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

Cr.A No. 392-M/2019

(Anwar Badshah ___Versus___ The State and another)

Present:

Mr. Rashid Ali Khan, Advocate for the appellant/convict.

Mr. Sohail Sultan, Assistant A.G. for State.

Mr. Muqadar Khan, Advocate for the complainant.

Date of hearing: **23.09.2021**

JUDGMENT

ISHTIAQ IBRAHIM, J.- This appeal has been filed by convict Anwar Badshah against the judgment dated 27.08.2019 of the learned Additional Sessions Judge/Izafi Zilla Qazi-I/Model Criminal Trial Court, Dir Upper rendered in case FIR No. 212 dated 25.06.2018 u/s 302/34 PPC, 15 A.A of P.S Gandigar, District Dir Upper, whereby he was convicted and sentenced as under:

i. **u/s 302(b) PPC**

Life imprisonment with fine of Rs.50,000/- as well as compensation of Rs.500,000/- in terms of section 544-A, Cr.P.C payable to LRs of the deceased or in default thereof to suffer six months S.I

ii. **u/s 15 A.A**

03 years S.I with fine of Rs.5000/- or in default thereof to suffer further 03 months S.I.

Benefit of section 382-B, Cr.P.C was extended to the appellant and both the substantial sentences were ordered to run concurrently.

2. Complainant Sultan Zarin, who was present with the dead body of his daughter Mst. Halima Bibi aged about 24/25 years, has lodged the report on 25.06.2018 at 18:30 hours stating that his daughter named above was married to Niazbar Said son of Said Rehman resident of village *Ranzra* some 5/6 years ago; since the days of her marriage her husband and other in-laws were at daggers drawn with her and they used to beat her, in this regard he himself had convened several *Jirgas* with Niazbar Said and other inmates of his house. The complainant further stated in his report that on the same day at 16:30 hours, brother-in-law of her daughter namely Anwar Badshah (the present appellant) telephonically informed him to make arrangements for carrying the dead body of his daughter as she had died due to falling near her house. On receipt of such information, he rushed to the place of occurrence and found his daughter Mst. Halima Bibi laying there dead. He examined the injuries on the body of deceased as well as the place of occurrence but could not find any such place from

which a person could sustain the same injuries due to falling. He expressed his satisfaction and belief before police that his daughter has been murdered cold bloodedly by the present appellant and his father Said Rehman, the acquitted co-accused.

3. Sherin Zada S.I (PW-7), who had visited the spot on receipt of information regarding the occurrence, recorded the above report of the complainant in shape of *Murasila* which was sent to police station where formal FIR was registered against the appellant and his acquitted co-accused on the basis of *Murasila*. PW-7 also prepared injury sheet and inquest report of the deceased and sent the dead body to civil hospital *Bebiawar* for postmortem which was conducted by Dr. Saima Naurin Nazir (PW-16). The relevant findings she incorporated in the postmortem report are as under:

> Body brought by: Akhunzada LHC.
>
> Body identified by:
>
> (i) Hazrat Said son of Sultan Zarin
>
> (ii) Taj Muhammad son of Khan Muhammad.
>
> Examination of body:
>
> 26.06.2018 at 09:15 A.M
>
> **External Examination:**
>
> Average built body wearing yellow qameez, black shalwar, skin coloured brazier, red underwear (in menses)

- Postmortem lividity and rigor mortis has passed away.

1. A large deep wound on the Rt side of skull 4 x 14 cm in size extending from the top of skull towards the Rt ear reaching behind the Rt ear, underlying bone fractured with brain coming out.
2. A 2x3 cm abrasion on the right leg 10 cm below Rt knee joint.
3. A 1x0.5 cm abrasion on the Rt hip bone (lateral side)

- Signs of putrefaction are present.
- Marbling present.
- Skin slip present

Remarks by Medical Officer:

In my opinion the deceased died due to injury to the brain due to heavy cutting weapon.

Probable duration:

Between injury and death: undetermined.

Between death and PM: 24-48 hours.

4. The appellant and his father/co-accused were arrested on 27.06.2018. During investigation, they made pointation of the place of occurrence and a blood-stained axe as crime weapon was also recovered on pointation of the present appellant. On 09.07.2018, police also produced minor daughter of the deceased namely Habiba before the Judicial Magistrate concerned and recorded her statement u/s 164, Cr.P.C wherein she charged the present appellant for committing murder of the deceased through blow of axe on her head. Similarly, blood-stained earth was also collected from the spot

besides blood-stained garments of the deceased were taken into possession. The matching FSL report regarding blood on the afore-mentioned articles is Ex.PK/1.

5. After completion of investigation, complete challan was put in Court. On commencement of trial they were formally charge sheeted for the offence, however, they did not plead guilty and opted to face the trial. In order to further substantiate its case against the accused, prosecution produced and examined as many as sixteen out of twenty-six PWs listed in the calendar of witnesses whereas the remaining were abandoned. On closure of prosecution evidence, the accused were examined u/s 342, Cr.P.C, but they once again denied the allegations of prosecution and stated to have been charged in a false case, however, they neither recorded their own statements on oath nor recorded any evidence in their defence. On conclusion of trial, the learned trial Court vide impugned judgment acquitted co-accused Said Rehman while convicted and sentenced the present appellant in the manner already stated above, hence, this appeal.

6. We have heard the arguments of learned counsels for the parties including the learned Assistant A.G. for State and perused the record with their able assistance.

7. As per contents of the FIR, the prosecution version is that the present appellant committed murder of his sister-in-law Mst. Halima Bibi through violence in jungle/thoroughfare situated in the area of village *Ranzra*, District Dir Upper. Although complainant had also charged co-accused Said Rehman, father of the present appellant, for commission of the offence, however, the learned trial Court has acquitted the said co-accused through the impugned judgment and no appeal has been filed against his acquittal, therefore, we would confine our discussion only to the allegation of murder against the present appellant.

Prosecution has examined minor daughter of the deceased namely Habiba (PW-10) aged 06 years as the sole eye witness of the occurrence. The learned trial Court, while convicting the present appellant, has mainly relied upon the testimony of this witness coupled with other circumstantial evidence on record. However, she

being a child witness and examined belatedly in the case, her testimony needs to be scrutinized with great care and caution.

8. The first question which pricks our mind regarding reliability of the said child witness is with regard to her introduction as eye witness in the case at a belated stage. As per record, the occurrence took place on 25.06.2018 at unknown time whereas the minor witness was examined u/s 164, Cr.P.C before the concerned Judicial Magistrate on 09.07.2018, after 14 days of the occurrence. According to her admission in cross-examination, she had told the entire story to her maternal grandfather (complainant) at evening time, which was most probably the evening on the day of occurrence but despite this she was not associated with the process of investigation from the very inception. Prosecution has never explained with reasons non-association of the child witness with investigation from the initial stage nor her examination u/s 164, Cr.P.C at a belated stage has been justified with reasons. We have no doubt regarding innocence of the child witness but on the other hand we cannot ignore the possibility that she

was associated with the case by complainant and police as a false eye witness of the occurrence and this possibility is substantiated by her emergence in the case after 14 days of the occurrence. It is by now well settled that belated examination of a witness without plausible explanation annuls his credibility, therefore, testimony of the minor PW in this case in view of her belated introduction as eye witness of the occurrence cannot be considered as genuine. Reliance in this regard is placed on the judgment in the case titled *Abdul Khaliq Vs. The State* **(1996 SCMR 1553)** wherein the august Supreme Court has observed that:

> **Nazar Hussain P.W.7, who investigated the case as Naib-Tehsildar, deposed that he recorded the F.I.R. on 1-7-1991 while statements of Mir Qalam and Abdul Qahir were recorded on 21-7-1991. In his cross-examination Nazar Hussain stated that statements of Abdul Jabbar and Muhammad Shah were recorded on 4-8-1991 when they were brought by the complainant. He admitted that all the eye-witnesses were examined at the instance of the complainant. There is no explanation furnished by the prosecution for examination of Mir Qalam after 20 days of the incident and for examination of Abdul Jabbar and Muhammad Shah after one month and three days of the incident. It is a settled position of law that late recording of 161, Cr.P.C. statement of a prosecution witness reduces its**

> **value to nil unless there is plausible explanation for such delay.**

In the case of *Muhammad Asif Vs. The State* **(2017 SCMR 486)**, the Hon'ble apex Court has held that unexplained delay of even one or two days in recording the statement of eye witnesses would be fatal and testimony of such witnesses could not be safely relied upon.

9. Since the edifice of the prosecution case mainly rests on the testimony of the child eye witness, as such, her legal status as a witness and thereafter the evidentiary value of her testimony on the factual aspects of the occurrence need determination by this Court.

The criteria for competency of a person to testify has been laid down in Article 3 of the Qanun-e-Shahadat Order, 1984 which reads:

> **3. Who may testify:** A persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind:
>
> Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:
>
> Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:

> Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Qur'an and Sunnah for a witness, and. where such witness is not forthcoming the Court may take the evidence of a witness who may be available. Explanation: A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

From bare reading of the above provision, it can easily be gathered that evidence of a witness cannot be rejected because of his age factor rather the test of competency of a witness is his capacity to understand the questions and to give rational answers. However, the superior Courts have always laid more stress to remain on guard while convicting an accused on the sole testimony of a child witness. The reason behind such precaution is that children, as observed by Lahore High Court in the case of *Amir Khan and others Vs. The State* **(PLD 1985 Lahore 18)**, are the most untrustworthy class of witnesses because in view of their tender age they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. When the issue before the Court is to

determine guilt or innocence of an accused on the basis of sole testimony of a child witness then more care and caution is required to be taken and the same evidence should not be considered unless corroborated by circumstantial evidence on record. Reliance in this regard is placed on *State through Advocate-General, Sindh, Karachi Vs. Farman Hussain and others* reported as **PLD 1995 S.C 1**, wherein the august Supreme Court, while making reference to ***Farman Ali's*** case *supra*, observed that:

> **Evidence of child witness is a delicate matter and normally it is not safe to rely upon it unless corroborated as rule of prudence. Great care is to be taken that in the evidence of child element of coaching is not involved. Evidence of child came up for examination before Division Bench of the High Court in the case of Amir Khan and others v. The State PLD 1985 Lah. 18 in which after consideration of the relevant case-law on the subject, Abdul Shakurul Salam, J. (as he then was) as author of the judgment observed that `"children are a most untrustworthy class of witnesses, for, when of tender age, as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and the desire of notoriety". In any case the rule of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record.**

Although no hard and fast rule could be laid down to determine as to whether a child is a competent witness or not and ascertaining the intelligence of a child witness depends upon the facts and circumstances of each case, however, we cannot shut our eyes from the precautions so highlighted by the superior Courts before considering the evidence of the child witness in the present case. What the law requires before taking into account the testimony of a child witness is to confirm that the child understands the questions and on the basis of his/her intellectual capacity and understanding he/she is able to give a rational account of the matter regarding which such witness steps into the witness box.

10. By analyzing the testimony of the child witness in the present case on the touchstone of Article 3 of the Qanun-e-Shahadat Order, 1984 as well as the afore-referred dicta, it can safely be held that her testimony gets no corroboration from the circumstantial evidence on record. As per statement of the child witness, the appellant had hit her mother inside the room of her residential house which is not the case of prosecution at all because after

examination of the witness u/s 161/164, Cr.P.C, the I.O neither prepared site plan of the house in view of the new development in the case in light of the child's statement nor collected any incriminating evidence from the said house except recovery of axe as the alleged crime weapon the evidentiary status whereof is also doubtful which will be discussed later on at proper stage of this judgment. According to initial version of prosecution, the appellant and his co-accused committed murder of the deceased at Point-1 of the site plan through violence and thereafter threw and dragged her downward to Point A1 shown near the public thoroughfare. After arrest of the accused, the I.O made addition in the site plan with red ink in light of pointation of the accused and they were shown at Points 4 & 6 respectively whereas minor son of the deceased namely Wisal, who was in her lap at the time of occurrence, was given Point 5 in the site plan. According to prosecution in light of pointation so made by accused, the present appellant hit the deceased with axe from Point 4 as result whereof the kid fell from her lap on Point 5 whereas she herself fell downward for 18/19 feet and died on the spot. Prosecution has

remained persistent on this version till the last and it appears that in light of the version of accused emerging from the FIR, police were in doubt regarding death of the deceased due to falling from height, as such, the mode and manner of the occurrence as mentioned in the site plan was believed as sufficient circumstantial evidence against the accused and no further investigation was conducted in the case in light of examination of the child witness u/s 161/164, Cr.P.C. Perusal of the record further transpires that formal charge against the accused has been framed in light of the said version of prosecution wherein the place of occurrence was shown the thoroughfare mentioned in the site plan and no reference was made to the allegation of hitting of the deceased by the present appellant inside the room of his house. Even during examination of the appellant u/s 342, Cr.P.C, he was not confronted with the mode and manner of the occurrence as narrated by the child eye witness during trial. But contrary to the above stated basic version of the prosecution and despite the fact that the actual place of occurrence had become controversial rather doubtful in view of the glaring

inconsistency between the site plan and statement of the child witness, the learned trial Court has straightaway relied upon her statement without seeking independent corroboration of her testimony. The learned trial Court is of the view, as emerging from the last portion of Para-16 of the impugned judgment, that the present appellant committed murder of the deceased through axe blows inside the house of her in-laws and thereafter dragged her to the nearby jungle, however, at the cost of repetition, no corroborative evidence of convincing nature is available on record in support of the above findings of learned trial Court. The I.O has not shown the house in the site plan wherein the murder was committed as per version of the child eye witness. Similarly, blood was only recovered from point 1A from where the dead body was recovered whereas a piece of human skin was recovered from point 1B. Both the mentioned points have been shown in the jungle. The astonishing fact is that police raided the house of appellant on the second day of the occurrence i.e 26.06.2018 and a shotgun was allegedly recovered from his residential room but neither any blood was recovered from the house nor

police has reported any disturbance inside the house. Even the said house was raided for the second time on 27.06.2018. This time the accused were arrested besides a bundle/pack hanging with the wall, containing CNISs of the deceased and appellant, was taken into possession but even then nothing favourable to prosecution in light of the child's statement was recovered from the said house. We cannot expect the police that they will not have searched the room of deceased at the time of raiding the house on two consecutive days. It is also noteworthy that floor of the house in photograph Ex.PW-12/11 appears to be made of mud. Removal of blood from such like floors through washing is not so easy as in the case of cemented one. It is a matter of general observation that blood from a mud floor cannot be completely removed and signs of disturbance on such floor are always left behind whenever any endeavor is made for removal of blood from mud floor through washing, rubbing or digging but the entire record is mute regarding any such signs inside the room of the deceased to support the statement of the child witness. Prosecution has placed on file a copy of daily

attendance of students of the school where the child witness was studying. According to the said photocopy Ex.PW-12/16, the child witness was present in school on 25.06.2016 and she had spent the time there from 07:30 a.m to 12:35 p.m as per certificate Ex.PW-12/18 issued by Head Teacher of the said school regarding the school hours in summer. When no corroborative evidence of convincing nature is available on record in support of the child eye witness, her narrations that the appellant had given her Rs.10 after hitting her mother with axe and she then left for school, appears to be a cooked up story for bringing her statement in conformity with school record. It can safely be held from the above mentioned scenario of the case that not only whatever the child eye witness has stated before the Court was put into her mouth but her statement is also not corroborated by circumstantial evidence on record, therefore, her testimony is not worth consideration. We are conscious of the fact that cause of death of the deceased as per postmortem report was due to injury to the brain with heavy cutting weapon but this report by itself is not sufficient to prove the mode and manner of the

occurrence as mentioned by the child eye witness in her statement, hence, her testimony does not get the required corroboration from the medical evidence on record. Further reliance is placed on *Ulfat Hussain Vs. The State* (2010 SCMR 247). The august Supreme Court has observed in the said judgment that:

> **12. We would like to observe that though in principle conviction can be based upon the testimony of an intelligent and understanding child witness yet the Courts have generally preferred to adopt the settled principle of prudence and the rule of care attached to the sole testimony of a child witness despite child's intelligent disposition. We may however, reiterate that the measure of prudence or the level of care would depend upon facts of each case.**

11. Another aspect of the case creating a doubt regarding the statement of the eye witness is that her minor brother Wisal also sustained multiple abrasions and scratches on his both cheeks, forehead and buttock in the same occurrence as is evident from medical report Ex.PW15/1, prepared by Dr. Ata-ul-Haq (PW-15) after examining the said kid after three days of the occurrence. According to the contents of site plan, the kid fell from the lap of deceased on Point 5 when she was hit by appellant

in the uneven land of the jungle. Sustaining bruises and scratches by the kid in the mentioned place being uneven and slope stands to reason but on the other hand prosecution, in light of the statement of the child witness, has changed the place of occurrence from jungle to residential room of the deceased where though falling of the kid from the lap of her mother was certain but coming of multiple abrasions and scratches on his both cheeks, forehead and buttock in a room is repellent to reason. After analyzing the entire evidence on record, we have reached to the conclusion that prosecution itself is not sure regarding the actual place of occurrence, hence, the mode and manner of the occurrence is highly doubtful. In such situation we do not find ourselves in agreement with the findings of learned trial Court on the basis whereof the appellant has been convicted.

12. Regarding the recovery of blood-stained axe on pointation of the appellant, we have already observed in the preceding paras that police had searched the house of appellant twice on 26.06.2018 and 27.06.2018 but no axe was recovered during the two raids on the mentioned dates. According to

prosecution version, police recovered the blood-stained axe on pointation of the present appellant on 30.06.2018 from veranda of his house. Close perusal of the sketch of recovery Ex.PW-12/10 and photograph Ex.PW-12/11 shows that the alleged recovery has been effected from point A which is the end point of veranda and the axe has been shown at corner of the wall meaning thereby that the axe was placed openly in the veranda. How was it possible for police to lose sight of such an important thing placed openly in the veranda more particularly when they were so cautious and vigilant that they did not leave even a baggage unattended which was hanging with a wall. Similarly, the stance of prosecution that the appellant had placed the axe stained with blood at the mentioned place after committing the murder, also does not appeal to prudent mind and it cannot be expected from a person of ordinary prudence to leave a sign of his involvement in a crime so conspicuously in his house. Thus, the recovery of axe from the house of appellant on his pointation is highly doubtful, hence, cannot be considered as a convincing evidence in corroboration of the statement recorded by the child eye witness.

13. The prosecution case is suffering from glaring inconsistencies and infirmities creating serious doubts regarding the mode and manner of the occurrence as well as involvement of the present appellant in commission of the offence. The learned trial Court, while convicting the appellant, has not appreciated the evidence in its true perspective, therefore, the impugned judgment cannot be maintained. Resultantly, this appeal is allowed, the impugned judgment is set aside and appellant is acquitted of the charge so leveled against him in this case. He be released forthwith from jail if not required in any other case.

14. Above are the reasons of our short order of the even date.

Announced
Dt: 23.09.2021

JUDGE

JUDGE

Office
29/9/2021
WR