IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE SALAHUDDIN MIRZA

JAIL CRIMINAL APPEAL NO.196/I OF 2006

Ghulam Abbas son of Ghulam Rasool, caste Darvesh, resident of village Phagwari, Tehsil Shakargarh, District Narowal.

..... Appellant

Versus

The State

.....Respondent

For the appellant	...	Mr.Imdad Hussain Kazi, Advocate
For the State	...	Mr.Arif Karim, D.P.G. Punjab
No.Date of FIR, Police Station	...	303, dt 24.08.2005, Police Station Shakargarh, District Narowal
Date of judgment of trial Court	...	20.04.2006
Date of Institution	...	24.07.2006
Last dates of hearing	...	05.03.2009
Date of announcement of judgment	...	10-4-2009

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Jail Crl.Appeal No.196/I of 2006
Crl.Mur.Ref.No.12/I/2007

JUDGMENT

JUSTICE SALAHUDDIN MIRZA, JUDGE: Vide Judgement dated 20.4.2006 Ghulam Abbas appellant has been convicted by learned Additional Sessions Judge Shakargarh (District Narowal), Rana Muhammad Yousuf, under section 302 PPC in Crime No. 303/05 of Police Station Shakargarh and sentenced to death plus compensation of Rupees One lakh under section 544-A Cr.P.C. which is to be recovered as arrears of land revenue and, in default of payment or recovery, he is to suffer simple imprisonment for six months. He has come in appeal against his conviction. However, he was acquitted of the charge under section 18 read with section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and his brother/co-accused Muhammad Sarwar has been acquitted 'of the charge' by giving him the benefit of doubt, but Sarwar was separately charged under two sections ----- under section 460 PPC as well as under

section 337 –L(ii) PPC ----- but the judgement acquits him 'of the charge', that is, of one charge, and the judgement does not make it clear as to under which charge he has been acquitted. Likewise, there is no finding either in favour or against appellant Ghulam Abbas in respect of the charge under section 460 PPC.

2. The prosecution case as per FIR recorded at the instance of complainant Mst.Azra at Police Station Shakargarh on 24.08.2005 at 0815 hours is as follows: She was the resident of 'Phagwari' and was sleeping in her house alongwith her children the previous night when at about 0250 hours Ghulam Abbas and Muhammad Sarwar, both sons of Ghulam Rasool of the same village, entered her house by scaling the outer wall of the house. Muhammad Sarwar pinned her down with pistol and Ghulam Abbas appellant tried to commit Zina-bil-Jabr with her whereupon she raised hue and cry as a result of which her daughter Mst. Tayyaba woke up and she also raised cries and at this Ghulam Abbas strangulated her to death by a rope.

By then her husband Ilyas and Dever Mujahid Ali and some other persons of the village came there upon hearing the shrieks of the complainant whereupon both the brothers ran away.

3. During the course of investigation appellant Ghulam Abbas was arrested on 06.09.2005. Date of arrest of acquitted co-accused Sarwar is not discernable from the record; during investigation he was found innocent and placed in Column No. 2 of the challan. However, learned trial court framed charges against both the brothers on 12.12.2005 as follows:

(1)	Both, appellant Ghulam Abbas & acquitted co-accused Sarwar:	Charged under section 460 PPC
(2)	Appellant Ghulam Abbas	Charged under section 302 PPC and also under section 18 read with Section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.
(3)	Acquitted co-accused Sarwar	Charged under section 337-L(ii) PPC

4. In support of its case the prosecution has examined, in all, nine witnesses consisting of five police officials including the Investigating Officer, two are public officials ----- the lady doctor and the draftsman ----- and two are private witnesses who are also eye-witnesses and they are the complainant (mother of the deceased girl) and her husband's brother Mujahid.

5. Lady doctor Mst.Zahida Imtiaz of THQ Shakargarh (PW-4) had conducted the postmortem examination on the body of Mst. Tayyaba at 11 a.m. On the same day the FIR was lodged (24.08.2005) and on the same day she had also conducted the medico-legal examination of complainant Mst.Azra who had allegedly sustained some injuries on her left arm and left side of face at the hands of acquitted co-accused who gave her blows from the butt of his pistol.

6. As for the postmortem examination of deceased Mst. Tayyaba in respect of which the lady doctor submitted her postmortem

examination report as **Ex. PB**, the lady doctor found her aged about 8 or 9 years and '3 feet 9 inches' tall and observed no injury on her person except a 7 cm x 1 cm brown-coloured bruise on her neck and on dissection the lady doctor also found that the inside muscles of the neck and cartilages were also bruised. In her opinion, the cause of death was 'interference with respiration at the level of neck due to the solitary injury mentioned above', in short, due to strangulation. The defence version of the death of Mst. Tayyaba was that she had been hanged and a question was put to the lady doctor in this regard but she emphatically repelled the suggestion and stated that death was not due to hanging. The evidence of the lady doctor leaves no doubt in our mind that Mst. Tayyaba died when she was strangulated by the neck by means of some rope or wire.

7. The lady doctor also conducted the medico-legal examination of Complainant Mst.Azra and found that she had one injury which was a bruise 2 cm X 2 cm on the left arm which fell within the

category of injury made punishable under Section 337-L(2) PPC. The lady doctor had actually listed two injuries, the other being "pain on last tooth on the left side lower jaw". This is, in fact, not an injury. **Ex. PF** is the copy of medico-legal report in respect of Mst.Azra. In cross examination the lady doctor was asked as to whether the injuries suffered by Mst.Azra ('pain in the last tooth on left side lower jaw and the bruise on left arm) could have been caused by "falling on the ground or grappling and she stated that both the injuries might have been so caused. The injuries on the person of the complainant, in our view, have been proved by the medical evidence and it seems they were not contested by defence either.

8. Complainant, while appearing in the court as PW-1, reiterated what she had stated in her statement to the police **(Ex. PA)** on the basis of which the FIR was lodged. She gave the detailed account of the manner in which the two accused persons entered her house and

Muhammad Sarwar put the barrel of his pistol at her temporal region to pin her down, thus trying to prevent her from moving about and defend herself while appellant Ghulam Abbas tried to commit Zina-bil-Jabr with her but she nevertheless struggled and raised hue and cry which awoke her daughter, deceased Mst. Tayyaba, whereupon Ghulam Abbas strangulated her to death by means of a string. She also stated that Sarwar gave her blows on her left arm and on the left side of face by the butt of his pistol. She further stated that her husband Ilyas (not examined) and her Dever Mujahid (PW-2), rushed towards her whereupon the two brothers managed to run away from her house. Mujahid (PW-2) deposed that he and his brother Ilyas were in the Haveli of Mian Arshad, Nazim of union council Phagwari, in connection with the on-going election campaign and were returning together at about 0230 hours from there to their respective houses and when they were in the street where the house of Ilyas was located they heard cries emanating

from the house of Ilyas (i.e. from the house of the complainant who is wife of Ilyas) and rushed in, pushing open the outer door and saw that Ghulam Abbas was strangulating Mst. Tayyaba whereas Sarwar was pointing his pistol on the temporal region of complainant Mst.Azra but both the culprits ran away on seeing them.

9. There is also evidence of recovery of the string, used in strangulating Mst. Tayyaba, from the house of the two brothers, and at the instance of appellant Ghulam Abbas. The two witnesses of this recovery are Constable Maqsood Ahmad (PW-5) and the investigating officer SI Muhammad Riaz (PW-8).

10. Thus, there are three pieces of evidence against the appellant ---- (1) the ocular evidence of complainant Mst.Azra and her dever, (2) the recovery of the piece of wire allegedly used by the appellant for strangulating Mst. Tayyaba and (3) the medical evidence. Learned trial judge seems to have relied upon all these three pieces

of evidence while finding the accused/appellant Ghulam Abbas guilty of murder under section 302 PPC.

11. We have heard learned counsel of the appellant and learned State Counsel at great length and shall examine the above evidence with their help in the following lines. .

The ocular & medical evidence.

12. In Para-8 of the judgement we have narrated the testimony of the complainant and her Dever (PWs 1 & 2) who are the only two witnesses of the occurrence and we need not repeat the same here. As per FIR and the testimony of the complainant and her Dever, the occurrence had taken place at 2.30 in the night. The time of occurrence is corroborated by the lady doctor who had conducted the postmortem examination upon the dead body of Mst. Tayyaba at 11 A.M. per postmortem examination report Ex. **PB.** The defence did not allege any enmity between complainant Mst.Azra or her husband with the appellant or his borther (acquitted co-accused

Sarwar) and, on the contrary, as per suggestion put to the complainant Mst.Azra (PW-1) in her cross examination, the relations between Mst.Azra and appellant Ghulam Abbas were not only very cordial but that Mst.Azra was so much in love with appellant Ghulam Abbas that she wanted to marry him after obtaining divorce from her husband. She repelled this suggestion but this nevertheless showed that she at least had no enmity with him. A very atrocious suggestion was then put to complainant Mst.Azra that as Ghulam Abbas did not agree to marry her, she got so angry with him that she herself murdered her daughter just to take revenge from Ghulam Abbas and to falsely implicate him in the murder of her daughter for his refusal to marry her. Even more atrocious question was put to the investigating officer (PW-8 SI Riaz) that *'Ghulam Abbas accused filed application before him two days prior to the occurrence incorporating therein that Mst.Azra Bibi Complainant had asked him (Ghulam Abbas) to contract*

marriage with her after murdering her husband, otherwise she would murder her daughter and its case would be registered against him (Ghulam Abbas). The Investigating Officer denied the suggestion but, nevertheless, the suggestion is worth taking note of.

In reply to question No.5 in his statement under section 342 Cr.P.C appellant/accused Ghulam Abbas stated as follows:

> "I and PW Muhammad Ilyas (given up) who is husband of complainant Mst.Azra Bibi used to work together at Bhatta Khashat. I had good visiting terms with said Muhammad Ilyas. The complainant Mst.Azra Bibi asked me that she wanted divorce from her husband and wanted to get marry with me but I refused as I was already a married person. Due to this reason, the complainant developed grudge in her heart against me and became revengeful to me and due to this reason, she has falsely involved me in this case. I have no connection whatsoever with this murder. PWs are inter-se related. I am innocent."

13. The abovenoted averments made by appellant Ghulam Abbas in his 342 Cr. P.C statement show that he and father of the murdered girl (i.e. husband of the complainant) were co-workers at a brick-kiln and had cordial relations and they were on visiting terms (to each other's house) but when he (the appellant) refused to marry complainant Mst.Azra she held grudge against him for that reason and became revengeful and had, therefore, falsely implicated him in this case (earlier the defence taken during the cross examination of complainant Mst.Azra, as is apparent from a question put to her in her cross examination, was that complainant Mst.Azra had herself murdered her daughter to show her anger and frustration over the refusal of appellant Ghulam Abbas to marry her and had then falsely implicated him to take revenge for his refusal to marry her, even though till then she had not taken any steps to get herself divorced from her husband Ilyas with whom she was, apparently, living happily). Co-accused Sarwar in his 342 Cr.P.C

statement, after denying his part in the commission of the crime, stated that he was involved due to what he was pleased to describe as "party faction in the village" and because "he was real brother of appellant Ghulam Abbas". He however did not explain why, in the first instance, Ghulam Abbas was implicated; being his real brother he could not be ignorant of the cause of his involvement. He also did not clarify what was this 'party faction' due to which he claims he was implicated in the case. Both the co-accused said that they would record their statements on oath under section 340(2) Cr P C 'if necessary' but, eventually, did not consider it necessary to do so and did not record such statements. It is unfortunate aspect of the criminal trials in our courts that 342 Cr P C statements of accused persons are more often than not dictated by defence counsel and do not reflect the real viewpoint of the accused. It is time that the courts should desist from this unethical and illegal practice. We refuse to subscribe to the defence plea taken by appellant Ghulam Abbas.

14. The above evidence would show that it is an admitted, as well as 'proved', position that there was no enmity between the appellant and the complainant and it cannot be believed for a moment that complainant Mst.Azra herself murdered her daughter for the reasons suggested by the defence to the complainant (PW-1), her Dever (PW-2) and the Investigating Officer (PW-8) in their cross examinations and as described in paragraphs 12 & 13 of this judgement. No mother, howsoever callous, can murder her own daughter unless she is insane and there is no evidence to suggest that complainant Mst.Azra was an insane woman. Mst.Azra held her ground and did not buckle during the lengthy cross examination to which she was subjected. Being mother of 7/8-year old minor Tayyaba, it was only natural that she should be sleeping with her, though on separate cots, in the courtyard of her house and her (complainant's) presence at the place of occurrence (her house) in the midst of the night cannot be doubted. She is therefore the most

natural witness of the occurrence. Her and her husband's good relations with appellant Ghulam Abbas stand admitted. The defence theory that she herself murdered her daughter only to punish and implicate appellant for his daring to refuse to marry her has been disbelieved. There is, therefore, no escape from the conclusion that it was appellant Ghulam Abbas who caused the death of Mst.Tayyaba by strangulating her and there is no reason why the evidence of complainant Mst.Azra should not be believed.

PW-2 Mujahid Ali, the Dever of complainant Mst.Azra, corroborates her evidence. Apart from the fact that he is related to the complainant, nothing else can be said against him but mere relationship of a witness with the complainant does not make him an interested witness and is no stigma for which his evidence should be discarded.

Evidence of recovery of the piece of wire

15. The investigating officer stated that he arrested appellant/accused Ghulam Abbas on 06.09.2005 and, during the course of interrogation, he disclosed on 09.09.2005 that he could produce the electric wire with which he had strangulated Mst.Tayyaba to death whereupon he (the Investigating Officer) constituted a police party consisting of himself, constables Maqsood and Ilyas and took with him appellant Ghulam Abbas who took them to his house in his village 'Phagwari' and Ghulam Abbas produced a piece of electric wire **Article P-1** lying under a cot in a room in respect of which Memo of Recovery **Ex. PH** was prepared which was signed by him and on which the two constables signed as musheers of recovery. Musheer constable Maqsood (PW-5) supported this recovery and identified his signature on Ex.PH. However, while the Investigating Officer (PW-8) says in his cross examination that (on reaching the village) he had sent constable

Maqsood (PW-5) for calling the Chowkidar, Lumberdar and Councilor of the village to join the recovery proceedings but none of them was willing to do so, Constable Maqsood, in effect, disowned this averment of the investigating officer and stated in his cross examination that he did not know whether SI Riaz had 'called the Chowkidar, Lumbardar or the councilor of the village at the time of this recovery'. Now, it was not necessary for the investigating officer to call these officials of the village to witness the recovery proceedings as Section 103 Cr PC. was not attracted to the recovery of this piece of wire and it was enough that Constable Maqsood had witnessed the recovery proceedings because 'association of two responsible persons of the locality is not required in a case where the accused himself leads the police to a particular place and gets the article recovered' as held by the Hon'ble Supreme Court in the case of Mir Muhammad Vs State **(1995 SCMR 614)** which judgement was followed by the Peshawar High Court in the case of

Yousuf Vs State (**2000 Cr L J 1386**). However, it is difficult to believe that Maqsood constable was sent (on 9.9.05) by the I.O. to call the three main officials of the village and, only five months thereafter when he was examined in the court, Maqsood could not recall whether the Investigating Officer had made any attempt to associate any of these three village officials with the recovery proceedings. This is very serious contradiction which goes to the root of the creditability of the proceedings pertaining to the recovery of the piece of wire. Moreover, as would appear from the prosecution case, strangulation was not a premeditated act and was resorted to at the spur of the moment and, therefore, if appellant Ghulam Abbas had used this piece of wire in strangulating the victim girl, he must have found it lying near him by the side of the cot of Mst. Tayyaba and picked it up at the spur of the moment. The piece of wire was of very little value and the mind boggles to comprehend that Ghulam Abbas should have taken it into his head

to take this worthless piece of wire with him while making his escape good from the place of occurrence when he and his co-accused were surprised by PW-2 Mujahid and Ilyas (not examined) in the act of commission of the offence. What even more boggles one's mind is the retention by Ghulam Abbas of this worthless piece of wire and keeping it under his cot from the day of occurrence (24.08.2005) to 09.09.2005 when the recovery was allegedly made. Even if Ghulam Abbas had brought it with him it should have been sweeped away while the room was sweeped during all these 15 days from 24.08.2005 to 09.09.2005. It would have been understandable if the piece of wire had been recovered from the side of the cot of deceased Mst.Tayyaba but it is not understandable that it was recovered from the house of the appellant. Moreover, Musheer of recovery, constable Maqsood (PW-5), states in his examination-in-chief that the recovery was made on 9.9.05 but in the 4th line of his cross examination he says that the accused (Ghulam Abbas) was

arrested on 24.09.2005. This makes no sense. How the appellant could have led to the recovery of the piece of wire on 09.09.2005 when he was arrested 15 days thereafter on 24.09.2005? For the abovenoted reasons we are of the view that no reliance can be placed on the evidence of Constable Maqsood and, consequently, on the recovery of the piece of wire Article P-1 at the instance of the appellant.

16. The upshot of the above discussion is that, notwithstanding the doubtful nature of recovery of the electric wire, the evidence of complainant, supported as it is by the evidence of PW-2 Mujahid Ali, is un-assailable and inspires full confidence. The evidence of PWs 1 & 2 as to the manner in which Mst.Tayyaba died is fully supported by the evidence of Lady doctor (PW-4) and the conviction of appellant Ghulam Abbas can be sustained on the basis of this evidence. The argument of learned counsel of the appellant that if complainant's husband had been examined, then

real facts of the case would have come on record is devoid of any force. The husband would have only duplicated the evidence of PW-2 Mujahid Ali. Moreover, the prosecution is not bound to produce each and every witness listed in the calendar of witnesses, as has happened in the present case. Moreover, if the prosecution had not examined any witness which the defence thought was material and necessary it was open to it to request the court to call such witness as a 'court witness' but the defence did not do this. We would therefore uphold the conviction of appellant under section 302 PPC (which should rather have been under section 302(b) PPC.

17. Learned Additional Sessions Judge acquitted appellant Ghulam Abbas of the offence under section 18 read with section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 after making the following observations in Para 30 of his judgement:

> "The prosecution has failed to prove charge of attempt to commit Zina against Ghulam Abbas accused. There is nothing in the evidence to suggest that Ghulam Abbas accused removed his Shalwar or that of Mst.Azra Bibi and committed any act towards the commission of penetration. His act falls short of attempt to commit Zina and at the most his act can be said to be a preparation to commit Zina which is not punishable under the law. However, the prosecution has successfully proved charge of murder against Ghulam Abbas accused beyond any shadow of doubt."

Now, the learned judge has believed the evidence showing that appellant Ghulam Abbas had entered into the house of the complainant, of catching hold of her and of strangulating to death Mst.Tayyaba when she woke up and raised cries. So, what for Ghulam Abbas had entered into the house of the complainant and annoyed the complainant as well as Mst. Tayyaba, if not for the purpose of committing Zina-bil-Jabr with the complainant? If not for committing Zina-bil-Jabr, then he must have entered complainant's

house for committing robbery. He could not have entered the house of the complainant and committed murder of her daughter for no purpose at all. No doubt the stage of untying the Shalwars and trying to affect penetration had not been reached but the stage had been reached whereafter untying the Shalwars and trying to affect penetration were the next steps which were to follow if things had gone as contemplated by the appellant and his co-accused. So appellant Ghulam Abbas, if he is found guilty under section 302(b) PPC, must also have been found guilty either under section 18 read with section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 or, in the alternative, for attempt at robbery under section 393 PPC. However, in the absence of any evidence to that effect, there was no question of his conviction under section 393 PPC and, therefore, it follows that offence under section 18 read with section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, as alleged by the complainant, had been

proved against the appellant and he should have been convicted accordingly. In our view it is a fit case in which notice could have been issued to Ghulam Abbas as to why he should not be convicted under section 18 read with section 10(3) of the Ordinance. However, we feel that it is now too late a stage to do so and let the matter rest as it is.

18. The finding of learned Additional Sessions Judge in respect of co-accused Sarwar, to say the least, appears to be pervert. In Para-29 of his judgement he states that DSP Malik Mahboob Ahmad (CW-1) has found Sarwar innocent during investigation and the pistol, with whose butt he had injured complainant, has not been recovered from his possession and neither had he caused any injury to the deceased nor put noose, alongwith Ghulam Abbas, in her neck, that the complainant had also not challenged the "finding of innocence" of Sarwar at any forum and, therefore, Sarwar was entitled to benefit of doubt. This finding of learned trial judge seems

to be without any rhyme or reason. Finding of the DSP (CW-1) during the course of investigation was not a judicial finding and there is no question of the complainant challenging it before 'any forum'. Besides, the DSP had not conveyed his finding to the complainant and this finding was not on record until the DSP appeared in the court as CW-1. So, how the complainant could have challenged the finding of the DSP before 'any forum'? Complainant had clearly alleged that she had been assaulted by Sarwar with the butt of his pistol, and her evidence has not been shattered in her cross examination and inspires confidence and appears to be creditable, and the evidence of the lady doctor and the medico-legal certificate **Ex.PF** which the lady doctor issued after examining the complainant within hours of the occurrence corroborate the evidence of the complainant, notwithstanding the failure of the prosecution in recovering the pistol from Sarwar and, thus, there was enough evidence on record to sustain the conviction of Sarwar

under Section 337-L (2) PPC. His acquittal has clearly resulted in miscarriage of justice. It is however a matter of regret that neither the State under section 417(1) nor the complainant under section 417(2) Cr.P.C. challenged this acquittal through an appeal. We therefore, under the circumstances, do not consider it appropriate at this late stage to issue show cause notice to Sarwar as to why he should not be so convicted and leave the matter as it is.

19. We also note with dismay that learned Additional Sessions Judge has not given any finding in respect of the charge framed against both the accused (appellant Ghulam Abbas and the acquitted co-accused Sarwar) under section 460 PPC. Learned Additional Sessions Judge was evidently very irresponsible and negligent in leaving this charge undecided and failing to give any finding on it. The case can be remanded to learned trial judge to adjudicate upon this charge but, again, we consider it too late a stage to do so and we

shall therefore assume that both of them had been acquitted of this charge.

20. In short, since conviction of the appellant is upheld vide Para-16 of the judgement, the appeal fails and is dismissed. Cr. Murder Reference No. 12 / I / 2007 is answered in the affirmative.

JUSTICE SALAHUDDIN MIRZA

Fit for reporting.
10.4.09

JUSTICE HAZIQUL KHAIRI
Chief Justice

JUSTICE DR.FIA MUHAMMAD KHAN

Announced on 10-4-09
At Lahore

Amjad/*

Copy of this judgement may be sent to the Registrar, Lahore High Court, Lahore, with reference to paras 17, 18 and 19 of the judgement.

10.4.09.