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Judgment Sheet

IN THE LAHORE HIGH COURT
BAHAWALPUR BENCH
BAHAWALPUR

JUDICIAL DEPARTMENT

Criminal Appeal No.426 of 2014
(Muhammad Rizwan v. The State etc.)
and
Criminal Revision No.183 of 2014
(Bashir Ahmed v. The State, etc.)

JUDGMENT

Date of hearing: 21.07.2017

Appellant by:	Malik Sadiq Mahmood Khurram, Advocate.
Complainant By:	M/S Muhammad Sharif Bhatti and Hafiz Ijlal Haider, Advocates.
State by:	Mr. Khalid Pervaiz Uppal, Deputy Prosecutor General.

Ch. Abdul Aziz, J. This judgment shall dispose of *Criminal Appeal No.426 of 2014 filed by appellant Muhammad Rizwan (against conviction)* and *Criminal Revision No.183 of 2014 filed by complainant Bashir Ahmad (for enhancement of sentence awarded to Muhammad Rizwan respondent/appellant)*, originating from the judgment dated 30.09.2014, passed by the learned Additional Sessions Judge, Fortabbas in a private complaint titled as "Bashir Ahmed versus Muhammad Rizwan and another" arising out of case F.I.R No.398/2013, registered under sections 302 & 34 PPC at Police Station Fortabbas, District Bahawalnagar. After trial, the learned trial court through the said judgment while acquitting co-accused namely Abdul Shakoor proceeded to convict and sentence the appellant as under:-

> **Under section 302 (b) PPC** to undergo imprisonment for life as well as to pay Rs.100,000/- as compensation to the legal heirs of deceased as required under section 544-A

Cr.P.C. and in default whereof to further undergo six months SI.

2. Precisely stated the facts of the prosecution case as unfolded by Bashir Ahmed complainant (PW.6) in F.I.R (Exh.PB) are to the effect that her daughter namely Mst. Saima Kosar was married with Muhammad Rizwan. The relations between Rizwan and Mst.Saima Kosar remained cordial for few months. Then Rizwan and his family members started torturing his daughter and used to expel her from the house after giving beating under different allegations. On 04.08.2014 at about 9:00 a.m., Mst. Saima Kosar telephonically approached and informed the complainant that she was being expelled from the house by snatching her son namely Usman. Whereupon the complainant along with PWs Muhammad Afzal son of Muhammad Rafique, Muhammad Aslam son of Muhammad Ramzan and Abdul Haq son of Muhammad Ismail went to Chak No.277/HR to reconcile the matter. They were sitting in the Bhathak of accused party at about 3:00/4:00 p.m. when they heard the hue and cry of Mst. Saima and rushed inside the house and saw Abdul Shakoor (since acquitted) and Muhammad Rizwan (appellant) in an assaulting position. Within their view, Muhammad Rizwan who was carrying a pistol in his hand made a straight fire which hit upon the chest of daughter of the complainant, who succumbed to the injuries at the spot.

The motive behind the occurrence was described that on account of domestic disputes the in-laws of Mst.Saima Kosar wanted to expel her from the house by snatching her son.

3. The case was subjected to successive investigations, which were conducted even upto RIB Branch, Bahawalpur. All the investigators were in consensus with each other that the deceased was not murdered and instead she committed suicide. On account of such findings, the F.I.R was recommended to be

cancelled. Being aggrieved of the result of investigation, Bashir Ahmed complainant filed the private complaint upon which the trial was conducted. The prosecution, in order to prove its case against the appellant produced eight PWs which include ***Bashir Ahmed (PW.6)*** and ***Muhammad Afzal (PW.7)***, *the* eye-witnesses of the occurrence and ***Lady Doctor Huma Mustafa (PW.8)***, who furnished medical evidence. The learned trial court also examined ***Asghar Ali SI***, ***Matloob Ahmad Bajwa Inspector*** and ***Shabbir Ahmed SI*** who conducted the investigation of this case as Court Witnesses.

4. According to Lady Doctor Humma Musatafa (PW.8), she on 04.08.2013 at about 7:00 p.m., conducted the postmortem examination of the dead body of Mst. Saima (deceased) and observed the following injuries:-

> **Injury No.1**
> On examination there was firearm injury present & entry wound was present in hypochondrium above 11cm from umbilicus & 22.5 cm below superasternal notch. Entry wound was about 1 x 1 cm, rounded with inverted margins and blackening was present around the hole. Other wound was present on back of about 14 cm above coccyx bone and it was relatively larger than entry wound it was 1.5 x 1 cm and with everted margins. No blackening was seen on exit wound"

According to the opinion of the doctor, the death in this case occurred due to injury No.1. The said injury was described to have been caused with firearm weapon damaging the liver and major blood vessels. This injury was declared as sufficient to cause death.

5. On the conclusion of prosecution evidence, the learned trial court examined the appellant and his co-accused under section 342 Cr.P.C. Rizwan (appellant) in response to question "why the complaint Exh.P.D. was filed against you and why the PWs made statements against you" made the following reply:-

> *"I am innocent. I was present at my shop when I hear a noise of fire & I rushed into my house and I saw that Mst. Saima Kousar was in injured condition and she has committed suicide and she succumbed to the injury which*

> *was caused by her own and the death of Mst. Saima Kousar was suicidal. I along with my co-accused never committed murder of Mst. Saima Kousar deceased in furtherance of our common intention. PWs are inter se related with each other and after the suicide of Mst. Saima Kousar they became inimical towards me and my son Rizwan.*"

The appellant neither opted to appear as witness under section 340 (2) Cr.P.C. nor produced any evidence in his defence.

6. After the completion of trial, the learned trial court convicted and sentenced the appellant as mentioned above, hence, the instant appeal and criminal revision.

7. It is contended by the learned counsel for the appellant/convict that the conviction awarded by the learned trial court is against the law and facts of the case; that in the instant case, the ocular account was furnished by the witnesses, who miserably failed to prove their presence at the crime scene; that from the bare recital of the prosecution evidence, it reasonably spells out that the FIR was not registered at the time mentioned in the relevant columns; that there is a glaring contradiction between the medical and ocular evidence; that as a matter of fact, this is not a case of homicidal death and instead is of suicidal death; that the bare perusal of the record gives a sufficient reflection; that the deceased committed suicide; that the defence of the appellant regarding the suicidal death of the deceased was found correct during the police investigation and that though the lacunas in the prosecution case are giving rise to a reasonable doubt yet its benefit was withheld by the learned trial court and the appellant was convicted in the case.

8. The learned Deputy Prosecutor General, assisted by the learned counsel for the complainant strongly controverted the arguments advanced on behalf of appellant and argued that the instant case is arising out of a promptly lodged FIR in which the appellant stands nominated and that too in reference to the

role performed by him in the commission of crime; that the ocular account in the instant case is furnished by the two witnesses, who reasonably explained their presence at the place of occurrence; that the detail of the occurrence, furnished by the eye witnesses, is reasonably supported by the medical evidence; that the defence of the appellant regarding the suicidal death of the deceased is an afterthought story and is not having any shred of truth; that keeping in view the fact that the deceased was the legally wedded wife of the appellant and more so, when she died in his house, such aspect speaks volume regarding his guilt; that though the appellant took the plea of alibi yet miserably failed to substantiate the same through some evidence; that since the appellant committed the cold blooded murder of his wife, hence deserves no leniency.

9. Arguments heard. Record perused.

10. The case of the prosecution, primarily hinges upon the ocular account furnished by Bashir Ahmed (PW-6) and Muhammad Afzal (PW-7), the medical evidence brought on record through lady doctor Huma Mustafa (PW-8) and the motive as set out in the FIR.

11. A wade through the prosecution case reveals that the police, from very initial stage, formed an opinion that the death of the deceased is not homicidal and instead is suicidal in nature. Due to this reason, the arrest of the appellant and his co-accused Abdul Shakoor (acquitted by the trial court) was dispensed with. In this backdrop, the complainant opted for the filing of private complaint, on which the trial was held. During the trial, the prosecution produced two eye witnesses i.e. Bashir Ahmed (PW-6) and Muhammad Afzal (PW-7). According to the detail of the occurrence provided by Bashir Ahmed (PW-6), his daughter, namely Saima Kauser was married with Muhammad Rizwan (appellant) two years prior to the occurrence. On account of certain domestic disputes, the couple

was not having a smooth sailing in their matrimonial life. In this background of strained married life, the couple was blessed with a baby boy, namely, Usman. On account of these disputes, the in-laws of Saima Kauser (deceased) used to extend threats, to expel her from their house by retaining the custody of Usman. On the eventful day, Saima Kauser telephonically contacted Bashir Ahmed (PW-6) at 09:00 a.m. and complained that she has been beaten by her in-laws. On the receipt of such information, Bashir Ahmed (PW-6), who was resident of Chak No.225-NR, proceeded to the crime scene in the company of Muhammad Afzal (PW-7) and three given up prosecution witnesses, namely, Aslam, Ismail and Abdul Haq. At about 04:00 p.m., the hue and cry of Saima Kauser (deceased) attracted the PWs, who went inside and witnessed the occurrence.

12. No doubt, the deceased attained eternal silence in the house of the appellant, who being in wedlock with her is obliged to reasonably explain as to how she died, yet before that the prosecution is saddled with the legal duty to prove its case. The perusal of the record reveals that the occurrence which led to the registration of the instant F.I.R took place on 04.08.2013 at about 3:00/4:00 p.m. in the area of Chak No.277-9-HR situated within the territorial jurisdiction of Police Station Fortabbas, District Bahawalnagar. According to the record, the matter was brought to the notice of Asghar Ali SI (CW.1) by Bashir Ahmed (PW.6) through an application/complaint (Exh.PA) at the place known as Addah Chak No.277/HR, which is statedly situated at a distance of 1-1/2 kilometers from the crime scene. According to the record, Bashir Ahmed (PW.6) reached at Addah Chak No.277/HR at about 4:15 p.m. but the complaint was presented approximately after about 2 hours and 30 minutes thereafter as it contains the time of 6:45 p.m. It further spells out from the record that even till the conclusion of

the trial, the name of the author of the complaint remained unknown to the complainant. In this regard, it would be in fitness of things to make reference to the relevant extract from the statement of Bashir Ahmed (PW.6) which is as under:-

> "Occurrence took place at 04:00 PM and I reached at adda of Chak No.277/HR at about 04:15 PM. I came there alone. I remained there at about 30 minutes. I cannot tell the name of that person who wrote application Exh.PA at adda Mord of Chak No.2177/HR, however, Exh.PA was written by shopkeeper of sweet".

In this backdrop, this Court has all the good reasons to observe that the F.I.R was registered with an unexplained and mysterious delay, which probably was used for consultation and fabrication of facts.

13. In the above backdrop, this Court has meticulously examined the statements of two eyewitnesses and has found that none of them is the resident of the vicinity where the occurrence took place. According to record, Bashir Ahmed (PW.6) is resident of Chak No.225/NR whereas Muhammad Afzal (PW.7) is resident of Chak No.230/NR. As discussed above, the crime scene is the house of Muhammad Rizwan situated at Chak No.277/NR. The only explanation offered by Bashir Ahmed (PW.6) for his presence at the crime scene is to the effect that after receiving a phone call from her daughter he arrived there. It has been found that neither Bashir Ahmed (PW.6) could give his mobile number nor the cell number through which his ill-fated daughter called him. In normal circumstances, such an omission can be termed as a minor discrepancy but in the instant case it has its importance. This call gave rise to a necessity of the visit of Bashir Ahmed (PW.6) to the house of his daughter. It evinces from his statement that he deliberately withheld his own mobile number as well as of his daughter. During cross-examination, he admitted that at the bottom of the complaint (Exh.PD) his contact number is mentioned as 0306-6155059, however, he

volunteered that the same belonged to his son with a further claim that he does not possess a mobile phone. When questioned by the learned counsel that whether mobile phone number 0305-2625021 belongs to his son, he failed to reply this question satisfactorily. I have not been able to understand that if at all the complainant received a telephonic call from his daughter, why he failed to mention the concerned mobile phone number. Such circumstances force this Court to lean for an inference that the two eyewitnesses failed to satisfactorily explain their presence at the crime scene.

The conduct of the PWs whereby they provided a safe passage to Muhammad Rizwan (appellant) and Abdul Shakoor (acquitted co-accused) to have a swift escape from the crime scene is also found to be contrary to the natural human behaviour. Needless to mention here that Saima Bibi (deceased) was none other than the daughter of Bashir Ahmed (PW.6) and was fired at within his sight, while he was present at the crime scene in the company of three other PWs. However, none of them made any effort to apprehend them. The only explanation offered by the PWs is to the effect that since Muhammad Rizwan was armed with pistol, hence they opted against apprehending him. However, it is noted that Abdul Shakoor (acquitted co-accused) despite being an old man and more importantly not armed with any weapon was also given a safe passage. It is equally important to mention here that as per record, the weapon of offence was recovered from the crime scene and was secured through recovery memo (Exh.CW.1/C), witnessed by Muhammad Afzal (PW.7) and Muhammad Aslam (given up PW). In this backdrop, the explanation offered by the PWs appears to be an after-thought story.

Further, it is but quite natural that if a close one receives a firearm injury and more so in the presence of a relative, the first thing which is expected from him is that he will make best

of his efforts to shift the injured to a nearby hospital. Even the critically injured persons with no symptoms of survival are shifted to hospital for medical treatment, as last ditch efforts. However, in the instant case, despite there being an admission on part of the PWs that the deceased died approximately fifteen minutes thereafter, they made no effort to save her life. In this regard, I have also perused the postmortem-examination report of the deceased (Exh.PK) and have found that the probable time that elapsed between injury and death was 30-minutes. Such conduct of the PWs casts big doubt regarding their presence at the crime scene. In somewhat similar circumstances, the Hon'ble Supreme Court of Pakistan observed in the case of *Nasarullah alias Nasro v. The State* **(2017 SCMR 724)** as under:-

> "It has been found by us to be intriguing that the above mentioned eye-witnesses had claimed to have seen the occurrence wherein Mst. Hameed Bibi had been critically injured but surprisingly the said eye-witnesses had never taken the injured victim to the hospital for medical treatment and till the arrival of the complainant at the house of occurrence the deadbody of Mst.Hameed Bibi was still lying in that house and it was he who had statedly taken the deadbody to the hospital."

14. According to the detail of the actual event, the deceased received firearm injury in her bed room. According to Muhammad Afzal (PW.7), the shot was fired by Muhammad Rizwan while standing outside the room. According to the site plan (Exh.CW1/13), the shot was fired from a distance of about 10-feet. A close look of the statement of lady Doctor Huma Mustafa (PW.8) reveals that during postmortem examination, not only she noted blackening around the entry wound, she also observed burning and blackening marks around the corresponding hole on the shirt of the deceased. Since, this feature of the case was contrary to the case of the prosecution, hence, a frail attempt was made to cover this lacuna. It is noted

with concern that neither at investigation stage nor during trial, the complainant ever challenged the site plan. Instead it spells out from the record that the Investigating Officer of the case after realizing that it negates the case of the complainant, he tried to plug this lacuna by approaching the Medical Officer with an application (Exh.PL), whereupon she opined that the shot was fired from a distance of three meters. I am constrained to hold that since such an opinion of the doctor is contrary to the well-settled principles of medical jurisprudence as well as of ballistic science, hence, is destined to be discarded. According to the medical jurisprudence, the blackening occurs when a shot is fired from a distance of 6 to 12 inches and vanishes if the distance is more than three feet. In support of such opinion, reference can be made to **"A Text Book of Forensic Medicine and Toxicology" authored by Dr. S. Siddiq Husain,** wherein he opined as under:-

> "(2) Discharge at 6-12". Effect of hot gases is lost. So there is no tearing of skin, wound is round and of the size of bullet, edges, inverted and surrounded by a zone of varying blackening and tattooing, there little burning only a grease ring due to oil and graphite is likely to be found. Clothing may show blast damage.
> (3) At 2-3 feet. No burning and tattooing becomes more discreet.
> (4) Beyond 3 feet. No blackening, burning or tattooing."

Even **"Jaising P. Modi in his book Medical Jurisprudence and Toxicology 24th Edition"** is found to be in consensus with above-mentioned view of Dr. S. Siddique Husain. Last but not the least, the Hon'ble Supreme Court of Pakistan has also expressed almost similar view in the case of *Amin Ali and another v. The State* **(2011 SCMR 323).**

15. An in-depth analysis of the testimony of the two witnesses reveals that both of them made improvements, while appearing in the Court. Such improvements were duly attended to by the defence and both of them were accordingly confronted

with their previous statements. Through these improvements, the two eyewitnesses mainly brought on record the times of different events, pertaining to the occurrence. Even they went on to shift the time of the occurrence from 3:00 p.m. to 4:00 p.m. probably in an endeavour to counter the delay in reporting the matter to police. The most important out of these improvements is the venue of delivering the complaint to Asghar Ali SI (CW.1). By making such variations in their statements before the court, which in law is termed as dishonest improvement, the two eyewitnesses compromised their integrity rendering them unworthy of any credence. It is settled law that the dishonest improvements made by the witness in his statement before the court are to be discarded from consideration. The Hon'ble Supreme Court of Pakistan in the case of *Ibrar Hussain and others* **(2007 SCMR 605)** held as under:-

> "It is settled law that person making contradictory statements cannot be held worthy of credence as law laid down by this Court in Muhammad Shafique Ahmad's case PLD 1986 SC 471. It is a settled law that witness making improvements and changing version as and when suited according to the situation then such type of improvements were found deliberate and dishonest, therefore, cause serious doubt on the veracity of such witness."

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case of *Muhammad Naeem Inayat v. The State* **(2010 SCMR 1054)**.

16. I have also given a considered thought to the motive as set up by the complainant and which is portrayed as domestic dispute between the spouses and the custody of their infant son. In support of the motive, neither the complainant made reference to any specific previous incident nor produced any other witness. Likewise, the allegation of physical violence alleged to have taken place against the deceased at the early hours of the same day remained unproved as the Lady doctor

(PW.8) stated in unequivocal terms that she noted no other injury on the body of the deceased except of firearm.

17. The perusal of the record reveals that the matter was investigated by as many as three investigating officers namely Asghar Ali SI (CW.1), Matloob Ahmad Bajwa Inspector RIB Branch (CW.2) and Shabbir Ahmad SI (CW.3). All of them unanimously concluded that Saima Bibi (deceased) was not murdered and instead died a suicidal death. The investigators were so firm on such opinion that they opted not to arrest the accused persons and even went on to recommend for the cancellation of the F.I.R No.398/2013. The learned counsel for the complainant argued vigorously that since the opinion of the police is based on no material, hence is of no significance and more so when the dishonesty of the police sufficiently reflects from the non-arrest of the appellant and his co-accused. In this regard, it is observed that though the appellant was arrested at no point of time yet such an approach is in consonance with the statutory as well as judicial directions. Simple saddling a person with an accusation of having committed a crime and even the registration of a criminal case, is not enough to make the arrest of the person. In order to do so, the police officer is required to collect some incriminating material. In the absence of such a material, he is legally competent to dispense with the arrest of the accused. In this regard, reference can be made to section 157 (2) Cr.P.C. read with 24.4 (1) of the Police Rules, 1934. It is equally important to mention here that almost a similar view was expressed by the Hon'ble Supreme Court of Pakistan in the case of *Sarwar and others v. The State and others* **(2014 SCMR 1762)** which is as under:-

> "It had not been appreciated in the cases of Noor Nabi and Luqman Ali that even in cases of the most heinous offences the police, not to speak of a court, is under the statutory obligation, to necessarily and straightway arrest an accused person during an investigation as long as he is joining the investigation and is cooperating with the same."

In the above backdrop, no legitimate exception can be taken regarding the opinion expressed by the police. It is also not out of place to mention here that though the opinion of the police is not binding on the courts yet can be taken into consideration for valid reasons. The police officer is the person, who visits the crime scene immediately after the occurrence, comes across different persons and interrogates them, inspects the crime scenes and more importantly probes the circumstances of the case from certain persons who opt not to become witness and then forms an opinion. If such declaration of innocence of the investigator is getting some support from the attending circumstances of the case, there is no reason to brush it aside, without assigning any reason. In the instant case, the opinion of the police is apparently based on convincing material, hence, requires to be given due importance and more so when the prosecution fails to rebut the same through convincing and confidence inspiring evidence.

18. In an urge to arrive at a decision above vacuum and to resolve the controversy of death being suicidal or homicidal, I have also given due consideration to the locale and nature of injury. A suicidal injury, more importantly of a firearm, is normally caused from close range. In case of weapon being a pistol or revolver, epigastrium or upper abdomen is one of the favourite locales, selected for the purpose of suicide. In the instant case, according to Lady Doctor Huma Mustafa (PW.8), the injury was found to be on the abdomen of the deceased, with blackening around its margins. In support of above view, it is appropriate to make reference to the opinion of **Jaising P Modi** expressed in his book **"Medical Jurisprudence and Toxicology"** which is being reproduced below:-

> "A suicidal firearm wound is usually a contact wound situated on the side of the temple, depending on which hand was used to shoot himself, in the centre of the

> forehead, the roof of the mouth, in the chest or epigastrium in front or the left side and sometimes under the chin. The firearm is usually fired at close range."

19. The above mentioned features of the case sufficiently exhibit that though the circumstances of the case give rise to two theories i.e. the death being homicidal or suicidal, the later one appears to be more convincing for a prudent mind and apparently rings true. Even otherwise, it is settled principle that when from the perusal of the entire evidence, two interpretations are possible then the interpretation or theory which favours the defence is to be accepted. In this respect, reference can be made to the case of *Qurban Hussain alias Ashiq v. The State* **(2010 SCMR 1592)** wherein the Hon'ble Supreme Court of Pakistan held as under:-

> ".....it is settled that the interpretation or theory favourable to the accused is to be accepted. Reference is invited to Wali Muhammad v. Nawab and others (1984 SCMR 914), Kazi Abdul Jamil and others v. The State (PLD 1958 SC (Pak.) 12)".

20. It is time tested principle of law that primarily the prosecution is obliged to prove its case against the accused and that too beyond the shadow of doubt. There is no cavil to the proposition that if there is a single circumstance creating a doubt regarding the veracity of the prosecution case, its benefit is to be extended to the accused person. Needless to mention here that the benefit of doubt can best be extended to a person facing criminal prosecution by acquitting him from the case and not through lesser punishment. Even as per saying of the Holy Prophet (p.b.u.h.), the mistake in releasing a criminal is better than punishing an innocent person. Same principle was also followed by the Hon'ble Supreme Court of Pakistan in the case of *Ayub Masih v. The State* **(PLD 2002 SC 1048)**, wherein, at page 1056, it was observed as under:-

> "…. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (p.b.u.h) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

In supra mentioned case of *Ayub Masih*, the Hon'ble Supreme Court was also pleased to observe as under: -

> "…The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted"…"

21. In the light of above discussion, I accept Criminal Appeal No.426 of 2014 filed by Muhammad Rizwan (appellant), set aside his conviction and sentence recorded by the learned trial court and acquit him of the charge levelled against him by extending him the benefit of doubt. He is in custody, be released forthwith if not required to be detained in any other case.

22. For the foregoing reasons, Criminal Revision No.183 of 2014 (for the enhancement of sentence of Muhammad Rizwan respondent) is dismissed.

(Ch. Abdul Aziz)
Judge

Approved for reporting

(Ch. Abdul Aziz)
Judge

*Najum**