

**IN THE HIGH COURT OF SINDH AT KARACHI**

Criminal Appeal No. 339 of 2019  
Crl. Acq. Appeal No. 876 of 2019

Appellant : Bejar  
through Mr. Tahir-ur-Rehman, Advocate

Respondent : The State  
through Ms. Robina Qadir, Addl.P.G.

Complainant : through Mr. Muhammad Yousuf Narejo, Advocate

Date of hearing : 9<sup>th</sup> December, 2022

**JUDGMENT**

**Omar Sial, J.:** Bejar Chang, married to Zubaida, had 7 children with her. The marriage was a rocky one and Zubaida would often tell her family that Bejar had another woman in his life who he wanted to marry and that when she objected to a second marriage he would beat her. Efforts by the family to resolve differences between the couple had failed. On 20.07.2015, Zubaida's brother, a man by the name of Niaz Ali, along with his cousin Bhai Khan went to the village where Zubaida resided for Eid. That night, Niaz Ali stayed at the house of another cousin named Azim, while Bhai Khan stayed at Zubaida's home. At 4:00 a.m. on 21.07.2015, Niaz Ali woke up at the noise of some commotion outside. He went out to investigate and saw that Bejar Khan had a gun pointed at Zubaida whereas the children were crying. Bhai Khan was pleading with Bejar not to harm Zubaida; however, Bejar shot her dead. Bejar then, after remaining in the house for some time, made his escape good. F.I.R. No. 24 of 2015 was registered on 22.07.2015 at 4:30 p.m. at the Keenjhar police station under section 302 P.P.C. on the complaint of Niaz Ali.

2. Bejar was arrested at 6:30 p.m. on 29.07.2015 when he himself surrendered at the police station. On 31.07.2015 at 4:30 p.m., the crime weapon was recovered from the home of Bejar upon his pointation. Earlier,

on 21.07.2015, an empty cartridge and blood was collected from the scene of the crime by the police. In addition, to F.I.R. No. 24 of 2015, a separate F.I.R. being No. 28 of 2015 under sections 24 and 25 of the Sindh Arms Act, 2013 was also registered against Bejar 31.07.2015.

3. Bejar pleaded not guilty in both cases to the charge against him and claimed trial. At trial in the case arising out of F.I.R. No. 24 of 2015, the prosecution examined 7 witnesses. **PW-1 Niaz Ali** was Zubaida's brother, an eye witness as well as the person who lodged the F.I.R. **PW-2 Amir Bux** was a cousin of both, the complainant and the appellant, and also an eye witness to the incident. **PW-3 Aijaz Chang** witnessed the inspection of the dead body, recovery of a white cartridge and blood from the crime scene as well as the seizure of the clothes of the deceased by the police and the arrest of Bejar and recovery of the crime weapon. **PW-4 Dr. Yasmeen Memon** conducted the post mortem of the deceased. **PW-5 Ali Akbar** was a tapedar who had made the sketch of the crime scene. **PW-6 S.I. Hadi Baksh** witnessed the arrest of Bejar. **PW-7 Inspector Younus Palijo** was the first police responder on the information of the shooting as well as the investigating officer of the case.

4. In his section 342 Cr.P.C. statement Bejar denied any wrong doing, denied all allegations, professed innocence and said that the complainant had wanted to take Zubaida and her 7 children to his village and that's why he had lodged the false case. He examined himself on oath pursuant to section 340(2) Cr.P.C. and also produced one witness to support his defence i.e. **DW-1 Lal Bux** (his father).

5. In the trial arising out of F.I.R. No. 28 of 2015, the prosecution examined 2 witnesses. **PW-1 Aijaz Chang** was the witness to the recovery. **PW-2 Inspector Mohammad Younus Palijo** was the complainant and the investigating officer. In his section 342 Cr.P.C. statement Bejar said that the gun was a licensed weapon owned by his father and that the same had been foisted upon him. He did not examine himself on oath or produce any witnesses in support of his defence.

6. At the end of the trial, the learned 1<sup>st</sup> Additional Sessions Judge, Thatta on 29.05.2019 announced 2 separate judgments in the 2 trials. Bejar was found guilty of an offence punishable under section 302(b) P.P.C. and sentenced to a life in prison as well as pay a compensation of Rs.100,000 to the legal heirs of the deceased Zubaida. If he failed to pay the compensation, Bejar would have to remain in prison for a further period of 6 months. Simultaneously, the learned trial court acquitted Bejar in the arms case.

7. Bejar has challenged his conviction under section 302(b) P.P.C. by filing Criminal Appeal No. 339 of 2019 whereas the State has challenged his acquittal in the arms case by filing Criminal Acquittal Appeal No. 876 of 2019. The acquittal appeal was heard first by me and after the same was admitted the counsel for the appellant as well as the learned Addl.P.G. gave consolidated arguments. Both appeals will be disposed of through this common judgment.

8. Learned counsel for the appellant has argued that Bhai Khan, who was an eye witness to the incident did not support the prosecution case; the recovery of the gun was doubtful as the same had been foisted upon Bejar; it did not make sense that Bejar would throw a used cartridge at the scene of the offence; there was no eye witness apart from Bhai Khan. He therefore concluded his argument by saying that there was not an iota of evidence against the appellant and that it was a case falsely registered against him due to malafide on the part of the complainant. To the contrary, the learned Addl.P.G. simply supported the impugned judgment. Learned counsel for the complainant adopted the arguments of learned Addl.P.G. My observations and findings are as follows.

#### Eye witnesses

9. The record reflects that there were 3 eye witnesses to the incident. One, was PW-1 Niaz Ali, the other was PW-2 Amir Bux whereas the third was Bhai Khan. PW-1 Niaz Ali was staying at the home of PW-2 Amir Bux on the day of the murder whereas Bhai Khan was staying in Zubaida's and

Bejar's home that night. Both PW-1 Niaz Ali and PW-2 Amir Bux were consistent in stating what they saw i.e. Bejar had shot dead Zubaida. Bhai Khan, was a very important witness. Though he was on the calendar of witnesses for the prosecution, an application was moved by the State counsel at trial saying that Bhai Khan was being given up as he had been "won over" by the defence. Bhai Khan was then named as one of the persons (Lal Bux being the other) who Bejar wanted to examine in his defence. The learned trial judge has noted in his judgment that Bejar would not initially appear to record his testimony and when he was finally arrested and brought to court, he declined to record his statement to support Bhai Khan's defence. I tend to agree with the learned trial judge that in such a situation the presumption contained in illustration (g) of Article 129 of the Qanoon-e-Shahadat Order, 1984 will not come into play. To the contrary, there is a strong argument that once listed as a defence witness, and then declining to appear to record his testimony, may have given rise to the presumption contained in Article 129 of the Order which would then impact Bejar Khan's defence plea. I find the testimony of the 2 eye witnesses who were examined at trial to be trustworthy and confidence inspiring and see no reason why they should not be believed.

#### Recovery

10. The prosecution case is that when the police inspected the crime scene on 21.07.2015 at 9:00 a.m. they found one fired cartridge and blood stained earth which were both sealed on the spot. On 31.07.2015 Bejar led the police to his home where the crime weapon licensed to Bejar's father was recovered. The gun and the cartridge were sent for analysis and vide its report dated 10.08.2015, the Forensic Laboratory opined that the recovered cartridge had been fired from the recovered gun. Learned counsel's argument as to why would the appellant discharge an empty cartridge on the scene of the crime has little weight as the spent cartridge was found from the crime scene which consisted of only one room and not necessarily lying next to the body.

### Medical Evidence

11. PW-4 Dr. Yasmeen Memon opined that Zubaida had been shot once from a very close range and the fire had hit her upper back with pellets exiting from her chest. Medical evidence reconciles with the ocular version.

### Motive

12. The motive for murder according to the prosecution was Bejar's insistence, and Zubaida's refusal, to allow Bejar to enter into a second marriage. This was however not proved at trial. Although Bejar was questioned about his relationship with the wife of one farmer, who ostensibly he had also kidnapped, no evidence was adduced by the prosecution to prove this allegation. The concerned farmer, who was identified during trial, was not called as a witness to support the prosecution story. It appears from the testimony of PW-1 Niaz Ali that the couple's marriage was marred by conflict and although they produced 7 children, physical and mental abuse of Zubaida was rampant during the marriage. The desire for a second marriage may very well have catalyzed prevailing abuse into Zubaida's elimination, however the same was not proved.

### Defence plea and the onus of proof

13. Yet another case of violence against women and yet another case where the husband denies all knowledge. Yet another case of gender based violence in which investigation was not at par. Article 117 of the Qanoon-e-Shahadat Order, 1984 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. The initial burden of proof would therefore lie upon the prosecution. Once that burden has been discharged successfully, some burden would shift on to the accused to show that the prosecution is incorrect or that his case falls within one of the exceptions contained in the Pakistan Penal Code.

14. The Supreme Court of Pakistan in the case of **Shaukat Hussain vs The State reported at 2022 SCMR 1358** has observed that *“In incidents of domestic violence more so in the event of homicidal death of a wife in the house of her husband a heavy onus is cast upon the latter to satisfactorily explain circumstances leading to the tragedy. See Article 122 of the Qanun-e-Shahadat Order, 1984.”* In that case, however, the court found the defence of the husband to be plausible.

15. In the case of **Nazir Ahmed vs The State reported at 2018 SCMR 787** the Supreme Court of Pakistan observed that: *“It has been argued by the learned Deputy Prosecutor-General, Punjab appearing for the State that the deceased in this case was a vulnerable dependent of the appellant and, thus, by virtue of the law declared by this Court in the cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) some part of the onus had shifted to the appellant to explain the circumstances in which his wife had died an unnatural death in his house during the fateful night which part of the onus had not been discharged by the appellant. We have attended to this aspect of the case with care and have found that when every other piece of evidence relied upon by the prosecution has been found by us to be utterly unreliable then the appellant could not be convicted for the alleged murder simply on the basis of a supposition. The principle enunciated in the above mentioned cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) was explained further in the cases of Nasrullah alias Nasro v. The State (2017 SCMR 724) and Asad Khan v. The State (PLD 2017 SC 681) wherein it had been clarified that the above mentioned shifting of some part of the onus to the accused may not be relevant in a case where the entire case of the prosecution itself is not reliable and where the prosecution fails to produce any believable evidence. It is trite that in all such cases the initial onus of proof always lies upon the prosecution and if the prosecution fails to adduce reliable evidence in support of its own case then the accused person cannot be convicted merely on the basis of lack of discharge of some part of the onus on him.”*

16. Bejar and Zubaida were married and lived in a house consisting of one room. They had seven children living with them in the same one room. The eldest daughter was 18 and a son who was 15. In addition, there were his parents and his brother along with his wife who also lived there, though it appears in a dwelling next door. There were therefore 12 persons in the house when the murder occurred. Apart from that, the small house was surrounded by houses of other relatives. In essence, a number of people, family and otherwise, lived in close proximity.

17. Bejar explained at trial that he owned land in the Johrar Forest and that he was working on his land when at 7:00 a.m. or 8:00 a.m. he received information that his wife had been killed the previous night. It took him a very long time to get back home and when he reached home he found out that his wife had been buried. He claimed that his children told him that their mother had been killed by "*someone*". He further claimed that although a number of people had called him on his mobile phone to tell him that his wife had been killed he could not name even one. He could not recollect who informed him of the murder of his wife and further could not confirm whether his father had even called him. He claimed that "*I did not ask nor did my children tell me as to how many people killed my wife.*" I do not believe the story given by Bejar in his defence as the same is unnatural, illogical implausible and absurd. He could not give the time or the day when he had gone to the land across the river; he did not show the title of the land he said was his but in the same breath said that it was the land of the forest department; his story as to why he could not attend to the last rites of his wife was equally absurd. His reluctance to ask his children or the other family members as to what had happened and how, is unnatural to say the least; he or any of his family members (except father) living in the house could not offer an explanation as to who came to the one room house and killed Zubaida; he could not produce even one person to support his alibi, are all circumstances that make me conclude that defence of alibi taken by Bejar was simply not correct. If a genuinely concerned husband had been informed that his wife had been murdered inside their home with

a dozen other people inside and around it, a genuinely concerned and innocent husband would not have reacted in the manner Bejar did. A negative inference is also drawn from the uncanny silence from everybody who was around on the scene of the crime that night, in supporting Bejar, or testifying in his favour. Apart from Bhai Khan, who declined to testify in his defence, the only other witness Bejar produced in his defence was his father. No child of the deceased or the family of Bejar's brother or any other relative or villager who appeared on the crime scene recorded a statement in his support. None, except father, appeared at trial. It is worth noting that even his own father in his examination-in-chief did not exonerate Bejar from the murder. Although in his cross examination he said that his son was not at home at that time. The father was also not a reliable witness as he quite ridiculously, in the circumstances, claimed that while he woke up with the sound of a gunshot he could not tell what time he heard it and then again, he denied that neither had Bejar led the police to the home to recover the weapon nor had he given the weapon to the police, he did not even say who he suspected murdered his daughter-in-law in their home. He admitted that the weapon was with the police but claimed that he had himself gone and given it to them. I also find it extremely unusual that while the father admitted that Zubaida had been killed in his home and that a number of villagers had gathered at the spot when the body was discovered, he could not tell the name of even one of his neighbors who had gathered at the spot. Rural communities are so closely woven that I do not believe the witness when he pleads complete ignorance and failed to name even one other person who could potentially have supported Bejar's defence.

18. As far as Bejar's claim that Niaz Ali filed this false case as he wanted Zubaida and the 7 children to live with him instead of Bejar, is concerned, even if true, why would Niaz Ali kill Zubaida makes little sense. If anybody at all, it should have been Bejar himself who should have felt threatened.

19. Taking guidance from the wisdom of the Honorable Supreme Court, I am of the view that when the dead body of the wife was found in the one

room of the house with a number of people living in it, the husband ran away and did not attend the last rites of his wife, blood was collected from inside the admitted house of Bejar, there was no report or complaint of a break in or the presence of any other person who would want to kill Zubaida, none of the children, or the brother of the appellant came to trial to support him, the reluctance of the appellant to even inquire from his family as to what had happened, there were 2 eye witnesses who saw the incident, whose testimonies I find to be trustworthy, the crime weapon was recovered, an empty was recovered from the crime scene which matched the seized weapon, and all of the foregoing was proved at trial, the prosecution had discharged its initial burden of proof. It was then up to the appellant to could give a plausible explanation of what had happened. He failed to provide a plausible defence.

20. It is with much respect that I am not in agreement with the reasons given by the learned trial court to acquit the accused in the case under the arms legislation. The learned trial court is correct when it observes that each case has to be looked at separately; yet, in a case such as this one in appeal, this view is one of an academic and theoretical nature. If a murder takes place and in the murder case the court is convinced that the gun produced by the prosecution was indeed the gun used for the murder, then how can it be justified in the connecting case that an offence under section 25 of the Sindh Arms Act, 2013 was not established? If a learned trial court is of the opinion that the witnesses in the arms case were dishonest and could not be believed, then how is it logically possible to believe them on the same set of facts, to convict the accused for the crime said to have been committed by that very weapon? Legal technicalities surely cannot be that blind. This court has consistently seen cases where such a conflict has occurred. In my very humble opinion, justice is adversely impacted for the parties when such a conflict happens.

21. I have had the opportunity and the advantage to hear both, the appeal against conviction and the appeal against acquittal filed by Bejar and the State, respectively. After having re-appraised the evidence, I am of the

opinion, in the conviction appeal, that based on the evidence led at trial, the allegation that Bejar killed his wife with this same gun was correct. Section 25 of the Arms Act provides that whoever uses or attempts to use firearm licensed or unlicensed or an imitation firearm with the purpose to commit any crime, any unlawful act or to resist or prevent his lawful arrest or detention or of any other person shall be punishable with imprisonment for a term which may extend to ten years and with fine. Bejar, according to my considered view, did kill his wife with this weapon and this did violate section 25.

Conclusion:

22. (i) Criminal Appeal No. 339 of 2019 is dismissed.
- (ii) Criminal Acquittal Appeal No. 876 of 2019 is allowed. Bejar Chang is convicted for an offence under section 25 of the Sindh Arms Act, 2013 and sentenced to a 5 year term of simple imprisonment and a fine of Rs. 10,000 and in case he fails to pay the fine he will have to remain in prison for a further period of 15 days. The sentence will run concurrently with the one given to him in the case arising out of F.I.R. No. 24 of 2015 (for which Criminal Appeal No. 339 of 2019 was filed) and he will be entitled to avail the benefit of remissions given to him in accordance with law.

JUDGE