

JUDGMENT SHEET
PESHAWAR HIGH COURT,
PESHAWAR.

(Judicial Department)

Cr. A No. 393-P/2016 with M.R No. 09/2016.

Date of hearing:..... 06.4.2017.

Date of announcement: 17.5.2017.

Appellant (Rahat Ali) by Mr. Javed. A. Khan, Advocate.

Complainant by Mr. M Ayaz Majid, Advocate.

The State by Mr. Rab Nawaz Khan, AAG.

SYED AFSAR SHAH, J.- This criminal appeal is

directed against the judgment dated 31.5.2016 rendered by learned Additional Sessions Judge, Lahor (Swabi), whereby the accused-appellant was convicted under section 302(b) PPC and sentenced to death with compensation of rupees two lac, payable to the legal heirs of the deceased, and in default thereof to undergo imprisonment for one year. Benefit of Section 382-B Cr.P.C was extended to the appellant. Murder reference is also before us for disposal. Since both the appeal and murder reference arise out of the same judgment, therefore, these are being disposed of through this single judgment.

2. Briefly stated facts of the instant criminal appeal as reflected from the record are that on 7.5.2011, Salsalat Bacha, the complainant, (PW-6) brought the dead body of his daughter Mst. Farasat to Police Station, Lahor, and made a report to Qamar Zaman ASI (PW-4) to the effect that some six years prior to the occurrence, the deceased was married to one Sami of village Dobian and from the

wedlock a baby girl was also born to the spouses. Since Sami was murdered after one year of his marriage, therefore, the deceased was living with them (parents). On the day of occurrence, she, after appearing in the exam of civic paper of second year in Govt. Degree College, Manki, was on way back, when informed him on his cell number that the appellant is moving some time ahead and some time at her back and, hence, in the backdrop, he (the complainant) immediately left his landed property on bike and when reached to the crime venue, he found her daughter lying murdered. As per narration of the complainant, the deceased was done to death by accused Rahat. The occurrence is stated to have been witnessed by those present at the spot. Motive behind the offence was that Sami, son in law of the complainant, was having close friendship with the accused and after his death, he wanted to marry the deceased. He has charged the accused-appellant for commission of the offence.

3. On report of the complainant, FIR No. 562 dated 7.5.2011 was registered against the accused under section 302 PPC at Police Station, Lahor. Investigation was started in the case and since the accused-appellant was absconding, therefore, he was proceeded under section 512 Cr.P.C, consequently, perpetual non-bailable warrant of arrest was issued against him. Later on, after his arrest, supplementary challan was submitted against the accused to the Court of learned Additional Sessions Judge, Lahor, where on conclusion of the trial, he was convicted and sentenced, vide judgment herein impugned.

4. Arguments heard and record perused.

5. It appears from the FIR Ex. PA that in the present case the occurrence took place on 7.5.2011 at 1245 hours whereas the report has been lodged on the same day at 1350 hours. Salsalat Bacha, father

of the deceased Mst. Farasat, is the complainant of the present case and he has charged the accused-appellant for murder of the deceased. When examined in the Court as PW-6, he has reiterated his stance which he has given in the FIR. He has stated about the marriage of deceased Mst. Farasat with one Sami, who was murdered after one year of his marriage with the deceased. From the wedlock as per version of the complainant a baby girl was also born to the spouses. After the death of her husband, the deceased was settled with her father, i.e, PW-6. On the day of occurrence, she had gone to the college for appearing in her inter examination and after giving the paper, she was on way back, when informed her father that the appellant is moving some time ahead and some time at her back and, hence, he proceeded to there, where found her daughter lying murdered. The reason behind the murder as given by the complainant was that after death of the husband of the deceased Mst. Farasat, appellant wanted to marry her, but neither he nor she was ready to accede to the whim of the appellant. Here it is pertinent to note that as per version of the complainant, Sami, husband of the deceased, was having a close friendship with the appellant.

Admittedly, Salsalat Bacha is not the eyewitness of the occurrence. He has, however, narrated the circumstance of the unfortunate incident. In the FIR, the complainant has stated that the occurrence has been witnessed by those present there at the relevant time. Before advertng to the other aspects of the case, it will be more appropriate to look into the circumstance, which the complainant has narrated not only in the FIR but as well as in his court statement. Ahmad Ali Khan SI, who is the investigating officer of the present case, has produced the question paper as Ex. PW 10/3 and roll number slip as Ex. PW 10/2. Perusal of the question paper, which in original is

available on record, would show that on 7.5.2011, which is the day of occurrence, it was a Saturday, the paper was that of Civic Part-II, timings were that of morning (9.00 a.m) and this being the position, the version of the complainant regarding appearance of the deceased in her intermediate exam on the day of occurrence is beyond any doubt.

The significant piece of evidence before us is the statement of Abdar Ali Shah (PW-7). As stated earlier, he has not been named in the FIR to be the eyewitness of the occurrence. Learned counsel for the appellant during the course of his arguments vehemently urged that since the name of Abdar Ali Shah is not mentioned in the FIR, therefore, his testimony is not worth consideration. He was of the view that the safer course is to keep his statement out of consideration.

We know that as a rule of prudent, Courts should keep out of consideration the testimony of a witness whose name is not figured in the FIR but it is not **a rule of law**. The Court in a fit case may go for consideration of the testimony of such a witness if it is corroborated with other reliable evidence on record and in this view of the matter, we would see as to whether Abdar Ali Shah has witnessed the occurrence and, if so, upto what degree it has been corroborated.

Appearing as PW-7, Abdar Ali Shah stated that he is owner of a Rickshaw, which he used to ply as a taxi. Deceased Mst. Farasat, who was belonging to his clan and was known to him used to attend her papers at Manki College; that he used to take her from village Jalbay to the Adda of Toor Dher and on her return from paper, he used to take her back from Toor Dher Adda to the village in his Rickshaw. He has categorically stated that when they reached near to the Dhera of one Zahid Khan, the appellant overtook them in a white colour motorcar. The appellant wanted to take the deceased forcibly but on her resistance

he opened firing at her with his pistol, due to which she was hit and died at the spot. During the cross examination, he deposed that he has given his statement to the police on their arrival at the spot at about 2/2.30 p.m or so. It is on record that he was examined by the I.O shortly after the occurrence and which is otherwise undisputed. The I.O during the investigation of the case, has also taken into possession the Rickshaw, vide memo Ex. PC/1. During the days of occurrence, the said Rickshaw being unregistered was marked as “**applied for**” and in which respect testimony of both the I.O and PW Abdar Ali Shah is worth perusal. Learned defence counsel while questioning the sanctity of the statement of PW Abdar Ali Shah also urged that being a relative of the deceased, he is interested witness and, hence, should not be relied upon. We think the learned counsel has misconceived the situation in that the testimony of interested witness can be relied if it otherwise rings true. Again, in the present case there is no direct relation between the deceased and the Rickshaw driver Abdar Ali Shah. They, however, belong to the same clan and that is why the deceased used to go with him in his Rickshaw to the Adda of Toor Dher. Needless to say that in the crime area, it is a practice that female always used to go with a known person. Being a young widow, she was supposed to go with PW Abdar Ali Shah for the above stated reasons.

We have gone through the testimony of Abdar Ali Shah. His testimony is straightforward and inspiring one. The version of the complainant with respect to the attending of the paper by the deceased, the inspiration of the appellant to marry with the deceased widow being close friend of her husband, who died after one year of his marriage, original question paper with roll number slip led us to an irresistible conclusion that she had gone for her appearance in the inter

examination and on way back the occurrence took place. The version of PW Abdar Ali Shah, who was having a Rickshaw and used to take the deceased to the Adda of Toor Dher and then back to her house, in the given position of the case appears to be natural. Simple is that, no doubt, the name of PW Abdar Ali Shah is not mentioned in the FIR but his testimony seems to be natural and confidence inspiring.

Even otherwise, what malice he was having against the appellant to depose against him, who has been charged in a murder case **singularly**. When put to a question as to why the PWs have deposed against him, the appellant replied that the PWs are interested, non independent and that they have deposed against him on account of his outstanding amount. Though, it is for the prosecution to prove its case beyond reasonable doubt, but so far as the above reply of the appellant is concerned, no evidence is forthcoming on record which could substantiate the above answer of the appellant even remotely.

In the present case, we have noticed certain omissions on the part of the investigating officer, i.e., taking of mobile sets into possession used by the deceased and her father before the occurrence, preparation of recovery memo with respect to the question paper and roll number slip and mentioning of the car in the site plan, which was used by the appellant at the time of his movement/chasing the deceased. Again, minor discrepancies are also there in the prosecution version but all that is other than of a fatal character.

6. Moreover, the appellant remained absconder right from the day of occurrence till his arrest on 7.5.2011, that too, from another District. Admittedly, Absconsion is not a substantive piece of evidence. It is a corroborative piece of evidence and in the instant case the appellant has failed to explain his longstanding abscondance.

7. In view of the facts and circumstances of the case, we are not hesitant to hold that charge against the appellant has been proved beyond reasonable doubt but the question arises that in the given position of the case what would be the quantum of sentence?

In the case of **Israr Ali vs. The State reported in 2007 SCMR 525**, it was ruled by the Hon'able bench that question of sentence demands utmost care on part of the Court dealing with life and liberties of people and that accused person (s) are also entitled to extenuating benefit of doubt on the question of sentence. Again, in the case of **Muhammad Riaz and another vs the State and another reported in 2007 SCMR 1413**, it was observed by the Hon'able Supreme Court that no doubt, normal penalty for an act of commission of Qatl-i-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case.

As stated earlier, we have noticed that the prosecution version suffer from inconsistencies but it is other than a fatal character and, therefore, in the circumstances, it appears proper not to resort to the death penalty touching the guilt of the accused. In support the case of **Falak Sher vs. The State (NLR 2000 Cr. 188)** can well be referred.

8. In view of the above discussion and while driving wisdom from the case law, referred to *ibid*, we, in the interest of safe dispensation of criminal justice, convert the sentence of death of the

appellant into imprisonment for life with compensation of Rs. 5, 00,000/-, payable to the legal heirs of the deceased, recoverable as an arrears of land revenue and in default of payment or recovery as land revenue, he shall undergo six months SI further. The benefit of section 382-B Cr.P.C is also extended to the convict-appellant.

With the above modification in the quantum of sentence, the appeal is disposed of and the Murder Reference is answered in the **negative**.

Announced

JUDGE

JUDGE

M.Zafra