

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Cr.A. No.303-P/2022

Sahar Gul s/o Soor Gul,
r/o Sadda Lower Kurram.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>Mr. Shabbir Hussain Gigyani, Advocate.</u>
For State :-	<u>Mr. Aqil Hussain AAG.</u>
For Respondent (s) :-	<u>Mr. Muhammad Furquan, Advocate.</u>
Date of hearing:	<u>11.06.2024</u>

JUDGMENT

ISHTIAQ IBRAHIM, CJ.- Sahar Gul, the appellant, charged in case No.174/PMS dated 25.11.2018, registered under sections 302 & 324 PPC in Police Station Lower Kurram, District Kurram, for committing murder of Khaista Jan deceased (grandfather) and attempting at the life of Muhammad (brother) of his wife Mst. Shakila, respectively, at Tehsil Headquarter Hospital (THQ) Sadda, after facing regular trial has been convicted and sentenced by learned Additional Sessions Judge Sadda Kurram (“Trial Court”) vide judgment dated 11.03.2022 (“impugned judgment”) as under:-

Under Section 302 (b) PPC:- To undergo imprisonment for life as Ta’azir and to pay rupees five lacs as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. and in default of payment thereof to further undergo six months simple imprisonment.

Under section 324 PPC:-To undergo rigorous imprisonment for ten years and to pay rupees one lac

as fine and in default of payment thereof to further undergo six months simple imprisonment.

Benefit of Section 382-B Cr.P.C. has been extended to him.

2. The prosecution's case as per First Information Report ("FIR") is that on receipt of information through one Khyal Muhammad Hawaldar Levy Force (PW.2), about committing murder of one person and causing injury to another by appellant Sahar Gul in THQ hospital Sadda and that he has been arrested by the hospital's administration along with the crime dagger, on 25.11.2018 Abdullah Political Moharrir Saddar (PW.1), along with other officials of the Levy Force reached the hospital, where he arrested the appellant. In the hospital the Political Moharrir came to know that Mst. Shakila wife of the appellant being annoyed was living in her parent's house; that she being pregnant on the fateful day was brought to the hospital by her mother Mst. Malala, grandfather, namely, Khaista Jan deceased and brother, namely, Muhammad and on medical examination when the doctor told that a child in the womb of Mst. Shakila has expired and the same shall be removed through surgery, the appellant present in the hospital got infuriated and gave dagger blow to Khaista Jan deceased and Muhammad, as a result, both got injured, however, the former then succumbed to injury. On the aforesaid report, FIR dated 25.11.2018 under sections 302/324 PPC was registered against the appellant in Police Station Lower Kurram.

3. Investigation in the case was conducted by Political Tehsil Lower Kurram, who recorded statements of Mst. Jannat Bibi, Mst. Shula (hospital made wife), Mst. Haleema Charge Nurse, THQ

Sadda, Mst. Shakila and Muhammad. After completion of investigation challan was submitted against the appellant before the learned trial Court, where he was formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as seven witnesses. After closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath under section 340(2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, the learned trial court, after hearing both the sides, convicted and sentenced the appellant as mentioned in the initial paragraph of the judgment, hence, this appeal.

4. We have heard the arguments of learned counsel for the parties and perused the record and evidence with their able assistance.

5. As per FIR, occurrence in this case has taken place on 25.11.2018 in Tehsil Headquarter (THQ) Hospital Sadda, the erstwhile Kurram Agency (now District Kurram). Though Investigating Officer has neither prepared site plan of the crime spot nor has taken into possession any blood or bloodstained garments of the deceased through recovery memo nor placed on file medico legal report of injured Muhammad (PW.5) and postmortem report of the deceased, if any, however, such flaws on the part of the Investigating Agency is obvious for the reason that after few months of the occurrence, FATA Interim Governance Regulation, 2018, was promulgated on 29th May, 2018, with an aim to provide for an interim system of administration of justice, maintenance of peace and good

governance in the Federally Administered Tribal Areas and repeal of the Frontier Crimes Regulation, 1901 and matters connected therewith and ancillary thereto till the merger of the Federally Administered Tribal Areas ("FATA") with the Province of Khyber Pakhtunkhwa. On expiration of life of the Regulation (*ibid*), Constitution (Twenty-fifth Amendment) Act, 2018, was brought by the government, whereby FATAs/PATAs were merged with the Province of Khyber Pakhtunkhwa, therefore, the Political Moharrir being not acquainted with the relevant provisions of the Cr.P.C. governing the investigation, has probably dealt with the investigation in the manner as provided in the FCR. However, as the trial in the case has been conducted in accordance with law and proper opportunity of producing evidence and hearing has been provided to both the parties, therefore, flaws in the investigation would not have any adverse bearing on the prosecution's case. It would also not be out of context to mention here that eyewitnesses of the case being the inhabitants of the erstwhile Kurram Agency and not acquainted and aware of the legal complications of the newly promulgated system and the law made applicable to the FATA, therefore, one cannot expect from the PWS the standard of evidence to be expected from the witnesses and the prosecution of the settled area. Admittedly, after promulgation of the FATA/PATAs into settled area, the entire law and system for the people of the erstwhile FATAs/PATAs and the prosecution was new, therefore, it would be more appropriate to reappraises the prosecution's evidence with a lenient yardstick.

6. Ocular account of occurrence has been furnished by injured Muhammad (PW5), who is the brother-in-law (sister's husband) of the appellant, Mst. Shakila Bibi (PW6), who is the wife of the appellant and an independent and impartial witness, namely, Haleema Charge Nurse THQ hospital Sadda (PW.7). Besides their testimony, the appellant was arrested red handed at the spot along with crime dagger by the hospital Administration and was handed over to Abdullah Political Moharrir Sadda (PW.1). In this regard the testimony of Khyal Muhammad Hawaldar Levy Force posted in THQ hospital Sadda is of worth perusal. He has deposed that on 25.11.2018 he was on duty at DHQ hospital Sadda where the occurrence took place; that the appellant was arrested along with dagger by the hospital administration and he informed Political Moharrir Sadda about the occurrence who along with other levy officials reached the hospital and arrested the appellant along with crime dagger. The testimony of Abdullah Political Moharrir Sadda (PW.1) fully corroborates the testimony of Khyal Muhammad Hawaldar. He deposed that on information of Khyal Muhammad Hawaldar about the occurrence he rushed to THQ hospital Sadda along with officials of Levy Force and arrested the appellant along with the crime dagger and learnt that he has committed murder of Khaista Jan deceased and caused injury to Mohammad.

7. The injured PW Muhammad while appearing in the witness box deposed that his sister Mst. Shakila was married to the appellant but due to harsh and cruel behaviour, she while abandoning her husband's house was living in her parents' house and by then she was also

pregnant; that on the fateful day they took Mst. Shakila to THQ hospital Saddar for checkup and telephonically informed the appellant to come to the said hospital; that on examination of Mst. Shakila when doctor told that child in her womb has expired, the appellant got infuriated and gave dagger blow to him and Khaista Jan, as a result, they both got injured, however, Khaista Jan succumbed to injures. In cross-examination he stated that he received injury on his chest and hand, however, his wounds were only stitched and he was not hospitalized.

8. Mst. Shakila wife of the appellant while appearing in the witness box as PW.6 has fully corroborated the testimony of eyewitness Muhammad. She while narrating the entire episode deposed that after her examination when she was told that child in her womb has expired, the appellant got infuriated and gave dagger blow to her brother Muhammad and grandfather Khaista Jan deceased as a result both got injured, however, the latter then succumbed to injury.

9. Haleema Charge Nurse, THQ hospital Sadda is an independent and impartial witness being not related to any party. She while appearing as PW.7 in the witness box deposed that during the days of occurrence she was posted at THQ hospital Sadda as Charge Nurse; that on the fateful day Mst. Shakila was brought to the said hospital and she was complaining of PV bleeding; that in the meantime the appellant arrived at the hospital and threatened the hospital staff not to treat his wife; that in the meanwhile, there was a scuffle between the appellant and another person and later on she learnt that few persons were got injured in the scuffle. The testimony of Haleema Charge

Nurse fully proves the occurrence to have taken place inside THQ hospital. Her testimony also proves presence of the appellant at the crime spot. However, one thing can be inferred from her statement that there was scuffle between the parties.

10. On reappraisal of the prosecution's evidence we are firm in our view to hold that prosecution has proved its case against the appellant through cogent and confidence inspiring direct evidence. Eyewitnesses Mst. Shakila is the wife of the appellant while Muhammad is his brother-in-law. It does not appeal to a prudent mind that such close relatives will charge an innocent person. No doubt, no medico legal report of injured PW Muhammad is available on file and there is also no autopsy report of the deceased, however, an OPD chit furnished by THQ hospital Sadda is available on file which shows that Khaista Jan deceased had received a single stab wound of 3cm on upper thigh which is a non-vital part. Mere fact that postmortem report of the deceased has not been conducted would not damage the prosecution's case. In this regard we would refer to the judgment of the Hon'ble Supreme Court in case titled, "Abdur Rehman vs the State" (1998 SCMR 1778), relevant part of which is reproduced below:-

"Now adverting to crucial point involved in the present case, it may be seen that when factum of *Qatl-e-Khata* or *Qatl-e-Amd* has been independently established through strong and convincing evidence, mere fact that dead body was not discovered or postmortem was not

conducted has altogether no material effect or legal consequence.”

Identical controversy has been dealt with by this court in case of provincially Administered Tribal area titled, **“Rahim Ullah Vs the State” (NLR 1985 page 41 Peshawar)** by observing that:-

“Absence of postmortem examination and inquest report regarding injuries sustained by the deceased would not be fatal for the prosecution’s case.”

Similar is the view of this court in case titled, **“Zard Ullah Khan vs the State” (1998 MLD 855)** wherein it has been held that a guilty person cannot escape from conviction merely for absence of postmortem report which always form a corroborative piece of evidence of the ocular testimony. Even otherwise, in case titled, **“Aqil Vs the State” (2023 SCMR 831)**, it has been held by the Hon’ble Supreme Court that:-

“It is settled principle of law that the value and status of medical evidence and recovery is always corroborative in its nature which alone is not sufficient to sustain conviction. Minor discrepancies and conflicts appearing in medical evidence and the ocular version are quite possible for variety of reasons. ...where ocular evidence is found trustworthy and confidence inspiring , the same is given preference over medical evidence and the same alone is sufficient to sustain conviction of an accused.

11. Admittedly, the occurrence has taken place at the spur of moment without premeditation and the deceased has sustained only

single stab wound that too on non-vital part of his body. The appellant has not repeated the act of giving further dagger blows to the deceased despite the fact that he was at his mercy. Identical situation came up before the Hon'ble Supreme Court in case titled, "Muhammad Salim Vs Muhammad Aslam and others" (1983 SCMR 53). Relevant part of the judgment is reproduced below:-

"Only one injury proved fatal and that too was caused not on any vital part of the body but on the knee which resulted in the severance of the femoral artery and the consequent loss of blood which led to his death. The learned counsel for the appellant contended that clause 3rdly of section 300 PPC applied to the case as the injury in the ordinary course of nature was sufficient to cause his death. It is true that this is the opinion of the doctor but nonetheless from the physical facts and the other inferential conclusions drawn by us, the incident was not premeditated but to be a sudden after which involved a grappling and the injury thus being caused on the knee in the heat of the moment which by itself could not saddle him with the knowledge of the precise local of different arteries and veins in the limbs of human body so as to lead only to the inferential conclusion to kill him. Therefore, it is a case of lesser culpability and all that they could have presumed to have intended was to cause grievous hurt with a dangerous weapon. This presumption is further augmented by the presence of the other incised injury not on any vital part of the body and that too being simple in nature. The element of intention, therefore, being absent, we would hold that the offence committed was one under section 304 Part-II, PPC."

In view of the peculiar facts and circumstances of the case coupled with single dagger blow on the person of the deceased that too on his non-vital part i.e. thigh, case of the appellant falls within the Exception (4) of the previous section 300 PPC, which by that time, was punishable under section 304 PPC. For the sake of convenience

and ready reference Exception 4 of the then section 300 PPC is reproduced below:-

“Exception 4:-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon sudden quarrel and without the offender’s having taken undue advantage or acted in cruel or unusual manner.”

12. No doubt, neither old section 300 nor exceptions thereto are available at present on the Statue book, however, it is laid down by the Hon’ble Supreme Court in case titled, **“The State Vs Muhammad Hanif and 05 others” (1992 SCMR 2047)**, that all the matters which were initially dealt with by erstwhile section 304 PPC, are now to be considered under section 302 (c) PPC. The same view has been repeatedly upheld by the august apex court in a number of cases. In case titled, **“Muhammad Ajmal Vs the State” (2022 SCMR 88)**, in an occurrence of sudden flare up, the Hon’ble Supreme court has observed the following:-

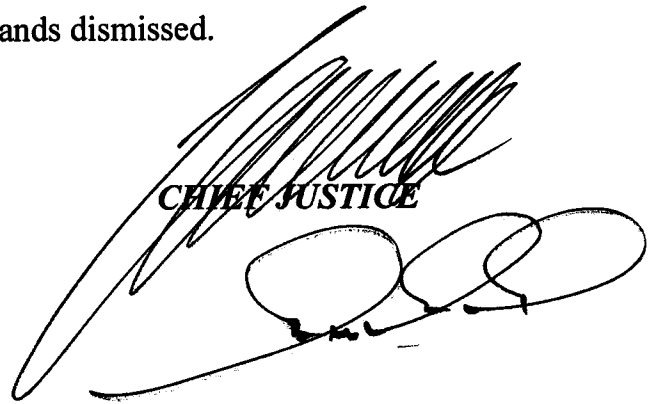
“The above mentioned evidence of both the witnesses clearly indicate that the deceased went to the workshop of appellant for repair of tractor, for the first time and in the absence of any previous ill will or grudge, at the spur of the moment due to “lain dain” probably regarding the payment of work done, by the appellant by repairing the tractor, suddenly there was altercation, followed by exchange of abusive language between the appellant and deceased, all of a sudden this occurrence took place indicating that there was no premeditation and at the spur of the moment due to abusive language, in the heat passion, appellant gave a solitary blow with the hatched which was lying there. He did not repeat the blow although deceased was lying on his mercy. He did not take undue advantage nor acted in a cruel or

unusual manner. So all the ingredients of the above exception are born out from the prosecution case **and his case falls under section 302(c) PPC. All the parameters mentioned above clearly indicate that it is a case falling under section 302(c) PPC and not section 302 (b) PPC.**

13. Placing reliance on the judgment (supra) of the Hon'ble Supreme Court, we convert the conviction of the appellant from section 302(b) PPC to section 302 (c) PPC and reduce his sentence from life imprisonment to rigorous imprisonment for twelve years rigorous imprisonment. Conviction of the appellant under section 324 PPC is maintained, however, period of his sentence is reduced from 10 years to 05 years rigorous imprisonment. The sentence of fine under section 324 PPC and period in default of payment therefore and the compensation under section 544-A Cr.P.C. shall remain intact. Both the substantive sentences under sections 302(c) and 324 PPC shall run concurrently. Benefit of section 382-B Cr.P.C. shall remain intact in favour of the appellant.

14. With the above modification in the conviction and sentences of the appellant, this appeal stands dismissed.

Announced:
11.06.2024
M.Siraj Afridi CS



CHIEF JUSTICE

JUDGE

DB Mr. Justice Ishtiaq Ibrahim Hon'ble the Chief Justice
And Hon'ble Mr. Justice Sahibzada Asadullah