

**2017 Y L R 2183**

**[Balochistan]**

**Before Muhammad Hashim Khan Kakar and Abdullah Baloch, JJ**

**ABDUL ALI---Appellant**

**Versus**

**SAATH MUHAMMAD and 3 others---Respondents**

Crl. Acquittal Appeal No.205 of 2013, decided on 22nd March, 2017.

**(a) Penal Code (XLV of 1860)---**

---Ss. 302 & 34---Criminal Procedure Code (V of 1898), S. 417(2-A)---Qatl-i-amd, common intention---Appreciation of evidence---Appeal against acquittal---Benefit of doubt---Prosecution case was that daughter of complainant was married with accused/respondent---Reportedly, she was facing trouble due to mis-behaviour of her in-laws, and she used to telephone her parents complaining about mis-behaviour and un-tolerable cruelty of in-laws---One unknown call was received by the complainant the dead body of his daughter was lying in the hospital---Matter was reported to the police and FIR was lodged---Complainant and other family members were not satisfied with the FIR for the reasons that the police authorities had not mentioned the names of all the accused persons, hence filed the private complaint with the allegations that respondents committed murder of the deceased---Affidavits of complainant, mother of deceased and brother of deceased were also filed---Complaint was entertained on the basis of affidavits and the trial commenced---Statements of witnesses were recorded---Record showed that said witnesses were not eye witnesses of the case and stated differently with regard to the information of death of deceased---Evidence of said witnesses transpired that there were material improvements and contradictions in their statements, which created serious doubt and dent in the case of prosecution---Witnesses named different persons, who conveyed information to the complainant party about the murder of deceased but said informers were not produced as witnesses to strengthen the case of prosecution---Statements of all the prosecution witnesses were not consistent and confidence inspiring---No direct or circumstantial evidence was available against the accused/respondents connecting them with the commission of offence---Circumstances established that there existed series of doubts in the case of prosecution, benefit of which would resolve in favour of accused/respondents---Appeal against acquittal was dismissed in circumstances.

**(b) Penal Code (XLV of 1860)---**

---Ss.302 & 34---Qanun-e-Shahadat (10 of 1984), Art. 21---Qatl-i-amd, common intention---Appreciation of evidence---Appeal against acquittal---Conduct of accused, relevancy of---Complainant had alleged that conduct of accused/ respondents was enough for proving the guilt accused/respondents were bound to prove their innocence as the dead body of the deceased had

been recovered from their home and the deceased was their family member and their subsequent conduct regarding maltreatment with the dead body was a proof against them---Validity---Initially burden was upon the prosecution/complainant to discharge its liability and to prove its case beyond shadow of any reasonable doubt---If prosecution failed to establish its case, accused/respondents could not be convicted merely on the basis of a presumption that since the murder of deceased had taken place in their house, therefore, accused/respondents would have committed that murder---Appeal against acquittal was dismissed.

Abdul Majeed v. The State 2011 SCMR 941 rel.

**(c) Penal Code (XLV of 1860)---**

---Ss.302 & 34---Criminal Procedure Code (V of 1898), S. 417(2-A)---Qatl-i-amd, common intention---Appeal against acquittal---Double presumption of innocence was attached to the order of acquittal---Interference in such situation was unwarranted unless the acquittal order was arbitrary, capricious, fanciful or against the record---In the present case, order of acquittal passed by the Trial Court was neither arbitrary, capricious, fanciful nor contrary to the evidence on record, warranting interference by High Court---Appeal against acquittal was dismissed accordingly.

Abdul Qahir Kakar for Appellant.

Ahmed Abbas for Respondents.

Abdul Latif Kakar, Additional P.G. for the State.

Date of hearing: 27th February, 2017.

**JUDGMENT**

**ABDULLAH BALOCH, J.**---This judgment disposes of Criminal Acquittal Appeal No.205/2013 filed by the appellant Abdul Ali son of Muhammad Shah, against the judgment dated 26th June, 2013 (hereinafter referred as, "the impugned judgment") passed by the learned Sessions Judge Quetta (hereinafter referred as, "the trial Court"), whereby the private complaint under section 200, Cr.P.C. filed by the appellant was dismissed and the accused/respondents Saath Muhammad Son of Abdul Ghani, Wazeer Muhammad, Abdul Ghaffar both sons of Saath Muhammad were acquitted.

2. According to the case of prosecution, the appellant filed a private complaint under section 200, Cr.P.C. against the accused/respondents and others, stating therein that about three years ago he got married his daughter namely Gul Makai with accused Wazir Muhammad, while the sister of said Wazir Muhammad was married to the son of appellant namely Asadullah. He further stated that he along with his family is resident of Chagai, while the accused persons are living at Spiny Road, near BMC Hospital Quetta. It is further averred that the deceased Gul Makai was facing trouble due to mis-behaviour of her in-laws (accused/respondents), hence she had used to have made telephonic calls complaining about their misbehavior and un-tolerable

cruelty, who used to beat her on petty matters and even she was apprehending of her murder by the accused/respondents and in such pretext, she requested her mother to send a person to take her from Quetta to Chagai. The appellant further stated that on 23rd February 2012, an unknown telephonic call was received in his house that the dead body of the deceased Gul Makai is lying in Bolan Medical Complex Hospital Quetta, hence on such information the family members along with other relatives of the appellant came to Quetta and took the dead body to Chagai, while the complainant, who at the relevant time was at Afghanistan departed to Chagai. On examination of the dead body, they found ligature marks on her neck and several other marks of torture in her person, which suggests that the deceased Gul Makai was strangled and the said fact was affirmed through the medico legal certificate. The appellant further stated that the matter was reported by his son Aminullah to Police and FIR No.18/2012 under section 302, P.P.C. was registered on 24th February 2012 at Kharot Abad Police Station Quetta against accused Abdul Ghaffar son of Saath Muhammad. It is next stated that pursuant to above, FIR accused Abdul Ghaffar along with other accused were arrested, but during investigation all the accused except accused Abdul Ghaffar, were released by the SHO on the pretext of insufficient evidence, whereas under the provisions of Article 21 of the Qanun-e-Shahadat Order, 1984, mere conduct of the respondents/accused is enough for proving the guilt and further while looking at the circumstances of the case, it is the duty of the respondents/ accused to prove their innocence, because the dead body has been recovered from their home and the deceased was their family member and further that their subsequent conduct regarding mistreatment with the dead body is also a proof against them and the release of accused persons one by one is suggestive of the fact that the police is not taking interest in the matter in establishing the charge against the accused-respondents. Hence, with the above averments, the appellant filed the complaint under section 200 Cr.P.C.

3. It appears from the record that on receipt of complaint, the inquiry was conducted by learned Judicial Magistrate-II, Quetta, whereafter the complaint was accepted to be tried against the accused/ respondents. During trial, the accused Abdul Ghaffar and Wazir Muhammad were arrested, while the accused Saath Muhammad and Khaisto were granted bail, whereas the remaining accused were declared as proclaimed offenders. Charge was framed and read over to accused/respondents, whereafter the prosecution produced four witnesses. The accused were examined under Section 342, Cr.P.C. Accused Abdul Ghaffar recorded his statement on oath under section 340(2), Cr.P.C. and also produced a witness in his defence, whereas rest of the accused neither recorded their statements on oath nor produced any witness in their defence. On conclusion of trial, the learned trial Court vide impugned judgment rejected the complaint and acquitted the accused, while the accused Abdul Ghaffar was ordered to be produced in the Court for the trial of case FIR No.18/2012 P.S. Kharot Abad Quetta under section 302, P.P.C. as after filing the complaint the proceedings of said case were held in abeyance. Whereafter, instant appeal against the acquittal of accused/respondents has been filed.

4. Learned counsel for appellant inter-alia contended that the impugned judgment suffers from misreading, non-reading and mis-appreciation of evidence; that under Article 21 of Qanun-e-Shahadat Order 1984, the accused/respondents are bound to prove their innocence; that the dead body of the deceased was recovered from the house of accused/respondents; that the dead body was brought to the hospital by the accused persons; that as per medical report there are marks of ligature on the neck of deceased; that the deceased was strangled by the

accused/respondents; that the charge of murder is enough as per previous conduct of the accused/respondents; that being the family members the accused/respondents were duty bound to have buried the deceased with all the traditional, and religious ceremonies, but being the members of family they threw away the dead body in the hospital and came to the home and stated that she has committed suicide; that sufficient ocular, supported by the medical evidence was produced against the accused/respondents, but the learned trial Court has failed to consider the same; that the learned trial Court while acquitting the accused/respondents only on the basis of certain improvements in the statements of PWs has wrongly given the benefit of doubt to the accused/respondents; that where a wife of a person or any vulnerable dependent dies an unnatural death in the house of such person, then some part of onus lies on him to establish the circumstances; that the impugned judgment suffers from material illegalities, irregularities and improprieties and not sustainable and liable to be set-aside and the acquitted accused/respondents be convicted and sentenced in accordance with law.

5. On the other hand, the learned Additional Prosecutor General assisted by learned counsel for accused-respondents Nos.1 to 3 while supporting the impugned judgment have vehemently opposed the arguments so advanced by the learned counsel for the appellant and further contended that the son of appellant namely Aminullah soon after occurrence lodged FIR No.18/2012 with Police Station Kharotabad Quetta under Section 302 Q&D against the respondent No.3 Abdul Ghaffar son of Saath Muhammad; that the proceedings were started in pursuance of said FIR; that despite investigation to collect evidence against the rest of the respondents in the said FIR, the complaint under Section 200, Cr.P.C. was afterthought; that the statement of PWs suffers from glaring improvements on material counts; that the complainant has failed to prove its case beyond the shadow of any doubt; that the learned trial Court after proper appreciation of evidence has acquitted the accused/respondents and benefit of doubt was extended in their favour; that the instant acquittal appeal is not maintainable and liable to be dismissed.

6. Heard the learned counsel and perused the available record. Perusal of record reveals that on 23rd February 2012 the occurrence had taken place in the house of one Wazir Muhammad, wherein his wife namely Gul Makai was found dead. On receiving such information his brother namely Amin Ullah son of Abdul Ali, caste Loden, Resident of Chagai arrived along with his mother and other male relatives at BMC Hospital Quetta, wherein found the dead body of his sister "Gul Makai" and found that there were certain marks of ligature on her neck, as such, he lodged FIR No.18/2012 with Police Station Kharot Abad against accused/respondent Abdul Ghaffar "brother-in-law" of deceased. After registration of aforesaid FIR and conducting of postmortem, the dead body of the deceased was taken by the complainant's family to Chagai. The record further reveals that at relevant time complainant was in Afghanistan. On receipt of such information he also arrived at Chagai and after burial of the deceased the father of the deceased and other family members were not become satisfied from the FIR for the reasons that the police authorities did not insert the names of all the accused persons, as such, they prepared to file a complaint under Section 200, Cr.P.C. against the respondents. The aforesaid complaint was filed before the learned Sessions Judge Quetta, which was transmitted to the learned Judicial Magistrate-II Quetta for inquiry and the learned Judicial Magistrate-II Quetta after proper inquiry submitted the complaint to the learned Sessions Judge Quetta for trial. The learned Sessions Judge Quetta after taking cognizance issued notices to the respondents and after arrest of some of

the accused persons initiated recording of evidence and held in abeyance the FIR.

7. To substantiate its case, PW-1 Abdul Ali, complainant, recorded his statement, wherein he held responsible the accused/respondents for murder of his daughter. PW-2 Jamai Bibi wife of Abdul Ali has also recorded her statement and also alleged that the accused/respondents have murdered her daughter. PW-1 Aminullah son of Abdul Ali brother of deceased his statement also held responsible the accused/respondents for murder of his sister. PW-4 Dr. Amir Muhammad Ghichki has recorded his statement, who has conducted the postmortem of deceased Gul Makai and produced the postmortem report before the Court.

8. Now advertent to the unnatural death of deceased Gul Makai, the perusal of contents of FIR No.18/2012 lodged by PW-3 Aminullah on 24th February 2012 reveals that the occurrence has taken place on 23rd February 2012. He received the telephonic call that his sister has been died and her dead body is lying at BMC Hospital. On such information, he along with his family members arrived from Chagai to BMC Hospital Quetta and found her sister as dead and there were certain marks of ligature on her neck, as such, he believed that her death is not natural rather she was strangled. On suspicious he nominated Abdul Ghaffar, the brother-in-law of deceased. Moreover, it is also transpired from the said FIR in police proceedings, wherein it is mentioned that on 23rd February, 2012 during the course of patrolling they have got information that a dead body of Mst. Gul Makai is lying at BMC Hospital. On such information, they reached there and examined that there is a mark of ligature on her neck. On such observation, they have called the concerned duty doctor, who conducted the postmortem and confirmed the marks of ligature on the neck of deceased.

9. Besides perusal of FIR, PW-4 Dr. Ameer Muhammad Ghichki was examined, who conducted the postmortem of the deceased and produced certificate of the same before the trial Court, wherein it is clearly mentioned that the marks of ligature found on her neck and the cause of death was shown as a suffocation due to homicide, as such, after re-appraisal and appreciation of aforesaid statements it can safely be said that the death of deceased was unnatural and homicide.

10. To hold responsible and prove the allegation against the respondents it is the prime duty of prosecution (complainant) to prove its case through confidence inspiring evidence. In this regard, we have gone through the contents of private complaint filed under Section 200, Cr.P.C. against six private respondents, wherein trial faced by the respondents Nos. 1 to 4, while the respondent No.5 Gul Ghatai and respondent No.6 Sardar were declared as absconders. In the complaint, the complainant submitted that his daughter (Gul Makai) was married three years ago with respondent No.3 Wazir Muhammad son of Saath Muhammad, while the sister of Wazir Muhammad was married with his son namely Asadullah on the basis of exchange. It is further submitted in the complaint that his daughter was living with her husband Wazir Muhammad and the other family members (the respondents), but she was not happy and often informed her mother for misbehavior and serious dire consequence of her killing by the respondents. It is averred in the complaint that on 23rd February, 2012 the complainant came to know through unknown telephone call to the house of complainant, whereupon it was told that the dead body of deceased Gul Makai is lying in BMC Quetta and thereafter the phone was disconnected. It is further submitted that the complainant at the time of occurrence was in Afghanistan. However,

on the very next day his son along with his family members rushed from Chagai to BMC Quetta, wherein found the dead body, whereby found marks of ligature on her neck and lodged the FIR. It is further submitted that the accused/respondents were nominated by the son of complainant and some of the accused/respondents were arrested by the police, but released one by one and the police was not interested in establishing the charge against the accused persons, hence lodged the instant complaint.

11. In support of aforesaid complaint, the affidavits of complainant and PW-2 Bibi Jamal and PW-3 Aminullah were also attached. On the basis of such affidavits the complaint was entertained and the trial was commenced. The complainant recorded his statement as PW-1, wherein made glaring contradictions and improvements in his statement contrary to his affidavit. The statement of PW-1 did not support the contents of complaint and affidavit, he improved his statement before the Court that accused Abdul Ghaffar made a telephonic call to his son, Aminullah, wherein stated that he has been recruited in police department and further deposed that the respondents beating the daughter of complainant. He further improved in his statement that her daughter called him on telephone that the accused persons will kill her. He further improved that after four days one Yaroo called Ali on telephone that Gul Makai was killed. He further improved in his statement that on arrival at hospital the SHO told his son to make arrest of accused persons because his sister was hanged and killed. Besides, there are number of glaring improvements in the statement of complainant as compared to his affidavit and the contents of complaint, which are silent with regard to the above improvements.

12. Similarly, the statement of PW-2 Bibi Jamal mother of deceased was also recorded, wherein she deposed in contradiction of her affidavit that her daughter called thrice to her that the accused persons will kill her and she is under serious threat of life. In her affidavit, she mentioned that an unknown telephonic call was received that her daughter has been killed and her dead body is lying at Hospital. The statement recorded before the court she deposed that Yar Muhammad Son of Baz Muhammad called on telephone to Mehreen wherein stated that Gul Makai had been killed and further deposed that Mehreen informed to her cousin Sher Afzal. Such glaring contradiction and improvement has been observed in the statement of PW-2. Further she also admitted in her cross-examination the above said improvements.

13. Now adverting to the statement of PW-3 Aminullah brother of deceased, he stated in his affidavit annexed with the complaint that her sister was not happy in her husband's house and she called her mother time and again that her life is under threat and mainly from her brother in law accused Abdul Abdul Ghaffar. He further stated in his affidavit that on 23rd February 2012 at night suddenly the telephone call was received that his sister has been died and her dead body is lying at BMC. He further stated in his affidavit that the person, who called on telephone did not mention his name and switch off the phone. He further stated that in his affidavit that on reaching at BMC Hospital he found dead body of his sister and found marks of ligature/wire/rope on her neck and alleged that she was killed by her brother in law Abdul Ghaffar and other family members. He further stated in his affidavit that he promptly lodged FIR with Police against Abdul Ghaffar and others while the police taken-up Abdul Ghaffar into custody and released the rest of the respondents after short arrest. While recording his statement before the trial Court he mostly reiterated the same story as stated in his affidavit. However, during the course of cross-examination he improved that telephone was received by Haji Sher Afzal and his house is nearby

our home. He also made certain improvements in cross-examination on the material count of prosecution version.

14. On proper reappraisal of aforesaid statements, it is observed that all the three witnesses are not eye witnesses of the case. All three witnesses on receiving the telephonic call with regard to the information of death of deceased have deposed different plea. PW-1 complainant deposed that one Yaroo called Ali that Gul Makai has been murdered, while PW-2 Bibi Jamal while submitting in her affidavit stated that suddenly a phone was received that Gul Makai has been died, but improved in her statement recorded before the Court, wherein deposed that one yar Muhammad son of Baz Muhammad called on telephone to Mehreen that Gul Makai had been killed and Mahreen informed such information to her cousin Sher Afzal. While on this count PW-3 Aminullah brother of deceased stated that in his affidavit that on 23rd February 2012 at right suddenly a telephone was received that his sister has been died and his dead body is lying at BMC while the person, who was calling them without showing his name closed the telephone, but during the course of cross-examination while recording his statement before the Court he answered in Question No.2 that the telephone was received by Haji Sher Afzal and his house is nearby their home. Comparison of all such improvements and contradictions in their statements creates serious doubt and dent in the case of prosecution (complainant).

15. Another aspect of the case is that neither the Yaroo nor the Sher Afzal was produced as witness to strengthen the case of prosecution (complainant) as well as there is no iota of evidence is available against the respondents to connect them with commission of offence.

16. As far as, the contention of learned counsel for appellant with regard to the applicability of Article 21 of Qanun-e-Shahadat Order 1984, is concerned, keeping in view the overall conduct of private respondents with the deceased, who was residing in the house of her husband accused/respondent Wazir Muhammad and his family members that they did not attend her dead body and further her burial showing the accusation of the private respondents. Be that as it may, but initially burden was upon the shoulders of prosecution (complainant) to discharge its liability and to prove its case beyond the shadow of any reasonable doubt. While the complainant itself preferred to file private complaint under Section 200, Cr.P.C. instead to rely upon FIR lodged by the police on the complainant of PW Aminullah brother of deceased and they were supposed to wait for investigation and pursuance of said FIR where might could have been chances of involvement of other accused persons, but they did not do so, however, the prosecution version was denied by the defence in the statement of accused Abdul Ghaffar and DW-I.

17. So far as the contention of learned counsel for the appellant that where a wife of a person or any vulnerable dependent dies an unnatural death in the house of such person, then some part of onus lies on him to establish the circumstances in which such unnatural death had occurred.

The contention so raised is devoid of force for the reason that such question was considered by a three Judges Bench of the Hon'ble Supreme Court of Pakistan in the Criminal Appeal No.315 of 2010 titled as Nasrullah alias Nasro v. The State, wherein it was held that:

"It has been argued by the learned counsel for the complainant that in the cases of Arshad Mehmood v. The State (2005 SCMR 1524) and Saeed Ahmed v. The State (2015 SCMR 710) this Court had held that where a wife of a person or any vulnerable dependent dies

an unnatural death in the house of such person then some part of the onus lies on him to establish the circumstances in which such unnatural death had occurred. The learned counsel for the complainant has maintained that the stand taken by the appellant regarding suicide having been committed by the deceased was neither established by him nor did it fit into the circumstances of the case, particularly when the medical evidence contradicted the same. Be that as it may, holding by this Court that some part of the onus lies on the accused person in such a case does not mean that the entire burden of proof shifts to the accused person in a case of this nature. It has already been clarified by this Court in the case of Abdul Majeed v. The State (2011 SCMR 941) that the prosecution is bound to prove its case against an accused person beyond reasonable doubt at all stages of a criminal case and in a case where the prosecution asserts presence of some eye-witnesses and such claim of the prosecution is not established by it there the accused person could not be convicted merely on the basis of a presumption that since the murder of his wife had taken place in his house, therefore, it must be he and none else who would have committed that murder."

18. If the entire prosecution evidence is taken into consideration together, it would become crystal clear that the statements of all the witnesses are not consistent and confidence inspiring and there exist series of doubts in the case of prosecution. The minute scrutiny of entire prosecution evidence shows that there is no direct or circumstantial evidence available against the accused/respondents connecting them with the commission of alleged offence. The trial Court after proper appreciating the evidence in its true perspective has rightly acquitted the accused/respondents of the charge. It is a settled principle of law that double presumption of innocence is attached to the order of acquittal and interference is unwarranted unless the acquittal is arbitrary, capricious, fanciful or against the record. In the instant case the order of acquittal passed by the trial Court is neither arbitrary, capricious, fanciful nor contrary to the evidence on record, warranting interference by this Court.

For the above reasons, the appeal is dismissed.

JK/34/Bal

Appeal dismissed.