

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

Present

MR. JUSTICE HAZIQL KHAIRI, CHIEF JUSTICE.
MR. JUSTICE DR. FIDA MUHAMMAD KHAN.

CRIMINAL APPEAL NO.5/P OF 2004

Umar Gul son of Arif Gul,
Resident of village Kamal Khel,
Kohat.

Appellant

Versus

The State

Respondent

For the appellant

Mr. Ajmal Khan,
Advocate.

For the State

Mr. F.M. Sabir,
Advocate.

No. & date of FIR/PS

No.203 dated 6-11-2000
P.S. Gumbat, Kohat.

Date of judgment of
trial court

23-12-2003

Date of institution

21-1-2004

Date of hearing

30-10-2008

Date of decision

28-11-2008

12/11

JUDGMENT

HAZIQUL KHAIRI, CHIEF JUSTICE:- This appeal arises out of the judgment dated 23.12.2003 whereby the appellant Umar Gul was convicted and sentenced by the Additional Sessions Judge-II, Kohat under section 302 (b) PPC to imprisonment for life, and to pay Rs.100,000/- as compensation U/S 544-A Cr.P.C. to legal heirs of deceased in default whereof to suffer S.I. for two years.

2. The prosecution story is that the complainant Arif Gul (examined as DW.1) reported to I.H.C. (not produced) who authored in the shape of murasila that on 5.11.2000 at 2300 hours he was present in his room and his daughter-in-law Mst. Bakhmal Bibi deceased was in her own room, when he heard the fire shot from her room. He rushed there and saw his son Umar Gul had a pistol in his hand, while Mst. Bakhmal Bibi without Shalwar was breathing her last. A male Shalwar was also lying in the Cot/Charpy of deceased. In the meanwhile Mst. Zar Nisa the wife of his other son also came there. Umar Gul told him that he had seen his wife and Sahib Gul accused (complainant's grand son) in a compromising position, therefore, he killed his wife with pistol, while Sabib Gul made good his escape. The complainant stated that as it was night-time and no vehicle was available, being an old man he could not lodge the report in time. The F.I.R. was registered on 6.11.2000 viz after a day of occurrence.

1/2001

3. Habibullah S.I. PW.9 investigated the case. As the accused namely the appellant and Sahib Gul had absconded, they were declared proclaimed offenders. On completion of investigation, Mohammad Hussain, SHO PW.8, initially submitted complete challan against accused Umar Gul u/s 512 Cr.P.C. on 5.12.2000 and subsequently against Sahib Gul accused on 19.6.2001 and their trial under section 512 Cr.P.C. was commenced in absentia. The prosecution produced nine witnesses many of whom were formal. For the sake of brevity, only depositions of those witnesses which shall have bearing on the case are reproduced as under:-

4. PW.1 Arif Gul complainant, further to what he had stated in FIR deposed that the occurrence was witnessed by him as well as his daughter-in-law Mst. Zar Nisa. Mst. Bakhmal Bibi died on the spot. They took the dead body of Mst. Bakhmal Bibi with the help of their co-villagers to the police station. He reported the matter to the police which was recorded in shape of murasila.

5. According to learned Sessions Judge when PW.2 Mst. Zar Nisa was asked to give her statement, she stated that she was present at the time of occurrence. But she had seen nothing about the occurrence, therefore, her further statement was not recorded.

6. PW.8 Miftah ud Din No.759, was posted at PP Shadi Khel P.S. Gumbat on the day of occurrence. The dead body of Mst. Bakhmal Bibi was brought to the PP by one Arif Gul (PW.1) in a pickup with the help of other co-villagers. He recorded the statement of Arif Gul

in shape of murasila Ex.PA. He then prepared an injury sheet and inquest report of the deceased and sent the dead body to the hospital.

7. PW.9 Mohammad Hussain Khan SI deposed that he was posted at PS Gumbat as SHO. On receipt of murasila from PW.8, he had incorporated its contents into the shape of FIR and registered the case against the accused. He prepared the site plan on the pointation of complainant. He had taken into possession blood stained earth, empty of 30 bore, two shalwars one of Sahib Gul and the other of deceased(blood stained), one Qamis and one small bottle containing swabs taken from the dead body of deceased Mst. Bakhmal Bibi sent by the medical officer through constable Fazal Subhan. All the articles were sealed into parcels in presence of marginal witnesses. He had sent the blood stained earth to FSL Laboratory for examination, the report of which is received in positive. He recorded the statements of PWs under section 161 Cr.P.C. He also initiated proceedings under section 204 Cr.P.C. against accused Umar Gul as well as proclamation notice under section 87 Cr.P.C. On completion of investigation against accused Umar Gul, he had submitted complete challan under section 512 Cr.P.C.

PW.3 Nazim Shah, ASI, PS City, PW.4 Malik Hakeem Khan, PW.7 Sher Nawaz, Constable, PW.8 Miftahuddin, Constable were marginal witnesses to recoveries made by Muhammad Hussain (PW.9), I.O.

8. On 17-12-2002, Sahib Gul was arrested and on 23-1-2003 appellant Umar Gul was arrested. The former was charged under

section 18 of the offence of Zina (Enforcement of Hudood) Ordinance, 1979 and the later under section 302 PPC by the learned Additional Sessions Judge-II Kohat to which both of them claimed for trial.

9. It may be noted here that the deposition of PW.9 who was the last witness under section 512 Cr.P.C. proceedings concluded on 4-11-2002 and after the arrest of accused both they were charged on 23-1-2003. The first PW entered into the witness box on 22-3-2003. As many as eleven witnesses were examined by the prosecution including five witnesses who were earlier examined in the absence of the accused under section 512(1) Cr.P.C. It is pertinent to note that after the arrest of accused, the complainant Arif Gul opted not to appear as prosecution witness but as DW.1. The said five witnesses namely Mst. Zar Nisa (PW.2), Hakeem Khan (PW.4), Abdul Malik (PW.5), Sher Nawaz (PW.7 and Muhammad Hussain SHO (PW.9) were re-designated and re-examined as PW.3, PW.2, PW.4, PW.7 & PW.8 respectively in the subsequent proceedings, however, Nizam Shah, PW.3, Fazal-e-Subhan, PW.6 and Miftahuddin, PW.8 earlier produced by the prosecution were not examined subsequently.

10. PW.1 Mir Chaman Khan SHO P.S. Gumbat testified that on 17.12.2002 accused Sahib Gul voluntarily surrendered before him at police station Gumbat. He was arrested and he recorded his statement U/S 161 Cr.P.C. PW.2 (earlier PW.4) reiterated what he had deposed earlier. Nothing came out from his cross-examination to the advantage of the appellant.

11. PW.3 Mst. Zar Nisa (earlier PW.2) mother of Sahib Gul and sister-in-law of Umar Gul deposed as under:-

“Accused Sahib Gul is my son while accused Umar Gul is the brother of my husband. Deceased Mst. Bakhmal Bibi was the wife of accused Umar Gul. At the time of occurrence I was in my house. We were taking our evening meal and accused Sahib Gul was also with us in our residential room. In the meantime, we heard fire shot from the room of accused Umar Gul, upon which I rushed there and saw that accused Umar Gul had murdered his wife Mst. Bakhmal Bibi with the fire shot and he was having pistol in his hand from which he had fired upon the deceased. Mst. Bakhmal Bibi was lying on the ground inside the room, seriously injured with the fire shots who died later on. I do not know further about the subsequent proceedings.” In cross-examination she stated: ‘I have not stated in my statement that I had heard the fire shot from the room of accused. As I am not the eyewitness of the occurrence, therefore, I cannot say that the pistol in the hand of accused was that one on which he had committed the murder of his wife. As I was busy with the dead body, therefore, I did not know about the visit of police to the spot. It is incorrect to suggest that my son accused Sahib Gul had remained absconder for two years. I had given the same statement in court before. I had not stated in my that statement that I had not seen the occurrence.’”

12. PWs. 4, 7 & 8 Abdul Malik, Sher Nawaz and Muhammad Hussain (earlier PWs. 5, 7 & 9 respectively) reiterated what they had testified earlier. PW.4 was not cross-examined at all while the deposition of PWs. 7 & 8 remained free from any daint whatsoever. They were marginal witnesses to the recoveries made by PW.9 Habibullah. PW.5 Arshad Khan was also not cross-examined. PW.6 Taj Malook was posted D.F.C.in Shadi Khel P.S. Gumbat. He was entrusted with the warrant of arrest and proclamation notices against the accused.

13. PW.9 Habibullah S.I./ I.O.(earlier PW.8 deposed interalia:-

“I registered FIR, prepared site plan on the pointation of complainant. I secured blood stained earth from the place of deceased Mst. Bakhmal Bibi, I also took into possession an

empty shell of 30 bore and prepared the recovery memo in presence of witnesses. Similarly, I also took into possession one Shalwar belonging to accused Sahib Gul which was produced by complainant. I prepared the recovery in respect of blood stained earth and empty shell. I also took into possession one phial P.3. containing Swab which was extracted from deceased Bakhmal Bibi by lady doctor and produced by constable Fazal-e-Subhan. Likewise, I also took into possession Qameez Shalwar which were produced by Arif Gul complainant, belonging to deceased Bakhmal Bibi, vide recovery memo. I also sent the last wearing clothes of Mst. Bakhmal Bibi and swab to the FSL for opinion and the result received in Exh.PK and PM, in respect of blood stained earth and swab. I also recorded the statements of PWs under section 161 Cr.P.C. After completion of investigation, I submitted challan against the accused Umar Gul under section 512 Cr.P.C. on 5.12.2000. All the documents which I have placed on file bears my signature.” In cross-examination he stated: “According to murasila the occurrence had taken place at 2300 hours while the report has been lodged at 8.00 a.m. in P.P. Shadi Khel. It is correct that the facility of electricity is not available in the locality i.e. the place of occurrence. The house of complainant is having boundary walls while the place of occurrence is without any boundary wall. The house of accused i.e. the place of occurrence and that of complainant are separate. Similarly, the house of Sahib Gul accused is separate as shown in the site plan which is mentioned as the house of Razez Gul (father of Sahib Gul). The result of swabs is in positive. After drafting murasila IHC Miftah ud Din prepared injury sheet, inquest report for which he had not obtained any permission or sanction from me. Self stated that he was incharge of the P.P. I did not recover any semen stained earth or any other article from the place of occurrence.”

14. According to PW.10 lady doctor Syeda Jamila:-

“On 6.11.2000 at 10.45 a.m. dead body of Mst. Bakhmal Bibi W/o Umar Gul aged about 24 years R/o village kamal Khel was brought to the hospital for postmortem examination.

“EXTERNAL EXAMINATION.

1. Entry wound 1-1/2” to the right of pubic symphysis circular in shape, about 1/4” in diameter with blackening around it.

2. Exit wound 3” to the left of vertebral column at the level of L.3, L.4 about 1” in diameter and was irregular in shape.

Abdomen: Walls. Corresponding walls damaged.

Peritoneum: Corresponding part damaged.

Large intestines, liver, left kidney were damaged.

Corresponding muscles damaged.

1 Mst. Bibi

Opinion: in my opinion the cause of death is due to hemorrhage and damage to the left kidney which leads to shock and death. Probable time between injury and death: about 1/2-1 hours.

Between death and post mortem: 12 to 18 hours.

I did not notice any mark of violence on the dead body. It is correct that the entry and exit wound on the body of deceased are from down to upward side. The possibility of causing such like injury is there when a person fire from down to upward side. It is correct that the deceased was fired at from very close range that is why I noticed blackening and charring marks on the body of the victim.

15. PW.11 Mosam Khan (Retd) S.H.O. deposed that on 11.9.2002, he was SHO Gumbat and arrested the appellant Umar Gul. He recorded the statement of the appellant under section 161 Cr.P.C. and when produced him before the Magistrate for recording his confessional statement, he refused. PW.11 submitted supplementary challan against the accused after completion of investigation.

16. The appellant in his statement under section 342 Cr.P.C. stated in his defence as under:-

“As I was not present and nothing was recovered in my presence, therefore, I know nothing about the above said recovery. In addition to my statement the empty was produced by police which is arranged one in corroboration of prosecution story and fictitious as well as planed one”

“The proceedings were carried out in PS and fictitious signatures and thumb impressions were taken on the said documents of the same witnesses and the procedure is against the law hence these are not admissible. As far as the question of absconding is concerned I was present in my village and have attended the burial ceremony of my wife. The police never attracted neither called upon me. I myself appeared when I came to know about the said report”

I am innocent. I have been charged by my father after consultation with his friends and people of our village to conceal the actual fact of this case being a case of zina for which Sahib Gul accused is charged and he left his Shalwar in the cot of my wife due to her refusal for commission of zina with him for which the FSL report is in positive which is

Exh.PW.9/2. At the time of occurrence I was not present in my house. I am falsely implicated in this case”.

In reply to the question whether the appellant would wish to be examined on oath and produce his defence, he replied in affirmative. However, he did not produce himself in his defence but produced his father and the complainant Arif Gul as DW.1 who deposed as under:-

“I was sleeping in my room when I heard the fire shot. I came out from my room and saw that the door of the room of Mst. Bakhmal Bibi is opened. I proceeded there and saw her lying in the cot in injured condition. No one was present there as that time. On the next morning I lodged the report in P.P. Shadi Khel. I have not seen any one at the time of firing upon deceased Mst. Bakhmal Bibi. The accused is innocent and falsely involved in this case. It is incorrect to suggest that for the safety of my son Umar Gul, I lodged the FIR in the P.P. I thumb impressed my report which I have seen today which bears my thumb impression. Self stated that I am illiterate and do not read the contents of report. I brought the I.O. to the place of occurrence. It is correct that I produced the shalwar of deceased and Sahib Gul accused to police in my house. The shalwar of Sahib Gul accused was recovered by me from the cot of deceased. I handed over the aforesaid clothes to the I.O. for the purpose of proof. I do not know as to where Umar Gul accused was but on the day of occurrence he was not present in his village. It is incorrect to suggest that the accused absconded after the occurrence for two years. Sahib Gul accused is my grand son. During the days of occurrence and time of occurrence accused Sahib Gul was present in the village.”

17. We have heard Mr. Ajmal Khan, Advocate for the appellant and Mr. F.M. Sabir, Advocate for the State at length and have also gone through the record of the case before us.

18. At the very outset, learned counsel for the appellant brought to our notice the examination of prosecution witnesses under section 512(1) Cr.P.C. in the absence of accused and stressed upon us that their deposition has no evidentiary value placing reliance on Irshad Mahmood-Vs-The State 1991 MLD 1993 and Sher Muhammad alias

Shera-Vs-The State 1997 P.Cr.L.J. 259. Learned counsel next contended that a witness who appears subsequently as prosecution witness shall be subjected to cross examination in respect of previous examination-in-chief but prosecution witnesses namely PW.3 Nizam Shah, PW.6 Fazle-e-Subhan and PW.8 Miftahuddin produced earlier were not available in the subsequent regular proceedings for which no plausible reason as contemplated was given by the prosecution and their deposition under section 512(1) Cr.P.C., therefore, cannot be accepted or taken into consideration. This position is understandable because the accused persons had no opportunity to cross-examine them. Having said so, we are of the view that their deposition may not be totally rejected where it is favourable to an accused person and helpful in his defence.

19. It may be reiterated that complainant Arif Gul earlier PW.1 and later DW.1 is the father of the appellant and Mst. Zar Nisa, PW.2 earlier and PW.3 in later proceedings is the mother of accused Sahib Gul. According to the complainant, the murder took place at 2300 hours on 5.11.2000 but the complaint was registered on 6-11-2000 in the morning. The report of PW.10 lady doctor Syeda Jamila discloses that she examined the dead body of Mst. Bakhmal Bibi at 10.45 A.M. on 6-11-2000 and the probable time between injury and death was half an hour and between death and post mortem was 12 to 18 hours. Admittedly both the accused had absconded after the commission of crime. With this backdrop in mind, it cannot be ruled out that the complainant purposely delayed reporting of the murder and allowed

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his son and grandson to become fugitives at law. However, when both were arrested and faced the trial, the complainant took U turn and came out with different version to his statements in FIR and under section 512 Cr.P.C. What however is pertinent to note is that the complainant elected to become a defence witness and his testimony as DW.1 entirely negates his statement under section 512 Cr.P.C. and in FIR in which he had accused the appellant of murdering his wife. Although declared not a hostile witness by the trial court, he was allowed to be cross examined by the prosecution and stated that he had reported the matter to police and put his thumb impression on the report. He also produced shalwars of the deceased and Sahib Gul to the police. Similarly, PW Mst. Zar Nisa disassociated her son from the commission of offence of zina to which he was ultimately acquitted by the learned trial court As regards the murder, she in her examination-in-chief had stated to have heard the fire shot coming out from the room of Umar Gul upon which she rushed there and saw that appellant Umar Gul had murdered his wife Mst. Bakhmal Bibi with pistol in his hand. In cross-examination, she said that she saw nothing. Her testimony as regards the appellant having a pistol in hand at the time of occurrence corroborates the statement of the complainant in FIR.

20. Another interesting aspect of the case was the appellant's statement under section 342 Cr.P.C. that he was present in his village and had attended burial ceremony of his wife. He rebuts himself in his own statement under section 340 Cr.P.C. that he had gone to

Karachi four months prior to the occurrence and was unaware of the case. Further, his father as DW.1 deposed that he did not know where the appellant was on the day of occurrence and was not present in the village. The defence of alibi put up by the appellant was on the face of it self defeating, contradictory, concocted and false not supported by tangible evidence and hence liable to be rejected outrightly.

21. We agree with Mr. Ajmal Khan, counsel for the appellant that non-production of witnesses examined under section 512 Cr.P.C. in the subsequent regular trial may create doubts to the prosecution case unless plausible grounds as contained therein are disclosed. Nevertheless, we find that their non-production is not fatal to the prosecution case as they were marginal witnesses. Accordingly we are of considered view that although there was no eye-witness account of the murder of Bakhmal Bibi at the hands of the appellant but there is irrebutable and overwhelming circumstantial evidence against him establishing beyond any shadow of doubt that the appellant had murdered his wife and his attempt to save himself from the clutches of law had ultimately failed.

As a result, we uphold the conviction and sentence of the appellant and dismiss his appeal.

Justice Haziqul Khairi
JUSTICE HAZIQUL KHAIRI
Chief Justice

Justice Dr. Fida Muhammad Khan
JUSTICE DR. FIDA MUHAMMAD KHAN

Announced on 28-11-2008
at Islamabad
M.Khalil

Approved for reporting
Justice Haziqul Khairi
28/11/08