

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

1) Cr.A No. 94-M/2019

Tandimand s/o Amir Mehmood r/o Asharay, Tehsil Matta, District Swat. (Appellant)

Versus

- 1) Qasim Jan s/o Hikmat Khan r/o Asharay, Tehsil Matta, District Swat.
- 2) The State through Additional Advocate General, Peshawar High Court, Bench Mingora, Swat.

Present:

Mr. Saeed Ahmad, Advocate for the appellant.

Mr. Haq Nawaz Khan, Assistant A.G. for State.

Complainant in person.

2) Cr.R No. 26-M/2019

Qasim Jan s/o Hikmat Khan r/o Asharay, Tehsil Matta, District Swat. (Petitioner)

Versus

- 1) Tandimand s/o Amir Mehmood r/o Asharay, Tehsil Matta, District Swat.
- 2) The State through Additional Advocate General, Peshawar High Court, Bench Mingora, Swat. (Respondents)

Present:

Petitioner/Complainant in person.

Mr. Haq Nawaz Khan, Assistant A.G. for State.

Mr. Saeed Ahmad, Advocate for the respondent/convict.

Date of hearing: 21.04.2020

Date of announcement: 28.04.2020

**JUDGMENT**

**SYED ARSHAD ALI, J.-** This judgment is directed to dispose of the instant appeal as well as the connected Cr.R No. 26-M/2019 as both these cases are arising out of one and the same judgment dated 26.02.2019 handed down by learned Additional

Sessions Judge/Izafi Zilla Qazi, Swat at Matta, in case F.I.R No. 850 dated 21.08.2017 u/s 302 P.P.C read with section 15 of the Khyber Pakhtunkhwa Arms Act, 2013, registered at police station Matta, District Swat whereby the appellant was convicted and sentenced as under:

i) u/s 302 (b) P.P.C

Life imprisonment (rigorous) with payment of Rs.200,000/- as compensation to legal heirs of deceased Mst. Sheema or to further undergo six months S.I in case of non-payment of compensation.

ii) u/s 15 A.A.

Six months R.I with fine of Rs. 10,000/-. In case of default, the appellant/convict was directed to undergo further 10 days S.I.

2. Complainant Qasim Jan (PW-11), while present in the house of the Appellant/convict situated at village *Asharay* made the report on 20.08.2017 at 23:55 hours to Habib-ur-Rehan ASI (PW-4), who had attracted to the spot on receiving the information about the murder of deceased, wherein he had reported that about 15 years ago his daughter Mst. Sheema (deceased) was married to the appellant/ convict Tandimand, who was a drugs addict and was in habit of beating his wife. For the said reason the complainant had kept his daughter confined/restrained in his house several times, however, on the request of the appellant he would

allow her to go with him. On the eventful day, on receiving information regarding the occurrence, the complainant came to the house of the appellant/convict at 22:30 hours where he found his daughter in pool of blood and a blood-stained axe was lying near her dead body. He charged the present appellant for committing the murder of deceased through axe blows.

3. The above report of complainant was recorded through *Murasila* (Ex.PW-4/3) which was later translated into F.I.R (Ex.PA) on 21.08.2017 at 00:30 hours (12:30 A.M). The author of *Murasila* (PW-4) prepared injury sheet (Ex.PW-4/1) and inquest report (Ex.PW-4/2) of the deceased and shifted the dead body to hospital *Matta* for post-mortem.

4. Muhammad Fayaz Khan Inspector (PW-7) has conducted investigation in the case, during the said investigation he prepared site plan (Ex.PB), secured the blood-stained axe and boot left by the appellant/convict, blood from the spot and blood stained shirt of the deceased through recovery memos. The positive F.S.L report regarding the mentioned blood-stained articles is Ex.PW-9/8 whereas the F.S.L report regarding the internal parts

of the deceased secured by the doctor during the post-mortem is Ex.PW-9/9.

5. Initially, the appellant/convict remained absconder. The process u/s 204 & 87, Cr.P.C conducted against him proved fruitless, however, he was later produced by elders of the locality in police station on 24.09.2017, where he was formally arrested in the present case. He recorded his confessional statement before the Judicial Magistrate on 26.09.2017 copy of which is available on record as Ex.PW-10/1.

6. After completion of usual investigation, challan was put in Court for trial of the appellant/convict. Formal charge was framed against him to which he did not plead guilty, therefore, the prosecution produced twelve (12) witnesses in support of its case. After examination of the appellant/convict u/s 342, Cr.P.C, the learned trial Court has found him guilty of the charge, hence, awarded him the sentence detailed in the earlier part of this judgment. Being aggrieved the appellant/convict has preferred the instant appeal whereas the complainant has filed the connected revision petition for enhancement of the sentence.

7. It is pertinent to note that this Court was informed on 29.10.2019 regarding compromise between the parties, therefore, the learned trial Court was directed to confirm the factum of compromise by recording statements of the legal heirs of the deceased. The learned trial Court has sent its report whereby this Court has been apprised that parents of the deceased, the only legal heirs survived by her, have effected a genuine compromise with the appellant/convict without any pressure and they have pardoned him in the name of Almighty Allah. Today the father of the deceased present in the court has confirmed the factum of compromise by stating that since the Appellant is his nephew (son of his sister) therefore, he has pardoned him.

However, when the case came up for hearing on 13.01.2020, it transpired from perusal of the record that prima facie it was a case of honour killing, therefore, this Court deemed it appropriate to hear the case on merits and thereafter to form an opinion regarding the compounding of the offence in view of the legal bar contained in section 311 of the Code.

8. Arguments heard and record of the case was perused.

9. On merit, the close perusal of the evidence would reveal that prosecution has established its case against the appellant/convict. It is the case of prosecution against him that he had killed his wife by inflicting injuries to her through axe blows inside his house on 20.08.2017 at 22:20 hours. The report has been promptly lodged keeping in view the distance between police station and place of occurrence as well as the time at which the occurrence had taken place. The place of occurrence is established in view of the site plan Ex.PB, recovery of blood from Point-A adjacent to Point-1 where Mst. Sheema was found dead between the veranda and courtyard of her house. The blood-stained axe with which the deceased was done to death was recovered from Point-B in the site plan. The post-mortem report Ex.PW-1/1 fully supports the prosecution version as mentioned in the F.I.R. The report of Serologist Ex.PW-9/8 regarding the blood-stained earth taken from the spot, blood-stained axe and boot of the appellant as well as blood-stained shirt of the deceased is positive with the observations that "*it was human blood and of the same group*". The PWs have recorded their straightforward statements wherein no



contradictions of glaring nature could be found to make the recoveries doubtful.

10. Although there is no eye witness of the occurrence, however, the appellant/convict has recorded his confessional statement before the competent Court on 26.09.2017. This statement was promptly recorded wherein the appellant has narrated all the events of the occurrence in the manner which is corroborated by the circumstantial evidence. He has admitted that he had killed his wife with axe blows on seeing her in a compromising position with his friend Umar Sahib. The confessional statement, being fully corroborated by remaining evidence on record, can rightly be termed as true and voluntary confession. Thus, the prosecution has established its case against the appellant through confidence inspiring evidence beyond shadow of any reasonable doubt.

11. Now the moot question for determination before this Court is the release of the present appellant/convict on the basis of compromise. Although the complainant has not stated the exact motive for the murder of the deceased, however, the appellant/convict has explained the mode and manner of the murder in his

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promptly recorded confessional statement which is reproduced below for convenience sake.

میرا میری بیوی کیساتھ یعنی مقتولہ شیمابی بی سے عرصہ 15/16 سال قبل شادی ہوئی تھی۔ ہم خوشگوار زندگی گزار رہے تھے، کبھی کبھار ہمارے درمیان تعلقات کشیدہ ہو جاتے۔ عمر صاحب میرا بچپن کا دوست ہے۔ وقوعہ کے روز میں اور عمر صاحب مچھلیاں پکڑنے کیلئے دریا (سینڈ) واقعہ اشارے گئے ہوئے تھے۔ پھر عمر صاحب کو ایک کال آئی، جس پر انہوں نے کہا کہ میں گھر جاتا ہوں، تم لوگ مچھلیاں پکڑو، میں واپس آتا ہوں۔ پھر میں بھی گھر خود واپس آیا۔ جیسے دروازہ کھولا تو تقریباً 80/90 فٹ پر میرا کرہ واقع ہے، میں نے دروازے سے دیکھا کہ مسماہ شیمابی بی اور عمر صاحب اپنے اپنے شلوار باندھ رہے تھے، یہ تقریباً 22:20 بجے کا وقت تھا۔ عمر صاحب نے شیمابی بی کے کہنے پر مجھ پر کلباڑی سے گزار کی لیکن میں بچ گیا اور مسماہ شیمابی (مقتولہ) اس گزار سے زخمی ہوئی۔ پھر میں نے عمر صاحب سے کلباڑی چھینی، جیسے ہی کلباڑی میرے ہاتھ آئی وہ گھر سے بھاگنے لگا، میں نے بھی تھوڑا تعاقب کیا لیکن وہ بھاگ نکلا۔ پھر میں شیمابی بی (مقتولہ) کی طرف مڑا اور غصے کی حالت میں اس پر گزرات کلباڑی شروع کیے۔ میں نے مقتولہ کو سر پرار گردن پر کلباڑی سے کئی وار کیے جس سے وہ موقع پر مر گئی۔ پھر کلباڑی وہی پھنک دی۔ مسماہ شیمابی بی کو قتل کرنے کے بعد میں موقع سے فرار ہوا۔ اپنی بیوی مسماہ شیمابی بی کو کسی عمر صاحب کیساتھ نازیبا حالت میں دیکھنے پر مجھے غصہ آیا تھا۔ میں نے اپنی بیوی مسماہ شیمابی کو قتل کر کے جرم کیا ہے۔ میں اپنا جرم مانتا ہوں۔

12. Needless to reaffirm, that when there is no ocular evidence available on file and the accused has confessed his guilt then the contents of the confession should be accepted as a whole. Thus we have no occasion to disbelieve the motive narrated in the confessional statement of the deceased. The aforesaid confessional statement was reproduced in order to form an opinion as to whether the death of the deceased was on the pretext of honour or she



was done to death on account of grave and sudden provocation.

13. The murder of a person most particularly a female on the pretext of honour has been termed *fasad-fil-arz* under 299 (ee) of the Code and thus is not compoundable in terms of section 311 of the Pakistan Penal Code, 1860 (“Code”) read with section 345 (7), Cr.P.C. Section 345 (7) puts an embargo on compounding the offence of murder, if committed on the pretext of honour. For ready reference the said provision is reproduced as under;

“345 (7). No offence shall be waived or compounded save as provided by this section and section 311 of the Pakistan Penal Code 1860 (Act XLV of 1860)”.

14. The word “pretext of honour” has not been defined in the Code, however, it would be appropriate to refer the provisions of the Code relevant to the term “pretext of honour”.

299 (ee), P.P.C. “*fasad-fil-arz*” includes the past conduct of the offender, or whether he has any previous conviction, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community, or if the offence has been committed in the name of the pretext of honor.

302, P.P.C (proviso). Provided that nothing in clause (c) shall apply where the principle of *fasad-fil-arz* is attracted and in such cases only clause (a) or clause (b) shall apply.

311, P.P.C. (proviso). Provided that if the offence has been committed in the name or on the pretext

of honour, the punishment shall be imprisonment for life.

The proviso to section 302 and the entire section 311 were inserted in the Code through Criminal Law (Amendment) (Offences in the Name or on pretext of Honour) Act, 2016 (Act XIII of 2016).

14. Causing death of a person due to grave and sudden provocation was indeed a mitigating circumstance under the erstwhile section 300 of the Code which was punishable u/s 304, P.P.C before introduction of Qisas and Diyat Ordinance. Despite the introduction of Qisas and Diyat Ordinance, whereby the erstwhile section 300 and section 304 of the Code was replaced with the explicit provisions relating to culpable homicide amounting to murder and the said exceptions as earlier provided under section 300 and 304 of the Code are not available in clear terms, however, the august Supreme Court of Pakistan has recognized all the exceptions mentioned under the erstwhile section 300, P.P.C as mitigating circumstances for awarding lesser punishment under the newly enacted section 302 (c) of the Code. Reliance is placed on "Ali

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Muhammad V. Ali Muhammad and another” (PLD 1996 SC 274).

15. Now the question arises that when a person kills his wife immediately after having found her in compromising/unacceptable position with a person stranger to her would fall within the mischief of murder on the pretext of honour and thus would not be compoundable due the restrictions as provided under section 345 ( 7 ) Cr.P.C. or the said murder would fall under the category of grave and sudden provocation, taking the case out of the purview of honour killing. In the case of “Muhammad Qasim Vs. The State” reported as **PLD 2018 S.C 840**, the august Supreme Court has drawn a distinction between the honor killing and death of person as a result of grave and sudden provocation. Relevant para of the judgment is reproduced as under:

4. The discussion made above leads us to an inescapable conclusion that the case in hand was indeed a case of grave and sudden provocation which could possibly attract the provisions of section 302(c) P.P.C. as declared by this Court in the case of **Zahid Rehman v. The State (PLD 2015 SC 77)**. The learned Deputy Prosecutor-General, Punjab appearing for the State has, however, pointed out that in terms of the first proviso to section 302(c), P.P.C. the case in hand was a case of murders committed in the name or on the pretext of honour and, thus, it was to be

treated as a case attracting the provisions of sections 302(a) or 302(b), P.P.C. and not those of section 302(c), P.P.C. We have attended to this aspect of the matter with care and have found that the words "in the name or on the pretext of honour" used in the first proviso to section 302(c), P.P.C. are not without any significance or meaning. The said words indicate that a murder committed "in the name or on the pretext of honour" has to be a calculated murder committed with premeditation in the background of honour whereas the words used in the context of grave and sudden provocation in Exception 1 to the erstwhile Section 300, P.P.C. were "deprived of the power of self-control". Such words used in Exception I to the erstwhile section 300, P.P.C. catered for a situation which was not premeditated and had developed suddenly leading to grave provocation depriving a person of the power of self-control. Such different phraseology used by the legislature in these distinct provisions clearly indicates catering for different situations and, therefore, the words "in the name or on the pretext of honour" ought not to be mixed or confused with grave and sudden provocation leading to depriving of the Power of self-control. This distinction between honour and grave and sudden provocation was clearly recognized by this Court in the case of Muhammad Ameer v. The State (PLD 2006 SC 283) and the same is manifestly attracted to the facts of the present case as well. It has already been found by us above that the case in hand was a case of grave and sudden provocation and honour only provided a backdrop to the same.

The Hon'ble apex Court in the aforesaid judgment, while explaining the plea of the appellant for killing the deceased for the reasons that he was deprived by the situation where he lost self-control,



has awarded him lesser punishment u/s 302 (c), P.P.C thereby discarding the element of killing the deceased on pretext of honour, and as such the proviso to section 302 (c) was not considered as legal contour for awarding punishment less than life imprisonment. In the present case, the appellant has killed his wife when he had seen her in a compromising position with a stranger. The mode and manner as mentioned by him in his confessional statement does not suggest any pre-planning or premeditation on his part before killing his wife, therefore, his case squarely falls within the definition of section 302 (c), P.P.C.

14. In view of the above, we hold that the murder of deceased by the appellant was not an honor killing (pretext of honor) but the incident was result of grave and sudden provocation which had erupted at spur of the moment, therefore, the prohibition contained in section 311 P.P.C read with Section 345 (7), Cr.P.C is not attracted to the present case.

15. Report of the learned trial Court would reveal that the deceased was survived by her parents, three brothers and two sisters, however, according to Hanafi law of inheritance, in the present case only

parents of the deceased are her legal heirs as only they can directly inherit from the deceased at the exclusion of brothers and sisters. In view of their such status, only they have the right to compound the present offence under section 345 (2), Cr.P.C. In this regard we may refer to Illustration (g) with note to Section 63 of D.F Mulla's Principles of Muhammadan Law (Pakistan Edition) as well as *Fatwa* of one Mufti Muhammad Ayaz available with the report as Ex.PD which was obtained during the compromise proceedings. Guidance can also be sought from the judgment of the august Supreme Court of Pakistan in "Muhammad Yousaf Vs. The State and others" PLD 2019 Supreme Court 461 wherein it has been held that:

There is, thus, no confusion in our law that an heir is a person who is entitled to inherit from the deceased at the time of his death. In view of this settled and recognized principle when the law of the land provides that in a case of Ta'zir an offence of qatl-i-amd under section 302, P.P.C. may be compounded by the "heirs of the victim" and when an heir of a victim is only a person who inherits directly from the victim then what is clearly meant by section 345(2), Cr.P.C. is that only a person who can directly inherit from the victim is the person who can compound the offence of qatl-i-amd of the victim and none else.



The report of trial Court would further reveal that parents of the deceased have patched up the matter through compromise deed Ex.PA in support of which they have recorded their joint statement whereby they have waived their right of *Qisas* and *Diyat* against the appellant/convict. We are satisfied from the report of the learned trial Court that the parties have effected a genuine compromise and parents of the deceased have pardoned the appellant in the name of Almighty Allah without duress or pressure.

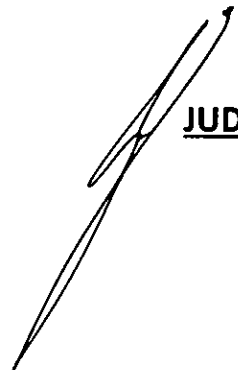
16. For what has been discussed above, the instant appeal is accepted on the basis of compromise, the impugned judgment dated 26.02.2019 is set aside to the extent of conviction and sentence of the appellant u/s 302 (b) P.P.C, hence, he is acquitted of the charge of murder of deceased Mst. Sheema Bibi. Conviction and sentence of the appellant u/s 15 A.A is maintained whereas the benefit u/s 382-B, Cr.P.C with further directions regarding concurrent running of the sentences have already been extended to him by trial Court. He be released forthwith from jail if not required in any other case. The connected Cr.R



No. 26-M/2019 is dismissed for having become  
infructuous.

Announced.  
Dt: 28.04.2020

  
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