge, has been now retired.

Announced
07.10.2015

J U D G E

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**M.Siraj Afridi P.S. D*