

**IN THE FEDERAL SHARIAT COURT**  
(APPELLATE JURISDICTION)

**PRESENT**

**MR. JUSTICE DR. SYED MUHAMMAD ANWER**

**Criminal Appeal No.04-I of 2022**

Abdul Moeen son of Hazrat Yousaf, resident of Kago Cham Barikot P/S Kalkot Tehsil Kalkot District Dir Upper

**.....Appellant**

*versus*

1. The State through Additional Advocate General.
2. Khan Alam son of Khaista Ullah (Complainant) through LRs
  - 2/1. Abdur Rahim (brother of deceased)
  - 2/2. Islam Ullah (brother of deceased)
  - 2/3. Mst. Naiba (injured / sister of deceased), resident of Kago Cham Barikot, P/S Kalkot, Tehsil Kalkot, District Dir Upper.

**.....Respondents**

<b>For the appellant:</b>	Mr. Ihsan Ullah, Advocate
<b>For the respondents:</b>	Mr. Muhammad Farooq Sulehria, Advocate
<b>For the State:</b>	Mr. Anees Muhammad Shahzad, State Counsel on behalf of Advocate General, K.P.
<b>Date of Institution:</b>	22.08.2022
<b>Date of Hearing:</b>	23.11.2023
<b>Date of Judgment:</b>	07.12.2023

**JUDGMENT**

**DR. SYED MUHAMMAD ANWER, J:** Through the instant criminal appeal, the appellant Abdul Moeen has called in question judgment of the learned Additional Sessions Judge-II/Judge MCTC, Dir Upper, dated 30.07.2022, whereby the appellant has been convicted and sentenced in case FIR No.16, dated 27.04.1999, under Sections 324, 450, 334, 148, 149 PPC read with Section 18 of the Offence of Zina (Enforcement Of Hudood) Ordinance, 1979, P.S. Kalkot, District Dir Upper.

2. Brief facts of the case are that Khan Alam (***respondent No.2 / complainant***) filed a complaint alleging therein that on 27.04.1999, at about 02:30 p.m., Abdul

Moeen (**appellant**) along with Ismail, Hujjat Khan, Ahmad Gul and Shah Ezat Khan (**co-accused persons**) duly armed with firearms entered his house and abducted his sister namely Mst. Naiba (**injured witness**) to contract marriage against her will. However, when the latter resisted, the appellant opened fire at her, as a result whereof Mst. Naiba received injuries at both of her arms, where-after the accused persons fled from the scene and remained absconder. Later on, accused persons Hujjat Khan and Ahmad Gul were arrested and put to trial, as such, the trial culminated in acquittal of Ahmad Gul by extending him benefit of doubt while Hujjat Khan (co-accused) was convicted by the Additional Sessions Judge Dir Upper vide order dated 23.04.2001. Afterward, Ismail (co-accused) was also arrested in the instant case and supplementary challan was submitted for trial, however the trial court acquitted him vide order dated 20.04.2016.

3. The appellant, after remaining absconder for 21 years, 01 month and 20 days, was arrested on 17.06.2020 in the instant case and after completion of investigation on 04.07.2020, supplementary challan was submitted for trial and charge under Sections 324, 148, 149, 449, 334 PPC read with Section 11 Z.O. was framed against the appellant on 24.09.2020, to which the appellant pleaded not guilty and claimed trial. The prosecution in order to establish guilt of the appellant has produced as many as eight (08) witnesses while the statements of Khan Alam (complainant), Yousaf Ali Khan (DSP), Hayat Muhammad Khan (SHO), Muhammad Islam (SI), Dr. Muhammad Inam and Najeeb Ullah were transposed on the request of the prosecution vide order dated 21.11.2020, 05.06.2021, 08.10.2021 and 26.02.2022, respectively, followed by recording of the appellant's statement under Section 342 Cr.P.C. After considering the pro and contra evidence of the parties, the trial court convicted and sentenced the appellant vide the impugned judgment dated 30.07.2022 in the following manner:

- i. *Convicted under Section 324 PPC and sentenced for seven (07) years rigorous imprisonment with fine of Rs.50000 (fifty*

*thousand) for attempting at the life of injured/victim Mst Naiba Bibi in default thereof he shall undergo three months S.I imprisonment.*

- ii. Convicted and sentenced under Section 18 of Offence of Zina (Enforcement of Hudood Ordinance) 1979 for ten (10) years R.I.*
- iii. Convicted and sentenced under Section 450 PPC for five years R.I.*
- iv. Convicted and sentenced under Section 334 PPC for seven (07) and to pay Arsh within the meaning of Section 337 X PPC amounting to Rs.2166526 one half of the existing diyat by keeping in view the quantum of Arsh under Section 337(R) PPC.*
- v. Convicted and sentenced under Section 148 PPC for one year R.I.*

4. Learned counsel for the appellant at the very outset contended that the prosecution has miserably failed to establish the guilt of the appellant beyond any shadow of doubt as the testimony of the prosecution witnesses, ocular account and medical report do not support the prosecution story, but the Trial Court has totally overlooked the same and passed the impugned judgment in a slipshod manner; that the findings recorded by the Trial Court in the impugned judgment are not tenable, rather the same are based on conjectures, surmises and assumptions, on the basis of which the appellant has unlawfully been convicted and sentenced; that the Trial Court has passed the impugned judgment without considering the legal provisions with regard to burden of proof and convicted the appellant based on the statements of the prosecution witnesses recorded in the trial of co-accused persons; that it is settled by the apex Court in case reported as **2022 SCMR 1148 (Khalid Mehmood alias Khaloo v. The State)** that statements recorded in the trial of co-accused without the same being exhibited, the conviction of another accused could not be based on such evidence, but the Trial Court erred in applying its judicious mind and relied upon transposed statements of the prosecution witnesses as well as of the medical expert, hence, the impugned judgment may kindly be set aside and the appellant may be acquitted of the charges.

5. Conversely, learned counsel for respondents No.2 to 5 as well as the State Counsel opposed the filing of instant criminal appeal and stressed that the appellant is directly nominated by the complainant as well as by the injured PW for attempt at her life and abduction for contracting illegal marriage; that eyewitnesses namely PW-3 Hazrat Khan and PW-4 Hakim Khan along with other PWs remained consistent in their testimony and despite lengthy cross examination nothing favorable has been brought on record by the defence; that the medical evidence is also in line with the prosecution story and the prosecution has successfully proved its case through cogent evidence connecting the appellant with the commission of offence, based on which the Trial Court has rightly convicted and sentenced the appellant vide the impugned judgment, therefore, the instant appeal may be dismissed.

6. Arguments heard. Record perused.

7. It has been observed from the record that the appellant Abdul Moeen along with his co-accused persons namely Ismail, Hujjat Khan, Ahmad Gul and Shah Ezat Khan were booked in FIR No.16, dated 27.04.1999, under Sections 324, 334, 148, 149, 449 PPC read with Section 11 of Zina (Enforcement Of Hudood) Ordinance, 1979, P.S. Kalkot, District Dir Upper for contracting marriage against her will with the appellant and causing firearm injuries to complainant's sister i.e. Mst. Naiba. In this regard, it is relevant to reproduce the medical evidence of Dr. Muhammad Inam, referred as Exh.PW-8/1, which was earlier produced in the trial of co-accused persons:

- 1) *Entry with tattooing marks posterolateral aspect Rt.forearm ½ inch below elbow.*
- 2) *Exit wound on the anterior aspect of right forearm which is 4 inch long and 3 inch wide. Muscles are protruded and torn.*

3) *Entry wound with tattooing marks on the posterior aspect of Rt. Wrist joint which is ½ inch in diameter and circular in shape.*

4) *Exit wound on the anterior aspect of Rt. forearm ½ inch about the wrist joint measuring 1 \* 1/2. The muscles protruded.*

5) *½ inch wound on the LT: arm on lateral aspect below the shoulder joint.*

*Wound on LT: Arm on the anterior medical and lateral aspect encircling the 3/4<sup>th</sup> of the Arm muscles and bones are shattered.*

*Emergent treatment given and patient referred to LRH/HMC Peshawar for further management.*

*Nature of injury:-----Grievous / dangerous*

*Duration of injury:-----with in 12 hours.*

*Kind of weapon:-----Fire arm.*

*Patient admitted in PGMI-LRH on 08.04.99 and discharged on 17.05.99, they have amputated LT.upper limb+backslab of Rt.upper limb.*

8. It has been observed from the record that one of the co-accused in this case, namely Shah Ezat Khan was murdered in some other incident, therefore, proceedings against him were abated. Co-accused Hujjat Khan and Ahmad Gul were arrested on 09.05.1999 and 05.06.1999, respectively, against whom charge was framed on 06.01.2000, to which they pleaded not guilty. Accordingly, the prosecution led the evidence by producing Najeeb Ullah (Illaqi Qazi Kalkot) as PW-1, Hayat Muhammad Khan (SHO, P.S. Kalkot) as PW-2, Yousaf Ali Khan (SI) as PW-3, Khan Alam (complainant) as PW-4, Mst. Naiba (injured witness / victim) as PW-5, Hazrat Khan (eyewitness) as PW-6, Hakim Khan (eyewitness) as PW-7, Dr. Muhammad Inam as PW-8 and Muhammad Islam (Investigating Officer) as PW-9. After concluding the trial, the Additional Sessions Judge Dir Upper acquitted the co-accused Ahmad Gul by extending him benefit of doubt while convicted the co-accused Hujjat Khan vide judgment dated 23.04.2001.

9. Similarly, the co-accused Ismail was arrested on 15.05.2011, against whom the charge was framed on 25.06.2011, to which he pleaded not guilty. However, based on the transposed statements recorded by the PWs in earlier trial, co-accused Ismail was acquitted of the charges by the Additional Sessions Judge Dir Upper vide judgment dated 20.04.2016.

10. After elapse of about 21 years of the occurrence, the appellant Abdul Moeen was arrested on 17.06.2020, from whose possession the police recovered one Kalashnikov, two magazines and 50 rounds vide recovery memo Exh.PW-5/2. Pursuant to completion of investigation, charge against the appellant was framed on 24.09.2020, to which he pleaded not guilty and claimed trial. In order to bring guilt of the appellant home, the prosecution has produced Rahmat Ayub (Inspector) as PW-1, Mst. Naiba (injured witness / victim) as PW-2, Hazrat Khan (eyewitness) as PW-3, Hakim Khan (eyewitness) as PW-4, Nowsherawan Khan (SHO) as PW-5, Wali Rahman (Constable) as PW-6, Taj Muhammad Khan (ASI) as PW-7 and Jafar Khan as PW-8, whereas the request of the prosecution to transpose the statements of PWs namely Khan Alam (complainant), Yousaf Ali (DSP), Hayat Muhammad Khan (SHO), Muhammad Islam (ASI), Najeeb Ullah Khan and Dr. Muhammad Inam, which had been recorded in the trial of co-accused Hujjat Khan and Ahmad Gul, was allowed by the Trial Court through judicial orders after completion of due process of law, which is necessary to be completed before transposing the statement of any witness.

11. In the instant case the victim / injured Mst. Naiba, who appeared as PW-2, is the star witness, hence her sole evidence is enough to prove the case of the prosecution beyond any doubt, wherein she stated before the Trial Court that:

”-----پھر ملزمان مجھے کچھ فاصلہ تک زبردستی لے گئے تو میں نے ایک درخت کے ساتھ لپٹ کر اپنے آپ کو ملزمان کے چنگل سے چھڑانے کی کوشش کی تو ملزم حجت خان نے ملزم عبدالمعین کو اپنی رائفل دیکر مجھ پر فائرنگ کرنے کو کہا جس پر ملزم عبدالمعین نے میرے دونوں ہاتھوں پر فائرنگ کر دی جس پر میرا ایک ہاتھ کندھے تک لگ کر لٹک گیا جبکہ دوسرا ہاتھ شدید زخمی ہو گیا اور میں زخمی ہو کر گر گئی۔“

12. This statement of the victim, which is supported by the medical evidence as well as by the statements of eyewitnesses, is enough to prove the case of the prosecution. The appellant raised a point in the appeal that during the trial of the appellant, those statements of the witnesses, which were transposed in the trial of the appellant cannot be relied upon, because only the statements were transposed through court order, but their exhibits were not transposed. For that he solely relied upon a case reported as **2022 SCMR 1148 (Khalid Mehmood alias Khaloo v. The State)**. Whereas, this judgment upon which the appellant relied is clearly differentiable from the facts of this case. In the referred case (2022 SCMR 1148), the statement was never transposed for trial of the co-accused subsequently. On the contrary, in the case of appellant before us the transposition of statements of PWs were duly made in accordance with Section 512 Cr.P.C, which states as follows:

***"512. Record of evidence in absence of accused: (1) if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try of send for trial to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged if the deponent is dead or incapable of, giving evidence or his attendance cannot be procured without an amount of delay, expanse or inconvenience which, under the circumstance's of the case, would be unreasonable.***

***(2) Record of evidence when offender unknown: if it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the First Class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence."***

13. The sole purpose of Section 512 Cr.P.C is to preserve the record of the evidence in absence of accused, (a) who has absconded, (b) there is no immediate prospect of being apprehended, and then (c) such deposition can be given in

evidence only if the deponent is dead or his evidence cannot be procured without an amount of delay, expanse or inconvenience. The basic purpose of Section 512 Cr.P.C. is the preservation of record so that presumption of authenticity remains attached to that record to the extent if that record is used as an evidence in the trial of any co-accused subsequently, than it can be relied upon subject to the fulfilment of other procedural conditions attached to it, which are mentioned in Section 512 Cr.P.C. Therefore, when a statement is recorded in a judicial trial then all those documents, which are duly exhibited in a statement of a witness, become the integral part of the statement and there remains no need of those documents to be re-exhibited separately in the subsequent trial of a co-accused in the same case, wherein the statement is transposed. Hence, this objection of the appellant is also baseless. Reliance in this regard is placed upon **PLD 2010 SC 612 (Mir Shakeelur Rahman vs. Yahya Bakhtiar)**.

14. In this regard, the Article 47 of the Qanun-e-Shahadat Order, 1984 provides the conceptual purpose of transposition of statements as well as of the preconditions of the acceptability and admissibility of a duly recorded statement in a subsequent trial of a co-accused in a same case, as is the case of the appellant. The Article 47 of the Qanun-e-Shahadat Order, 1984 reads as follows:

***47. Relevancy of certain evidence for proving, in subsequent proceedings, the truth of facts therein stated:-*** Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:---

***Provided that,---***

*The proceeding was between the same parties or their representatives-in-interest;*



*The adverse party in the first proceeding had the right and opportunity to cross-examine;*

*The questions in issue were substantially the same in the first as in the second proceeding.*

*Explanation. A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article.*

15. This article provides three ingredients, which are necessary for the admissibility of a transposed statement in a subsequent trial of a co-accused, these ingredients are explained in the proviso of the above-mentioned Article 47 of the Qanun-e-Shahadat Order, 1984 that;

- (1) If the proceedings are between the same parties or their representatives-in-interest;
- (2) If the adverse party in the first proceedings has the opportunity to cross examine;
- (3) If the questions in issue were substantially the same in the first as in the second proceedings, as held in case reported as **2018 SCMR 71 (Muhammad Siddique vs. The State)**.

All three ingredients of Article 47 of the Qanun-e-Shahadat Order, 1984 were completely present when the statements were so transposed in the case of the appellant during his trial. Reliance is placed upon **2009 PCrLJ 919 FSC (Tanveer Ahmad vs. The State)**.

16. The statements of a witness duly recorded can be transposed under Section 512 Cr.P.C to the trial of accused subsequently arrested and same falls within the category of substantial evidence, however the Trial Court has to evaluate the transposed statements of the witnesses cautiously while considering all the other facts of the case, other statements of the witnesses along with the cross examinations and circumstantial evidence available on record. In the impugned judgment, while giving reasoning all such aspects were duly considered by the Trial

Court. It is the requirement of Section 512 Cr.P.C that a careful scrutiny be placed by putting all the available evidence on record in juxtaposition with the witnesses or statements recorded under Section 512 Cr.P.C. All such due care, which is required, was duly considered by the Trial Court while reaching to the conclusion of the case.

17. The appellant pointed out certain irregularities in MLC (Exh.PW-8/1), like the name of the victim and date of examination by the medical officer are not written in the prescribed column of the MLC, where they were supposed to be written, instead they were written by the doctor underneath the prescribed lines in the printed form, hence the MLC must not be read as evidence. Furthermore, the fact that the arm of the victim (Mst. Naiba) was amputated at Lady Reading Hospital (LRH), from where MLC No.492, dated 27.04.1999 (Exh.PW-8/1) was issued. She was discharged and her left upper limb was amputated, but it is not written on MLC which doctor did the surgery and amputated her arm. Such irregularities are immaterial and cannot be used in defence as they do not amount to failure of justice. Reliance in this regard is placed upon **1986 SCMR 446 (Rehmat Ali vs. The State)**.

18. In this case, the sole statement of the victim is trustworthy and confidence inspiring along with the statements of the eyewitnesses, hence same is enough to maintain the conviction of the appellant / accused. Even otherwise, the status of medical evidence is always corroborative in its nature. Reliance in this regard is placed upon **2023 SCMR 831 (Aqil vs. The State)**, **1996 SCMR 908 (Muhammad Iqbal vs. The State)**, **PLD 2003 SC 396 (Naeem Akhtar vs. The State)**, **2010 SCMR 1025 (Faisal Mehmood vs. The State)** and **2011 SCMR 460 (Muhammad Ilyas vs. The State)**.

19. For the reasons stated hereinabove, the case of the prosecution, especially in the light of statements given by the victim along with the statements of other witnesses, proves the case of the prosecution without any doubt.

20. Moreover, the recovery of firearm i.e., Kalashnikov used in the crime from the possession of the appellant / accused, after the abscondence of the appellant for 21 years, 01 month and 20 days is also added circumstantial evidence to the case and a supportive evidence to prove the case of the prosecution.

21. This Court has gone through the impugned judgment dated 30.07.2022, passed by the Additional Sessions Judge-II/Judge MCTC, Dir Upper, and observed that it does not suffer from any legal infirmity and the sentence awarded to the appellant is well within the four corners of law, hence the Court finds no merits in the instant appeal, therefore, the same is hereby **dismissed** along with the accompanying pending applications.

**(JUSTICE DR. SYED MUHAMMAD ANWER)**  
**JUDGE**

*Announced in Open Court  
on 07.12.2023, at Islamabad.  
Khalid/\**

Approved for reporting.