

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR

Appeal No. 685/2016

Date of Institution ... 14.06.2016

Date of Decision ... 09.02.2018

Sahib Zar, PTC, GMPS Abu Banda, Salim Khan, District Swabi. ... (Appellant)

VERSUS

1. The Secretary Education (E&SE) Peshawar and two others. ... (Respondents)

SYED NOMAN ALI BUKHARI, ... For appellant
Advocate

MR. ZIAULLAH, ... For respondents.
Deputy District Attorney

MR. NIAZ MUHAMMAD KHAN, ... CHAIRMAN
MR. MUHAMMAD AMIN KHAN KUNDI, ... MEMBER

JUDGMENT

NIAZ MUIHAMMAD KHAN, CHAIRMAN.- Arguments of the learned
counsel for the parties heard and record perused.

FACTS

2. The appellant was dismissed from service on 18.05.2016 against which he filed the present service appeal on 14.6.2016. The background of the case is that the appellant was serving in the Education Department and during that service he was booked for an offence under Section 302 on 19.08.1996. The appellant remained

absent since that date. Finally he was convicted by the Trial Court on 20.05.2000 and the conviction was upheld by the Appellate Court on 21.11.2002. After serving his punishment he was released on 09.6.2010. Thereafter he filed an application to respondent No. 3 for his adjustment on 26.7.2010 which was not responded to and thereafter, the appellant filed a service appeal No. 1272/2012 on 21.11.2012. The said service appeal was finally decided on 19.4.2016 with the direction to the appellate authority to treat the application of the appellant dated 25.7.2010 and 26.7.2012 as departmental appeal and decide the same. That in pursuance to that order respondent No. 3 (the Authority) passed the impugned order dated 18.5.2016 dismissing the appellant from service. Thereafter, the appellant filed the present service appeal.

ARGUMENTS.

3. The learned counsel for the appellant argued that no proceedings were initiated by the department against the appellant right from 1996. That respondent No. 3 through impugned order, dismissed the appellant whereas this Tribunal had directed the appellate authority to dispose of the departmental appeal and not the authority to initiate fresh proceedings. He further argued that in cases of major penalty it was incumbent upon the department to have held regular enquiry. He further added that there are a number of cases in which the civil servants have been reinstated after serving punishment both by the department as well as by the Courts/Tribunal. He specifically referred to some reinstatement orders of civil servants placed on the file. He also referred to a judgment of this Tribunal in case entitled "*Zulfiqar Ali Shah Vs. DIG of Police and another*" decided on 29.8.2017. He next contended that the impugned order was passed in exercise of the powers

conferred under Rule 5(b) (i) & (ii) of the Khyber Pakhtunkhwa Government Servants (E&D) Rules, 2011. That this Rules empowered the department to dispensed with the enquiry only in cases of conviction of any offence other than corruption by a court of law. That the department instead of dispensing with the enquiry straight away dismissed the appellant from service.

4. On the other hand, the learned Deputy District Attorney argued that the appellant was convicted for murder which fell within the scope of Rule 8 of the Khyber Pakhtunkhwa Government Servants (E&D) Rules, 2011 and that the department could rightly order the dismissal without serving any notice. He added that the offence of murder is an offence of moral turpitude as interpreted by the august Supreme Court of Pakistan in a case entitled "*Ghulam Hussain, Vs. Chairman POF and another*" reported as 2002-SCMR-1691. He further argued that there was no legal infirmity in the impugned order and the competent authority was rightly directed by the appellate authority to proceed under the relevant disciplinary rules.

5. At this stage the learned counsel for the appellant pressed into service a letter issued by the Government of Khyber Pakhtunkhwa Establishment & Administration Department (Regulation Wing) dated 03.12.2003 wherein the Law Department had opined that murder was not an offence of moral turpitude.

CONCLUSION.

6. This Tribunal is first to decide whether the order of this Tribunal remitting the matter to the appellate authority on 19.4.2016 was duly complied with. If we go through that judgment, the Tribunal had expressed that it was not in a position to decide the matter as there was no order of department regarding removal or

otherwise, of the appellant and that the appellant was still on the roll of the department therefore, the Tribunal directed the appellate authority to decide the matter so that it should be cleared to the appellant as well as to the Tribunal that what status the appellant had held in the department. The appellate authority could not decide his appeal as there was no original order, therefore, the matter was rightly sent to the competent authority for deciding the status of the appellant. The competent authority after initiating disciplinary proceedings dismissed the appellant. In the impugned order, the competent authority dismissed the appellant on the ground of his conviction in the murder case. The authority then imposed major penalty of dismissal by quoting Rule 5(b)(i)&(ii) of the Khyber Pakhtunkhwa Government Servants (E&D) Rules, 2011. It would be seen that what is the scope of this mentioned rules and whether the competent authority was empowered to dismiss the appellant without holding any enquiry and without serving any show cause notice under the concerned disciplinary rules mentioned above. The quoted rule empowers the authority to dispense with the enquiry in cases where a civil servant is convicted in an offence other than corruption. But the authority instead of dispensing with the enquiry in exercise of powers under this sub rule has dismissed the appellant straight away without show cause notice and without formal enquiry. This Tribunal is to see whether the department had such powers under any other law or rules to order dismissal straight away and if the department had such powers under any law or rules then whether non-mentioning of that relevant law or rules or wrong mentioning of law or rules would result in the order being illegal and liable to be set aside.


7. This Tribunal has gone through the whole rules of 2011 and has found Rule 8 which empowers the department to dispense with not only the enquiry but show

cause notice as well if the civil servant is convicted for an offence of moral turpitude, corruption etc. As per the judgment of the august Supreme Court of Pakistan relied upon by the learned Deputy District Attorney the offence of murder falls within the definition of moral turpitude and the letter of the Establishment Department is not an authority in this respect. Therefore, the department had the power under Rule 8 of the above mentioned rules to straight away dismiss the appellant.

8. Now this Tribunal is to see that what prejudice has been caused to the appellant by mentioning of wrong rules or even the proceedings under wrong rules in substance or ignorance of the department regarding their powers under Rule 8 mentioned above. This Tribunal is of the view that if under any law or rules, the power is available with a functionary and the functionary had acted accordingly then that powers though exercised unconsciously cannot be said to have been exercised under colorable exercise of the authority. Because the power was available which was exercised. Mentioning of wrong law or non-mentioning of enabling law would not benefit the aggrieved person unless it has been shown that the aggrieved person was prejudiced in material terms. In order to determine that whether any prejudice was occasion^{ed} to the appellant the easy criteria is that if the present order is set aside on this score and the department is directed to hold denovo proceedings the department straight away can issue an order under Rule 8 motioned above and the result would be the same. This Tribunal has decided this issue in two judgments entitled "*Mehnaz Hafeez Vs. Government of Khyber Pakhtunkhwa and others*" bearing No. 1340/2013 decided on 18.7.2017 and "*Muhammad Qayum Vs. EDO and others*" No. 670/2014 decided on 12.09.2017. So far as the arguments of the learned counsel for the appellant regarding

reinstatement of other civil servants who were convicted for murder is concerned, the matter before this Tribunal is not that the convicted person cannot be reinstated. At present we are to see whether the department had acted within the powers conferred on it. Every day many civil servants are reinstated by the Government functionaries and the Courts/Tribunal even in cases severe than the present case. The judgment of this Tribunal pressed into service by the learned counsel for the appellant has no relevancy because in that judgment, the appellant was reinstated on the basis of failure to hold denovo proceedings within the stipulated time.

9. Consequently, the present appeal is dismissed. Parties are left to bear their own costs. File be consigned to the record room.


(MUHAMMAD AMIN KHAN KUNDI)
MEMBER



(NIAZ MUHAMMAD KHAN)
CHAIRMAN

ANNOUNCED
09.02.2018

685/16

07.2.2018

Appellant with counsel and Mr. Ziaullah, Deputy District Attorney alongwith Fazle Khaliq, ADO (Lit.) for the respondents present. Arguments partly heard. To come up for further arguments before this D.B on 09.02.2018.


Member



Chairman

09.02.2018

Counsel for the appellant and Mr. Ziaullah, Deputy District Attorney alongwith Fazle Khaliq ADO for the respondents present. Arguments heard and record also perused.

Vide our detailed judgment of today, this appeal is dismissed. Parties are left to bear their own costs. File be consigned to the record room.



MEMBER


CHAIRMAN

ANNOUNCED
09.02.2018

18.05.2017

Counsel for the appellant and Mr. Muhammad Jan, Deputy District Attorney for the respondents present. Counsel for the appellant requested for adjournment. Adjourned. To come up for arguments on 17.08.2017 before D.B.

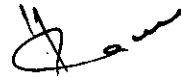

(Gul Zeb Khan)
Member


(Muhammad Amin Khan Kundi)
Member

17.08.2017

Counsel for the appellant present. Mr. Shahi Mulk, Deputy DEO alongwith Mr. Muhammad Jan, Deputy District Attorney for the respondents present. Learned counsel for the appellant seeks adjournment. Adjourned. To come up for arguments on 29.11.2017 before D.B.

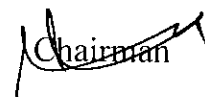

(Muhammad Amin Khan Kundi)
Member (J)


(Muhammad Hamid Mughal)
Member (J)

29.11.2017

Counsel for the appellant and Addl: AG alongwith Mr. Fatal Khaliq, ADO for respondents present. Counsel for the appellant seeks adjournment. Granted. To come up for arguments on 07.02.2018 before D.B.


Member


Chairman

15.08.2016

Clerk to counsel for the appellant and Addl. AG for respondents present. Written reply not submitted. Requested for adjournment. Request accepted. To come up for written reply/comments on 24.10.2016 before S.B.


Member

24.10.2016

Appellant in person and Mr. Fazali Khaliq, ADO alongwith Assistant AG for respondents present. Written reply submitted. The appeal is assigned to D.B for rejoinder and final hearing on 04.01.2017.

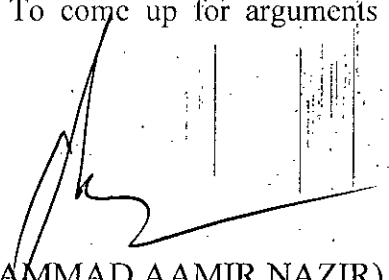

Chairman

04.01.2017

Clerk to counsel for the appellant and Mr. Fazal e Khaliq, ADO alongwith Assistant AG for respondents present. Rejoinder submitted which is placed on file. To come up for arguments on

18.5.17


(ASHFAQUE TAJ)
MEMBER


(MUHAMMAD AAMIR NAZIR)
MEMBER

01.07.2016

Junior to counsel for the appellant present and requested for adjournment. To come up for preliminary hearing on 14.7.2016.


Member

14.07.2016

Counsel for the appellant present. Learned counsel for the appellant argued that the appellant was appointed as PST/PTC on 17.12.1989. He Performed duty till 19.8.1996. The appellant was charged in a case under section 302/34 PPC in FIR No. 692 lodged in police station Kalu Khan Swabi. The appellant was awarded life imprisonment and fine of Rs/-50000 by Session judge Swabi. He filed an appeal in Peshawar High Court, Peshawar, but the sentence was maintained by the PHC. He was placed under suspension. On release from Jail, the appellant submitted an application for adjustment, which was not decided by the respondents. He also filed an appeal No. 1272/2012 in Khyber Pakhtunkhwa Service Tribunal for adjustment as PST. The Service Tribunal vide its judgment dated 19.4.2016 remitted the case to the respondents with the directions to pass orders on the departmental appeal dated 25.7.2010 and 26.7.2010. Instead of implementing the above judgment of Service Tribunal the respondent no. 3 vide order dated 18.5.20163 again imposed major penalty of dismissal from service on the appellant, hence the instant service appeal.

Points urged need consideration. Admit. Subject to deposit of security and process fee within 10 days, notices be issued to the respondents for written reply/comments for 15.8.2016 before S.B.

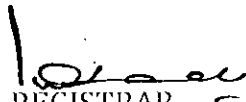

Appellant Deposited
Security & Process Fee


Member

Form- A
FORM OF ORDER SHEET

Court of _____

Case No. 685/2016

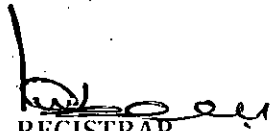
S.No.	Date of order proceedings	Order or other proceedings with signature of judge or Magistrate
1	2	3
1	27/06/2016	<p>The appeal of Mr. Sahib Zar resubmitted today by Mr. Muhammad Asif Yousafzai Advocate may be entered in the Institution Register and put up to the Worthy Chairman for proper order please.</p> <p style="text-align: right;"> REGISTRAR</p>
2-	28-6-2016	<p>This case is entrusted to S. Bench for preliminary hearing to be put up there on. <u>01-07-2016</u></p> <p style="text-align: right;"> CHAIRMAN</p>

The appeal of Mr. Sahib Zar PTC GMPS Abdu Banda Salim Khan Swabi received to-day i.e. on 14.06.2016 is incomplete on the following score which is returned to the counsel for the appellant for completion and resubmission within 15 days.

1- Page No. 38 and 40 of the appeal are illegible which may be replaced by legible/better one.

No. 1031 /S.T.

Dt. 14-6 /2016


REGISTRAR
SERVICE TRIBUNAL
KHYBER PAKHTUNKHWA
PESHAWAR.

Mr. M.Asif Yousafza Adv. Pesh.

*Sir, Re-submitted after compliance
Am - Fai*

**BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.**

Appeal No. 685 /2016

Sahib Zar

V/S

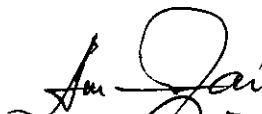
Education Department.

INDEX

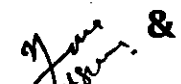
S.No.	Documents	Annexure	Page No.
1.	Memo of Appeal	-----	01-04
2.	Copy of Affidavit	- A -	05
3.	Copy of judgment of high court dated 20.5.2000.	- B -	06-19
4.	Copy of judgment of high court dated 21.11.2002.	- C -	20-37
5.	Copy of Letter	- D -	38
6.	Copy of Application	- E -	39
7.	Copy of order	- F -	40
8.	Copy of application	-G&G1-	41-43
9.	Copy of service tribunal judgment dated 19.4.2016	H	44-47
10.	Copy of order dated 18.5.2016	-I-	48-49
11.	Copy of order of teacher Abdul Qaddus	-J-	50
12.	Copy of order of teacher Shamsur Rehman	-K-	51
16	Vakalat Nama	---	52

APPELLANT

THROUGH:


(M. ASIF YOUSAFZAI),


(TAIMUR ALI KHAN),

 &
(SYED NOMAN ALI BUKHARI)
ADVOCATES, PESHAWAR.

**BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.**

Appeal No. 685 /2016

Khyber Pakhtukhwa
Service Tribunal

Sahib Zar, PTC,
GMPS, Abu Banda, Salim Khan
Distt: Swabi.

Diary No. 633

Dated 14-6-2016

APPELLANT

VERSUS

1. The Secretary Education (E&SE) Peshawar.
2. The Director Education (E&SE) Peshawar.
3. The Distt: education Officer (E&SE),(male) Swabi.

RESPONDENTS

.....

**APPEAL UNDER SECTION-4 OF THE KHYBER
PAKHTUNKHWA, SERVICE TRIBUNAL ACT,
1974 AGAINST THE ORDER DATED 18.5.2016
PASSED BY RESPONDENT DEPARTMENT IN
PURSUANT TO THE DIRECTION OF THIS
AUGUST TRIBUNAL DATED. 19.4.2016 GIVEN
IN APPEAL NO. 1272/2012.**

.....

PRAYER:

**THAT ON ACCEPTANCE OF THIS APPEAL, THE
ORDER DATED 18.5.2016 MAY BE SET ASIDE
AND THE APPELLANT MAY BE REINSTATED
WITH ALL BACK AND CONSEQUENTIAL
BENEFITS BY TREATING THE APPELLANT AT
PAR WITH THOSE WHO HAVE BEEN
REINSTATED BY THE DEPTT: ITSELF IN
SIMILAR SITUATION. ANY OTHER REMEDY,
WHICH THIS TRIBUNAL DEEMS FIT AND
APPROPRIATE THAT MAY ALSO BE
AWARDED IN FAVOUR OF APPELLANT.**

Filed to-day


Registrar

14/6/16

Re-submitted to -day
and filed.


Registrar

22/6/16

RESPECTFULLY SHEWETH:

FACTS:

1. That the appellant joined the Deptt: as PST/PTC on 17.12.1989 and perform his duty till 19.8.1996. As the service record has been misplaced by the respondents, therefore, the appellant is unable to annex the same with the appeal. However, the appellant annex the affidavit to that effect which is attached as **Annexure-A**.
2. That on 19.8.1996 the appellant was charged in a case under section 302/34 PPC in FIR No. 692 of police station Kalu Khan Sawabi. The appellant was convicted for life imprisonment and fine of Rs 50000/- by the Session Judge Swabi. The appellant filed appeal in the Peshawar High Court but the Sentence maintained by the High Court also. (**Copies of Judgment dated 20.5.2000 and 21.11.2002 are attached as Annexure-B & C**).
3. That the appellant during his arrest had also filed application for payment of pay etc during his suspension which was duly forwarded to EDO by the concerned office on 17.12.1999. (**Copies of application, letter and order is attached as Annexure-D, E & F**).
4. Those after release from jail, the appellant filed application for adjustment being not terminated so far till date. The appellant was orally asked to wait till proper order. (**Copy of application is attached as Annexure-G**).
5. That the appellant filed an Appeal bearing No.1272/2012 for adjustment as PST. That the said appeal was finally heard by the Honorable Tribunal on 19.4.2016 and the Honorable Tribunal was kind enough to accept the appeal and remitted the case to respondent with direction to pass orders, on the departmental appeal dated 25.7.2010 and 26.7.2012 needless to mention that in the absence of any express orders the appellant still remain on the roll of department and FR-18 being not in the field the termination of the service of the appellant was not automatic as intercepted by the respondents. The appeal is decided in the above terms. (**Copy of judgment is attached as Annexure-H**).

6. That after the judgment of the august Tribunal, the respondent No's instead of forwarding the case to the appellate authority, has directly passed order of dismissal from service on 18.05.2016. **(Copy of the order is attached as Annexure-I).**
7. That now, the appellant comes to this august Honorable Tribunal on the following grounds amongst the others:

GROUND:

- A) That the impugned order dated 18.5.2016 is against the law, facts, norms of justice and principle of fair play and material on record.
- B) That the impugned order and attitude of respondent department is in sheer violation of Article 4, 10-A and 25 of the Constitution.
- C) That the appellant has been discriminated because previously many other teachers who stood convicted in 302 cases have been reinstated after their release under the garb of not involved in a moral turpitude case. Thus the appellant is also entitled to the same relief and benefits. For proof orders of two teachers are attached as **Annexure-J & K).**
- D) That the order dated. 18.05.2016 is a without lawful authority order because the august Tribunal remitted case for passing an appropriate order on the appeal of appellant but the DEO instead of forwarding the same to the respondent No.3, himself passed dismissal from service order and that too in violation of norms of justice and fair play.
- E) That the appellant has not been served with any show cause notice nor given a chance of personal hearing, thus the appellant has been condemned unheard which is against the principles of Audi Alteram Partem.
- F) That the respondents have violated the directions of this august Tribunal, therefore the impugned order dated. 18.05.2016 is not sustainable at all.

- G) That the appellant has been condemned unheard and has not been dealt with in accordance of E&D Rules 2011.
- H) That the appellant cannot be held responsible for the lapse/irregularities committed by the department and in such cases the Hon'ble Supreme Court of Pakistan has held that the department responsible should be penalized and reinstated the poor employees.
- I) That the dismissal from service is a very harsh punishment and that too without any fault on the part of appellant and without considering his previous more than 10 years service.
- J) That the appellant seeks permission to advance others grounds and proofs at the time of hearing.

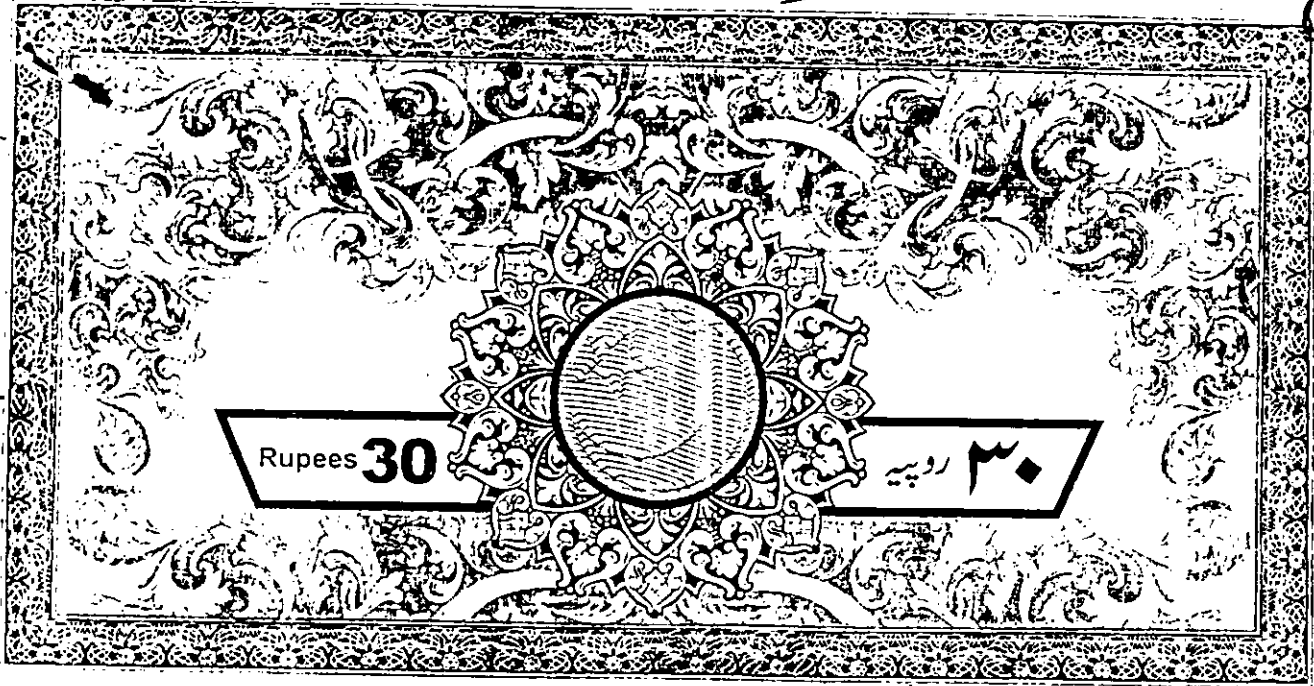
It is, therefore, most humbly prayed that the appeal of the appellant maybe accepted as prayed for.

APPELLANT
Sahib Zar



THROUGH:


(M. ASIF YOUSAFZA
(TAIMUR ALI KHAN), &
(SYED NOMAN ALI BUKHARI)
ADVOCATES, PESHAWAR.



بیان حلفی

کہ میں سی صاحب زر و لہ زمان شاہ کئی کاروان آدینہ کاروان کعبہ زر یا صوبہ بلخ صوبہ بلخ
کا باشندہ ہے کہ میں تبت محل نجوشی در ضلع بیان حلفی عمر راجون کہ میں بطور استاذ پڑھی سی

گورنمنٹ مسجد پیر لہی سکول ابوبانہ قادہ دادانی نسیم خان کعبہ زر یا صوبہ بلخ صوبہ بلخ
میں لکھی ہو چکا تھا۔ سکول حذا میں نے ۱۹۸۸/۸۹ تک اپنی دیوی سر باجام دے چکا ہوں۔

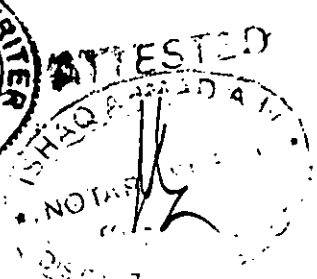
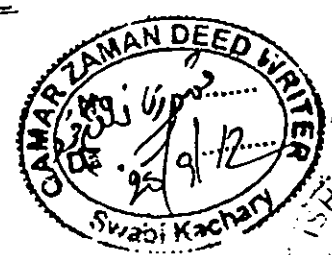
کعبہ زر یا صوبہ بلخ صوبہ بلخ ۱۹۸۸/۸۹ مجھ پر ۳۵۲ الف آئی آر معقول زمان خان و لہ حلفی خان و آریاز و لہ زمان خان
سائن تحت نیکہ کاروان کعبہ زر یا صوبہ بلخ صوبہ بلخ کا وٹوہ مس فلاں سٹیشن پریس کاروان میں درج
ہو۔ ۳۵۲ فیصد عدالت پورٹ لہی کے سائل قید گزار لہی۔ جیل گزرتا ہے میں نے اپنے کعبہ

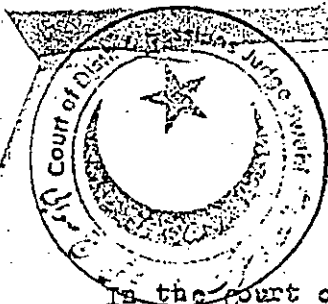
کعبہ زر یا صوبہ بلخ صوبہ بلخ ۵۵۰۵۰۰ ای ڈی آڈیٹ کو دوبارہ سر و س حاصل کرنے کے لیے درخواست دی لیکن یہ قسمی ہے
میں نے سائل منورہ بالا قاصر میں جہاں بیان حلفی بائبل حقیقہ پر مبنی ہے اور میں اس

بیان حلفی کسی قسم کے جعلی یا لہو یا لہو ہے یا لہو ہے یا لہو ہے یا لہو ہے یا لہو ہے یا لہو ہے یا لہو ہے
تو میں خلاف قانون کاروان کا مجاز ہے بیان حلفی کے نام سے سند آریہ آریہ و قہ حلفی

۱۶۲۵۲۰ ۷۹۷۶۵۶۵۰ ۷۹۷۶۵۶۵۰
صاحب زر و لہ زمان شاہ

ATTESTED





Attested Copy

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6

In the Court of Sahibzada Khurshid Ahmad Khan,
Addl. Sessions Judge/Judge Spl; Court,

SWABI.

Special court case No. 75.

Date of institution: 6-11-1999.

Date of decision: 20-5-2000.

The State...versus..... Sahibzar son of Zaman Shah,
resident of Takhta band,
District, SWABI.....Accused.

Charged u/ss. 302/34 PPC, FIR No. 692
dated. 19.8.1996 of P.S. Kalu Khan.

JUDGMENT/

Accd Sahibzar son of Zaman Shah resident of Takhta-band District Swabi has faced trial in this court on charge u/s. 302/34 PPC that he along with his absconding co-accused Sher Akbar and Kamal Khan while, duly armed and in furtherance of their common intention caused qatl-e-amd of Zaman Khan and Ayaz Khan by firing at them with their respective fire arms.

2. Prosecution case as narrated in FIR is that at 11.00 hrs- on 19-8-1996/Mst. Sajida brought dead bodies of her husband Zaman Khan and son Ayaz on cots with the help of co-villagers to P.S. Kalukhan and reported to police that she was ill and coming to Kalukhan Hospital, accompanied by her husband Zaman Khan, son Ayaz and "dewar" Ajab Khan when at 10.00 hours they reached Garhi mur within limits of Takhta band, there Sahibzar, Sher Akbar sons of Zaman Shah and Kamal Khan son of Ghafar Khan, co villagers were present duly armed, who made firing at her husband Zaman Khan and son Ayaz due to which they got hit and died on the spot.

ATTESTED

[Signature]

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the prosecution case...
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EX.PC/2

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Khan, with...
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Occurrence was also witnessed by her brother in law
Majab Khan. Motive is that her son AYAZ was employed
in police department, who was removed from service due
to "shararat" of accid resulting into enmity between the
parties. She charged all the three accid for occurrence.
FIR EX.PA was accordingly registered by P.W. said Bostan
Khan S.I./ I.O.

3. P.W.9 said Bostan SI/I.O. prepared injury
sheet EX.PM/1 and EX.PM/4 of both the decd. He also
prepared inquest report EX.PM/3 and EX.PM/5 and sent
the dead bodies for p.m. examination, under the escort
of Raees Khan F.C. He then went to the spot where he
prepared site plan EX.PB at the instance of complt and
P.Ws. He recorded their statements u.s. 161 cr.pc. Vide
recovery memo EX.PC he recovered and took into possession
some blood stained earth from the spots of both the decd
at the time of spot inspection which were packed and sealed
by him on the spot and he recovered 20 empties of 7.62
bore EX.P.1 from the spot of accid sahibzar and sher Akbar.
From the spot of accid Kamal Khan he also recovered five
empty shells of the same bore EX.P.2, freshly discharged
which were also packed and sealed by him on the spot, vide
said recovery memo. He took into possession the blood
stained clothes of the decd vide recovery memo EX.PC/1.
He also took into possession the blood stained garments
of the decd zaman Khan consisting of a shirt P.3, shalwar
P.4, and white bunyan P.5 and blood stained shirt P.6
shalwar P.7 along with the bunyan EX.P.8 of decd AYAZ,
sent by the Doctor through FC Raees Khan, which were
made into separate parcels sealed by him in presence of
marginal witnesses. vide recovery memo EX.PC/2. He also
marginal witness to the recovery memo EX.PC/2, vide which
in his presence PW Amir Khan took into possession a bullet

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recovered from dead body of Azaz decd, Ex.P.9 vide the said recovery memo. vide his application the copy of which is EX.PW.9/1 he sent the above mentioned blood stained earth and garments of the decd to FSL Peshawar for chemical analysis and vide his application the copy of which is EX.PW.9/2, he sent the empties mentioned above to arm expert for safe custody, and received the result in respect of the garments which is EX.PK and placed on file. All the above mentioned documents are correct and correctly bear his signatures. Further investigation was conducted by Amir Khan SHO of P.S. Kalukhan.

4. Case file was received in this court on 6-11-1999. Accused was summoned and appeared in custody. Copies of statement and relevant documents were delivered to the accused sahibzar. He was charge sheeted on 20-11-99 to which he pleaded not guilty and claimed trial. To prove its case the prosecution examined as many as nine P.Ws. The resume of prosecution evidence, is as under:-

P.W. 1 Dr. Qaim Shah Medical officer of C.H. Kalukhan on 19.8.96 at 12.30 p.m. has conducted the P.M. examination on the dead body of decd zaman Khan son of Jaffar Khan aged about 45/50 years resident of Takhta band and found the following:-

External examination:-

1. A.F.A. entry wound on the left temple of the skull size $\frac{1}{4}$ " x $\frac{1}{4}$ ".
2. A.F.A. entry wound on the left side chest size $\frac{1}{4}$ " x $\frac{1}{4}$ ".
3. A.F.A. entry wound on the left side neck, size $\frac{1}{4}$ " x $\frac{1}{4}$ ".
4. Right half of the skull scalp and brain matter is destroyed and smashed.
5. Four fire arm entry wounds on the left side abdomen size $\frac{1}{2}$ " x $\frac{1}{2}$ ".
6. Four fire arm exit wounds on the back to the right side sizes $\frac{1}{3}$ " x $\frac{1}{3}$ ".

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- 7. A.F.A. entry wound on the front of the left upper arm size 1/4" x 1/4".
- 8. A.F.A. exit wound on the front of the left elbow size, 1/2" x 1/2".
- 9. A.F.A. tearing wound on the left fore arm frontal aspect of size 2"x3" muscle deep.
- 10. A.F.A. entry wound on the lateral aspect of the left knee size 1/4" x 1/4".
- 11. A.F.A. exit wound on the medial aspect of the left thigh size 1"x1/2".

Internal examination:-

Cranium and spinal cord: scalp, was injured and skull was fractured. Right half smashed and destroyed. Membranes and brain... were injured.

Abdomen:- walls, peritoneum, small intestines and large intestine: were injured, and stomach was healthy and was full with semi digested food.

Muscles, bones and joints: Muscles of the left femur and left humerus were injured. Left humerus and left femur were fractured.

Remarks:-

In his opinion the death had occurred due to injury to the brain as a result of the injuries No. 1, 2 and 3 caused by fire arm. Time between injuries and death; was instantaneous. Time between death and P.M. was within 24 hours.

The P.M. examination report EX.PM is in his hand writing and correctly bears his signature. His endorsement on the injury sheet EX.PM/1 and the inquest report EX.PM/2 are in his hand writing and correctly bear his signatures.

On the same date, at 11.40 p.m. he also conducted the p.m. examination on the dead body of decd Ayaz son of Zaman Khan aged about 27/28 years, resident of Pakhta band and found the following:-

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External examination:-

1. A.F.A. entry wound on the front of the left chest 2" medial to the anterior axillary line, in the third intercostal space, size 1/4" x 1/4".
2. A.F.A. entry wound on the right left size 1/2" x 1/2".
3. A.F.A. entry wound on the right flank size 1/4" x 1/4".

Internal examination:-

Thorax:- walls, ribs and cartilages, plurae, right and left lung and heart, with pericardium were..injured.

Abdomen:- Walls, peritoneum small and large intestines, right kidney, were injured. Stomach was healthy and full with semi digested food.

Remarks:-

In his opinion the death had occurred due to damage to the heart and both lungs as a result of the injuries No. 1 caused by the fire arm. Time between injuries and death..instantaneous. Time between death and P.M:..was within 24 hours. A bullet removed from the dead body and handed over in sealed bottle along with the shirt, banyan blood stained and bearing corresponding cut marks to the injuries and the P.M. report were handed over to police constable Raees Khan No. 133. The P.M. examination report EX.PM/3, endorsement on the injury sheet and inquest report EX.PM/4 and EX.PM/5 are also in his hand writing and correctly bear his signature.

P.W. 2 Raees Khan No. 123 PS Kalukhan had escorted the dead bodies of Zaman Khan and Ayaz to the mortuary at C. H. Kalukhan. No body interfered with the dead bodies during his transit. After the P.M. examination the doctor handed over the clothes of the decd, blood stained which he produced to the I. O.

P.W. 3 Jammad son of Namdar is marginal witness to recovery memos EX.PC, EX.PC/1. He has verified the contents of said memos to be correct and bear his signatures.

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P.W. 4 siraj gul son of rahim gul had correctly identified the dead bodies of decd Ayaz Khan and zaman Khan before the police as well as before the Doctor at the time of P.M. examination.

P.W. 5 Mohammad sher constable No. 532 had completed the process of s. 204 cr.pc. and 87 cr.pc. against the present accused and absconding co-accused vide warrants EX.PW. 5/1 to EX.PW.5/6 and proclamation notices with its reports EX.PW.5/7 to EX.PW.5/12, which were correctly signed by him.

P.W. 6 Amir Khan the then SHO of P. S. Kalu Khan has partially investigated the case. vide recovery memo EX.PC/2 he took into possession a sealed bottle containing bullet sent by the Doctor through FC Raees Khan, which was recovered from the dead body of the decd, the memo is correct and correctly bear his signature. He has also recorded the statement of P. Ws u. s. 161 cr.pc. and placed on file the P.M. report. Accd were absconding therefore, vide his application EX.PW.6/1 has got received warrants u.s. 204 cr.pc. through court of J.M. Swabi and accd were avoiding their lawful arrest intentionally therefore, vide his application EX.PW.6/2 he also obtained proclamation notices u. s. 87 cr.pc. from the concerned court. He recorded statement of DFO concerned. after completion of investigation he submitted challan on 3.9.96 u. s. 512 cr.pc. against the accused.

P.W. 7 Munawar Khan SI has arrested the accd facing trial sahibzar on 6.10.99 during gusht. He obtained his two days police custody from the concerned court vide his application EX.PW.7/1. He interrogated him. He recorded his statement u. s. 161 cr.pc. vide his application EX.PW.7/2 he obtained further two days police custody of the accd facing trial and interrogated him. vide his application EX.PW.7/3 he once again obtained his two days police

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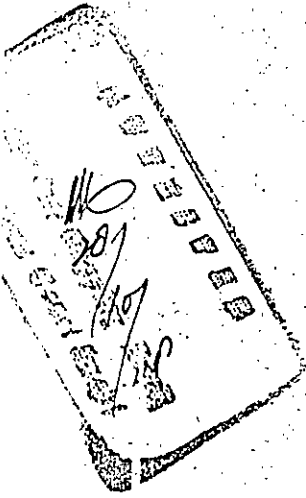
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custody and interrogated him. vide his application EX.PW.7/4 he produced the aced facing trial in the court of J.M. Swabi for recording his confessional statement but he refused and was sent to Judl:lock up. On 13.10.99 he submitted supplementary challan against the aced which is in his hand writing and bear his signature.

P.W. 8 Mst. Sajida widow of zaman Khan stated that zaman Khan was her husband while, Ayaz was her son. P.W. Ajab Khan is the brother of her decd husband. Izat Shah is the paternal uncle of sahibzar and sher Akbar. The daughters of qadim shah were married to Izat shah and Ajab Khan. In this way the aced facing trial related to them including PW Ajab Khan. On the eventful day she was a ill and coming to Kalukhan Hospital along with her husband zaman Khan, Ayaz Khan son and P.W. Ajab Khan the brother of her husband. At about 10.00 A.M. when they reached Garhi mur there, sahibzar, Sher Akbar and Kamal Khan were present duly armed with Klashnikovs, who made firing at her husband zaman Khan and son Ayaz due to which they got hit and died on the spot. The occurrence was witnessed by her as well as PW Ajab Khan. Motive for the occurrence was that her son Ayaz was employee in police who was removed from service due to "shararat" of accused, due to which deferences and illwill was created between them. She raised hue and cry due to which people attracted to spot, who lifted her husband and son to the cots and they took them to the PS where she lodged her report about the occurrence against the accused. She seen her report today in court which is correct and correctly bears her thumb impression. The same is EX.PA. The decds were then despatched to the mortuary where she accompanied the I.O. to the spot along with PW Ajab Khan. where on her pointation a site plan was prepared. PW Ajab Khan was also present at that time. she charged the



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accused for the murder of her husband and son and demand Qisas.

P.W. 9 said Bostan Khan the then S. I. of P. S. Kalu-Khan has investigated the instant case and his role has already been discussed in early part of the judgment therefore, needs no repetition.

5. P.W. 6 Mohammad Zaman and Saad were abandoned by the prosecution being unnecessary and P.W. Ajab Khan being won over, and closed its evidence on 5.4.2000.

6. statement of accused was recorded u. s. 342 cr. pc. in which he refuted the allegations and professed innocence. He however, did not wish to be examined on oath nor to produce any defence.

7. I have heard the arguments of A.P.P. for the state, assisted by complt counsel, defence counsel for the accused and perused the record carefully.

8. Accusation against accused Sahibzar is that he along with his absconding co accused gher Akbar and Kamal Khan while, duly armed and in furtherance of their common intention, caused Qatl-e-Amd of zaman Khan and his son Ayaz Khan by firing at them.

9. It is a daylight occurrence. During the gory incident two persons were done to death by spraying bullets on them. FIR was lodged within one hour of occurrence which took place at 10.00 a.m. while, report was made at 11.00 a.m. P.S. is at a distance of 2/3 K.Ms from spot as such, it is a promptly lodged FIR, hardly leaving any scope for consultation and deliberation.

10. Ocular account was furnished by P.W. 8 Mst. Sajida complainant who is the widow of zaman Khan decd and mother of Ayaz decd. she has deposed in natural and straight forward manner. No doubt she is closely related to decd but the relationship alone is not sufficient to discard the testimony of a witness unless it is established that the witness is --

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inimical towards accd or having some personal motive to falsely implicate him. It is the intrinsic value of the evidence which matters. In present case it has not been shown that Mst. Sajida was having any personal motive to falsely implicate the accused for the double murder and let go real culprits. Even otherwise, substitution is a rare phenomenon. P.W. 8 Mst. Sajida complt supported her FIR and deposed in chief that on the eventful day she was ill and coming to Kalu Khan Hospital along with her husband Zaman Khan, son Ayaz Khan and PW Ajab Khan, the brother of her husband. At about 10.00 a.m. when they reached "Garhi moar" there Sahibzar, Sher Akbar and Kamal Khan were present duly armed with Klashnikovs who made firing at her husband Zaman Khan and his son Ayaz Khan, due to which they got hit and died on the spot. The occurrence was witnessed by PW Ajab Khan. Motive for occurrence was that Ayaz was an employee in police and she was removed from service due to the "gharabat" of accused, due to which differences and illwill was created between them. She raised hue and cry due to which people were attracted to spot who lift her husband and son to the cot and they took them to the P.S. where she lodged the report about the occurrence. She was subjected to lengthy cross by defence side but no major dint or shake in favour of accused could be made. She has reasonably explained her presence with decds on spot at relevant time and her statement is confidence inspiring.

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11. Medical evidence corroborates ocular account as both the decds sustained multiple fire arm inlet wounds on their person which are commensurate with number of accused. From spot blood stained earth was recovered by I.O. from place of both the accd and 20 empty shells of 7.62 bore were recovered from places of accused facing trial and Sher Akbar absconding co accd while, five empty shells from place of Kamal Khan co accused.

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12. Accused facing trial remained absconder for more than 3 years 2 months which could not be reasonably explained. Occurrence is of 19.8.96 while, accused was arrested on 6.10.99. Warrants u.s.204 cr.P.C. and proclamation notices u.s.87 cr.pc. were issued and proceedings u.s.512 cr.pc. was also completed against him. It is well settled that abscondance itself does not prove the guilt of an accused person but it definitely corroborates ocular account.

13. According to prosecution, the motive for the occurrence is that decd Ayaz was employee in police department who was sacked/removed from service due to the mis-chief of accused as a result of which differences and ill-will was created between them. Pw.8 Mst.Sajida has testified in support of such motive. She has not been specifically cross-examined in this respect nor defence side has dis-proved the motive.

14. Some objections raised by defence side are discussed here. It was asserted by defence side that PW Mst.Sajida admitted in evidence that she had not fallen on dead bodies of decds nor kissed them at that time which depicts her strange conduct, thus making her presence on spot, as doubtful. Objection is not sustainable for the reason that it is not unusual that she would have been scared by the aggression of accused party at that time and in such moment of shock and grief one hardly retains her normal senses. It was next objected by defence side that presence of PW Mst.Sajida on spot is doubtful because she having undergone paralysis on right hand and right leg could not move so as to be present on spot. The objection has little value because she has clarified that she had undergone paralysis attack before two months of the occurrence. According to her she was having temperature and paralysis for treatment of which she was going to Hospital. It is to be noted that she stated in cross that she had gone on foot while, accompanying the cots of both the decd to P.S. defence assertion that the inlet wounds were found on left side of decd with its exit

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on right side, ^{and-} that assailants were on northern side in the grave-yard who were wrongly shown towards south in site plan EX.PB. The plea is not tenable for the reason that P.W.9 said Bostan I.O. had denied the suggestion that there exist any grave-yard towards northern of the spot. The decds were certainly not statues that they had stayed at one position and not moved on sighting assailants. Ayaz decd sustained most of inlet wounds on his right side. Besides this, the site plan is not substantial piece of evidence. The defence assertion that decds were having enmity with large number of persons in the area and occurrence was the result of the same, is not tenable. P.W. Mst. Sajida has certainly not suppressed the position with regard to previous incidents on this account. she however, categorically stated that all such differences were patched up and due to compromise decds were not having bad blood with any one except the accused. It was also contended by defence side that non- production of P.W. Ajab Khan who is the real brother of decd and mentioned as eye witness in FIR is a fatal blow to prosecution case. The contention has little force because it has been reasonably explained by prosecution that the wife of P.W. Ajab Khan is real sister of the paternal aunt of accd facing trial and gher akbar absconding accused and that due to the pressure of both the absconding co accd P.W. Ajab Khan was hesitant in deposing against them. Accused has also not deposed on oath nor produce any evidence in his defence.

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15. some case law is reproduced below for elucidation of legal position in respect of points discussed earlier:-

1- 1998 S C M R page-1825.

c)S. 302/34 PPC... Evidence.. Interested witnesses.. test.. Interested witness in a criminal case is one who has motive to involve the accd falsely in the case... Mere friendly relation or relationship of the

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witness with the deceased or complainant party is no ground to discard his evidence describing him as an interested witness.

- f)S. 302/34 PPC...Art. 22 qanun-e-shahdat gate plan , utility of...site plan is prepared only to explain or to appreciate the evidence on record and same being not a substantive piece of evidence, cannot contradict the ocular account in the case.
- h)Abscondance of accused...Abscondance by itself is not sufficient to prove guilt of absconder, but it may provide corroboration to other evidence and circumstances proving his guilt, "

2- 1999 S C M R page- 329.

- b)S. 302 PPC--re-appraisal of evidence.. Interested witnesses...Such witnesses was a person , who had a motive to falsely implicate a person...Ocular testimony had been furnished by the first informant who was the husband of the sister of decd lady and his brother.... Contention was that such witnesses being closely related to decd, their testimony could not be believed...Mere relationship held, was no basis to discard the evidence of such witnesses.
- c)Witness...Interested witness was a person, who had a motive to falsely implicate another person....Mere relationship of the decd was no basis to discard the evidence of such witness, "

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3- 2000- P.G.R.L.J. page-47 Lahore(DB).

- c)S. 302/324/34 PPC...Interested witnesses... Test..Relationship of a witness by iteself was not a valid ground for discrediting or rejecting sworn testimony...Not an invariable rule that interested evidence could never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence..Interested witness was not necessarily un-reliable evidence.

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5)S. 302/324/34 PPC...Appreciation of evidence...Discrepancies and inconsistencies in prosecution evidence...Effect..No criminal case was free from such inconsistencies and discrepancies, main thing which was to be seen was whether some went to the root of the matter or pertained to the insignificant aspect thereof...Preferrence in the case going to the root of the matter be justified in seeking advantage of incongrities in the evidence, No such benefit, however, was available in a case which pertained to insignificant aspect of the case and it was the salutary method of appreciation of evidence in criminal cases.

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b)substitution of accd in criminal case...is a rare phenomenon and one who alleges substitution must lay foundation for the same, ".

1976 SCMR page-136 says, " witnesses related to accused would not normally allow real murderer to escape by implicating innocence person.

1996 P. Cr. L. J. page 418(a) and 1997 P. Cr. L. J. page 1673 Quetta (a) say, that conviction of accd can be based on the statement of solitary witness provided it does not suffer from infirmities.

In the cases reported in , PLD 1972 Peshawar page-27 DB(a) and PLD 1979 Peshawar page-206 (c) are to the effect that no adverse interference can be drawn where P.Ws who are not supporting prosecution case are abandoned.

1994 P. Cr. L. J. page -2265 Peshawar says, that non-description of crime weapon is not detrimental to prosecution case.

In the case reported in 1976 SCMR page-128, the solitary witness was an old lady held, there was no reason for such old lady to falsely implicate the accused.

1992 SCMR page-1625 says, abscondance corroborates ocular account

1995 P. Cr. L. J. page-313 Peshawar says, that motive absence or weakness of motive, would not help the accd against whom

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unimpeachable evidence is available nor the same would devalue or render less trust-worthy reliable & direct evidence.

1984 SCMR page-645 is to the effect that no invariable duty placed on prosecution to prove motive and its failure to do so held, immaterial if direct and reliable inculpatory evidence was otherwise, available. Motive other than one asserted by prosecution, if present, same would be within knowledge of accid and it was for the accid to come out in order to satisfy that offence committed fell within any exception.

16. For the afore-said position, the prosecution has reasonably proved its case against the accused facing trial. It has been established that accid sahibzar along with his absconding co-accused in furtherance of their common intention committed Qatl-e-Amd of Zaman Khan and Ayaz Khan. By way of abundant caution and keeping in view the over all circumstances of case I desist from imposing major penalty of death on him. He is convicted and sentenced u/s. 302(b)/34 PPC to imprisonment for life on two counts and also directed to pay compensation of Rs. 50,000/- to the legal heirs of each deceased or in default to suffer two years S.I. on each count. Both the sentences awarded to the accid shall run concurrently. The benefit of S. 382-B, Cr.P.C. is also extended to him. An attested copy of this judgment is given to the accused free of costs. He is in custody and sent to Jail along with jail warrant.

17. So far as the case of absconding co-accused gher Akbar and Kamal Khan is concerned, my this judgment shall have no bearing on their case. They are already proceeded u.s. 512 cr.p.c. Perpetual NBW of arrest be issued against them. D.M. Swabi be informed to include their names in the register of P.O.s. Case property, if any, be kept intact till the arrest and trial of absconding co-accused. File be consigned to the R.R. announced.

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(Sahibzada Khurshid Aamad)
 Asst/Judge Spl: Court, SWABI.

Bated. 20-5-2000.

Certified that my this judgment consists of (14) pages. Each page has been read, corrected and stated where-even it was necessary.

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Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR.

JUDICIAL DEPARTMENT.

.. Cr. A. No. .. 217 of 1998

JUDGMENT

Date of hearing .. 21.11.2002 ..

Appellant. (Sahibzar) by M. S. S. M. S. Akhbar Advocate

Respondent. (State) by M. S. S. M. S. Akhbar Advocate
WV. A.S.S. aduqlik rwa champion aduqlik jst complimant

IJAZ-UL-HASSAN, J. - The appellant namely

Sahibzar son of Zaman Shah, resident of 'Takhtband' District Swabi was tried by learned Additional Sessions Judge/Judge Special Court Swabi on a charge under sections 302/34 PPC on the allegation of having, in furtherance of his common intention with absconding co-accused Sher Bahadur and Kamal Khan of the same residence, caused death (Qatl-e-Amd) of Zaman Khan and his son Ayaz Khan by firing. Vide judgment dated 20.5.2000, the learned trial Judge found appellant guilty of the said charge and thus the appellant was convicted under section 302(b)/34 PPC to imprisonment for life (on two counts) and to pay compensation of Rs.50,000/-to legal heirs of each deceased or in default to suffer two years simple imprisonment on each count. Both the sentences were ordered to run concurrently. Benefit of section 382-B, Cr.P.C. was also extended to the appellant.

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2. Feeling aggrieved of his conviction and sentence, the appellant has assailed the same by way of filing instant Criminal Appeal No.217/2000 which is before us for consideration.

3. The crime in question culminating into the murders of Zaman Khan and Ayaz Khan, is alleged to have taken place on 19.8.1996 at 10.00 A.M. at a place masooma 'Gari Mor', in the limits of Takhtband District Swabi and the report (Ex.PA) about it was lodged the same day at 11.00 A.M. at Police Station Kalu Khan, distant 2/3 Kilometers from the spot, at the instance of Mst.Sajida complainant wife of Zaman Khan deceased and it was recorded by ASI Said Bostan Khan (PW.9).

4. The case of the prosecution in brief is that on the eventful day i.e. 19.8.1996 at about 10.00 A.M. Mst.Sajida (PW.8) accompanied by her husband Zaman Khan, son Ayaz Khan and brother-in-law Ajab Khan was on her way to Civil Hospital Kalu Khan for medical treatment. When they reached 'Gari Mor' Takhtband, Sahibzar (appellant), Sher Akbar and Kamal Khan (absconding co-accused) already sitting at the venue of occurrence

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resorted to firing at the deceased. The deceased were fatally hit and died there and then.

Explaining the motive behind the occurrence it was disclosed that Ayaz Khan one of the deceased employed in police Department was removed from service and the accused were suspected of having a hand in his removal.

5. S.I. Said Bostan Khan (PW.9) the then ASI Police Station Kalu Khan after recording the report (Ex.PA), prepared injury sheets and inquest reports of the deceased and despatched the dead bodies to the hospital for post mortem examination under the escort of F.C.Raees Khan (PW.2). He then proceeded to the spot and on reaching there prepared site plan (Ex.PB) at the pointation of complainant and P.Ws. Vide memo (Ex.PC/1) he recovered some blood stained earth from the spots of both the deceased and took the same into possession. He also recovered twenty empties of 7.62 bore and five empty shells of the same bore giving smell of freshly discharged powder from the spot. He also took into possession a bullet (P.9) extracted from the dead body of Ayaz Khan deceased. The blood stained earth

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secured from the spot and the last worn clothes of the deceased were sent by him to Forensic Science Laboratory Peshawar for analysis. He also sent the empties recovered from the spot to Arms Expert Peshawar for safe custody. He handed over the remaining investigation to SHO Amir Khan Police Station Kalu Khan (PW.6). The latter partially investigated the case, obtained warrants of arrest and proclamation against the accused and submitted challan in court on 3.9.1996.

1/2 - Dr. Amir Khan

6. Dr. Qaim Shah (PW.1) the then Medical Officer Civil Hospital Kalu Khan on 19.8.1996 at 12.30 P.M. conducted post mortem examination on the dead body of Zaman Khan and found the following:-

External Examination:

1. A.F.A. entry wound on the left temple of the skull size 1/4" x 1/4".
2. A.F.A. entry wound on the left side chest size 1/4" x 1/4".
3. A.F.A. entry wound on the left side neck size 1/4" x 1/4".
4. Right half of the skull scalp and brain matter is destroy and smashed.
5. Four fire arm entry wounds on the left side abdomen size 1/2" x 1/2" each.
6. Four fire arm exit wounds on the back to the right side sizes 1/3" x 1/3".

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- 7. A.F.A. entry wound on the front of the left upper arm size 1/4" x 1/4".
- 8. A.F.A. exit wound on the front of the left elbow size 1/2" x 1/4".
- 9. A.F.A. tearing wound on the left fore arm frontal aspect size 2" x 3" muscle deep.
- 10. A.F.A. entry wound on the lateral aspect of the left knee size 1/4" x 1/4".
- 11. A.F.A. exit wound on the medial aspect of the left thigh size 1" x 1/2".

Internal Examination.

Cranium and spinal cord, scalp, membrane and brain were found injured and skull fractured. Abdomen, walls, peritoneum, small intestines and large intestine were also found injured and stomach was healthy and full with semi digested food. Time between injury and death was found instantaneous whereas time between death and post mortem examination was within 24 hours.

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On the same day at 11.40 P.M. Dr. Qaim Shah conducted the post-mortem examination on the dead body of Ayaz Khan and found the following:-

External Examination:

- 1. A.F.A. entry wound on the front of left chest 2" medial to the anterior axillary line in the third intercostal space, size 1/4" x 1/4".
- 2. A.F.A. entry wound on the right left size 1/2" x 1/2".
- 3. A.F.A. entry wound on the right flank size 1/4" x 1/4".

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Internal Examination:

Thorax, walls, ribs and cartilages, pleurae, right and left lungs and heart, with pericardium, were found injured.

Abdomen: Walls peritoneum, small and large intestines, right kidney, were also found injured. Stomach was healthy and full with semi digested food.

Death was found to have occurred due to damage to the heart and both lungs as a result of injury No.1 caused by fire arm. Time between injuries and death was instantaneous and time between death and post mortem examination was 24 hours.

7. The prosecution in order to substantiate the charge examined nine witnesses in all. Mst.Sajida complainant supported the prosecution version and furnished eye witness account of the incident. PW.Ajab Khan claimed to have accompanied the complainant party at the time of occurrence and seen the incident was withheld by the prosecution on account of having been won over by the accused party.

8. In his statement recorded under section 342 Cr.P.C. the appellant denied the prosecution allegations and claimed to have been falsely charged on mere suspicion. He disputed absconcion and stated that on learning about the occurrence he voluntarily surrendered before the police. In answer to a question as to why the prosecution witnesses have deposed against him he stated:-

"Only complainant being closely related to both the deceased has deposed against me on account of suspicion though I was in no way

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involved in the dismissal of the deceased Ayaz Khan nor there was any quarrel between us. Later on, I have come to know that deceased Ayaz Khan was dismissed from his service on account of his forged educational certificate and unsound character."

He did not want to examine himself under section 340(2) Cr.P.C. and he did not offer any evidence in defence.

9. We have heard at length Mr. Javed A. Khan Advocate for the appellant, Ms. Musarrat Hilali, Additional Advocate General for State and Mr. Asadullah Khan Chamkani, Advocate for the complainant. We have also gone through the material available on the record with their able assistance.

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10. Learned counsel for the appellant attacked propriety of impugned judgment on various grounds and contended with force that the learned trial court has not only misread the evidence but also greatly misexercised its jurisdiction by placing undue reliance on the solitary deposition of Mst. Sajida complainant, who has totally failed to justify her presence at the spot. The learned counsel also submitted that

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the F.I.R. in this case has been lodged with considerable delay and that P.W. Ajab Khan claimed to have seen the occurrence, has been withheld by the prosecution without good reason which has created dent in the prosecution case. The learned counsel further asserted that the motive set up by the prosecution has not been established and the appellant had no reason to participate in the offence. In reply to the submissions of learned counsel for the complainant, regarding abscondence of the appellant, learned counsel for the appellant urged that abscondence has not been proved; that the appellant did not abscond and on hearing of the charge he voluntarily appeared before the police. Concluding the arguments the learned counsel contended that neither the medical evidence nor the circumstantial evidence brought on the record support the prosecution version and in absence of corroborative evidence, learned trial Judge had no good reason to draw a conclusion that prosecution has succeeded to establish its case beyond shadow of reasonable doubts. In support of the submissions, he relied

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on Muhammad Ilyas appellant vs. The State respondent (1997 SCMR 25), Asghar convict-appellant vs. The State respondent (PLD 1970 Lahore 878), Mehboobur Rehman appellant vs. The State respondent (1996 P.Cr.L.J.238 Peshawar) and Gul Mohammad vs. The State (2002 P.Cr.L.J.1177 Karachi).

11. Learned counsel for the complainant, on the contrary, supported the impugned judgment of conviction and attempted to argue that overwhelming evidence was available on the record to implicate the appellant with the murder of Zaman Khan and his son Ayaz Khan, a young man of 27/28 years of age and as such the learned trial Judge was quite justified to hold that prosecution has succeeded to establish its case against the appellant and the absconding co-accused. The learned counsel asserted that the medical evidence, recoveries and evidence on the point of motive fully connect the appellant with the guilt. He further submitted that immediately after the occurrence the appellant disappeared from the village and remained in hiding for sufficient long time which clearly proves his guilty conscious.

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To add vigour to the submissions, reliance was placed on Dosa and others appellants vs. The State respondent (2002 SCMR 1578), Abdul Ghafoor vs. The State (2000 SCMR 919), Muhammad Amin vs. The State (2000 SCMR 1784), Jan Muhammad appellant vs. Muhammad Ali and three others respondents (2002 SCMR 1586), The State vs. Mushtaq Ahmad (PLD 1973 SC 418) and Allah Bakhsh vs. Ghulam Rasool and others (1999 SCMR 223).

12. It needs no reiteration that while passing an order of conviction of an accused for murder the court has not only to be satisfied that the murder has been committed but it must also be satisfied that accused committed the murder. Before recording an order of conviction all the facts and circumstances of the case must be taken carefully into consideration and the golden principle of the Criminal Jurisprudence must be borne in mind that in case of murder the onus of proof always lies upon the shoulders of the prosecution and that the case must be proved against the accused beyond any reasonable doubt. Ghulam Abbas and others vs. The State (2001 P .Cr.L.J. 1672), Tariq Parvez vs. The State (1995 SCMR 1345) and Hakim Ali and

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others vs. The State (1971 SCMR 432).

13. Coming to the instant case, we find that appellant is one of the accused persons directly nominated in the promptly lodged FIR by Mst. Sajida complainant for murder of her husband Zaman Khan and son Ayaz Khan. The matter has been reported to the police without loss of time. It is not denied that the promptitude in lodgment of the First Information Report, per se, is not a guarantee of truthfulness of its contents. But where a first informant /complainant has no time to reflect upon the incident, has no occasion to consult with his family members and to ponder over the matter in order to concoct a story whereby he could assign role of his choice to his enemies, the FIR narrative can be considered fairly true account of the occurrence. Prompt lodging of the F.I.R. in this case is a circumstance corroborating the eye witness account furnished by the complainant. Nothing is available on the record of this case to doubt the claimed lodging of the FIR at the stated time. This promptly lodged FIR contains all the relevant details of the occurrence including the names of the accused as well as the role played by them

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during the incident. We share the view of the learned State counsel that there was little time available in this case firstly for procuring the complainant and then for deliberations for the purpose of substitution or false implication of the appellant. The complainant has fully justified her presence at the spot and we see no good reason to exclude her testimony out of consideration. The complainant has given a straightforward and faithful account of the tragedy and despite lengthy cross examination her testimony could not be shaken. The solitary statement of the complainant is sufficient to sustain conviction of the appellant. The contention of appellant's counsel that prosecution has failed to produce an independent evidence to corroborate the statement of complainant, is misconceived. It is true that complainant is closely related to the deceased but mere relationship has never been considered to be sufficient to discard the testimony of an eye witness if otherwise it inspires confidence of the court and remains unshaken when subjected to the test of cross examination. The presence of the complainant

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at the spot is neither extraordinary or unusual. The argument that the appellant was substituted for the real assailant has not been supported or substituted by any circumstance existing on record. We have not been shown any other person more inimical to the deceased other than the appellant. The plea of substitution is banal and is not supported by any aspect of the case.

14. It was also contended before us that the medical evidence runs contrary to ocular evidence when seen in the context of number, locale and dimension of the injuries found on the person of the deceased and the presence of semi digested ^{Food} in the stomach of the deceased at the time of post mortem examination. The learned counsel attempted to argue that the occurrence had not taken place at the time and in the manner described by the prosecution and the deceased were done to death by some unknown assailants at the early hours of the morning. The submission is misconceived. Learned counsel has remained unable to show that the medical evidence is not in accord with the prosecution

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story. Modi's Text Book of Medical Jurisprudence and Toxi has the following relevant passage with reference to the time of death calculated according to the degree of digestion of the stomach contents:-

"It has been ascertained by physiologists that a mixed diet containing more of animal food and less of vegetable food as ordinarily taken by a European leaves the stomach in four to five hours after it is completely digested, while a vegetable diet containing mostly farinaceous food as usually taken by an Indian does not leave the stomach completely within six to seven hours after its ingestion. But this cannot always be relied upon in determining the time of death, inasmuch as the power of digestibility may remain in abeyance for a long time in states of profound shock and coma. Food has been seen in the stomach remaining undigested in persons who received severe head injuries soon after their meal and died within twelve to twenty-four hours afterwards. In one case the food consisting chiefly of rice and Dal (pulse) remained in the stomach for about forty hours without undergoing digestion. It must also be remembered that the process of digestion in normal, healthy persons may continue for a time after death."

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15. It is not denied that evidence furnished by an expert is always treated to be of confirmator nature qua the ocular testimony and if latter kind of evidence is trustworthy, confidence inspiring

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and consistent then the expert opinion will not outweigh it. Muhammad Hanif vs. The State (PLD 1993 SC 895) and Sarfaraz alias Sappi and two others vs. The State (2000 SCMR 1758).

16. Learned counsel for appellant next contended that PW Ajab Khan claimed to have been accompanying the complainant party at the time of occurrence, was most natural, independent and important witness of the incident but his evidence has been withheld by the prosecution without good reason. It is true that PW Ajab Khan claimed having seen the occurrence but it is equally true that he has been won over by the accused party on account of close relationship and for this reason the prosecution was left with no option but to abandon him. It is settled proposition of law that prosecution is required to produce best kind of evidence to establish accusation against accused facing trial but at the same time it has no obligation to produce a good number of witnesses because it has an option to produce as many as witnesses which in its consideration are sufficient to prove prosecution case. It is the quality of evidence and not quantity which matters. Allah Bakhsh vs. Shammi and

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others (PLD 1980 S.C. 225) and Mehboob Shah vs. The State (PLD 1987 S.C. (AJ&K) 47).

17. Another circumstance weighing heavily in favour of prosecution is prolonged abscondence of the appellant. The occurrence having taken place on 19.8.1996, the appellant surrendered before the police on 5.10.1999. There is noticeable abscondence spreading over three years. The explanation offered by the appellant in his statement under section 342 Cr.P.C is least satisfactory. Immediately after the incident the appellant went into hiding and remained fugitive from law for sufficient long time. The disappearance seems to have been made by the appellant with sole object to save himself from the clutches of law. It is true that abscondence at the most can be taken as corroborative of the charge and not the evidence of the charge as held by the superior courts from time to time because innocent persons may go into hiding due to fear of unjustified harassment and victimization at the hands of the police but in the instant case the abscondence when judged in attendant facts and circumstances of the case points out the guilt of appellant and exhibits his guilty conscience. This circumstance has been rightly treated tilting

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in favour of the prosecution. Aminullah vs. The State (PLD 1976 S.C.632).

18. A strong motive is alleged against the appellant for having participated in the commission of crime and taken lives of two persons. It is disclosed that one of the deceased Ayaz Khan employed in police department was removed from service and the accused party was suspected instrumental in his removal. The motive is highlighted in the F.I.R. as well as in the statement of the complainant. Though the motive has been denied by the appellant in his statement under section 342 Cr.P.C. but in the cross examination no suggestion was made to him regarding non-existence of motive. Any how, it is not denied that mere absence or weakness of motive would not come in the way of prosecution if the case is otherwise proved by reliable evidence. Motive is not considered a sine qua non for proving the offence of murder and mere absence of motive is no ground to doubt the truth of prosecution case. Government of Sindh vs. Sobharo (1993 SCMR 585), Muhammad Ramzan vs. The State (1992 PLD 302(1) and Shabir Ahmad vs. The State (1997 P.Cr.L.J.1539).

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19. After hearing the arguments of learned counsel for the parties with reference to the material available on the file and the case law cited at the bar, we are confident that prosecution has succeeded to prove its case against the appellant and the solitary statement of Mst.Sajida complainant has been rightly believed by the learned trial Judge to make basis for conviction of the accused. The minor contradictions and omissions pointed out in the testimony of the complainant are insignificant and do not shatter the prosecution case. The statement of the complainant also gains strength from the medical evidence, recoveries, motive and abscondence of the appellant. Conviction can be maintained even on the basis of solitary statement and close relationship of the witness with the deceased by itself is no ground to exclude the statement out of consideration.

20. In the result and for the foregoing reasons, we are of the view that no other conclusion can be drawn except that the appellant has been rightly found guilty for the crime in question and thus the impugned judgment dated 20.5.2000 being unexceptionable warrants no interference of this court. The same is maintained. Appeal stands dismissed.

Plissue

Adeli. Registrar
Mohammad Ali

4/11/2002

Sd/ Malik Hamid Saad - J
Sd/ Sajid Hassan - J

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21.11.2002.

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OFFICE OF THE SUB-DIVISIONAL EDUCATION OFFICER (M) PRIMARY SWABI.
Dated: 17/12/1999

To

The District Education Officer,
(M) Primary Swabi.

Subject:- SUBDIVISION ALLOWANCE.

It is requested that one Mr. Cokib Zar PTC have been involved U/s 302 PPC murder case as PIR in the Police station Kohan.

An enquiry has been conducted against the accused by ASDRO (M) Charsagh which is enclosed herewith alongwith the original enquiry copy for taking further necessary action as desired pl.

Sd/
Sub-Divisional Education Officer (M) Primary Swabi.

Project No. 2989-90 Dated 17-12-1999

✓ Copy to the :-
1. ASDRO (M) for information pl.

M. Hussain
Sub-Divisional Education Officer (M) Primary Swabi.

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OFFICE OF THE SUB DIVISIONAL EDUCATION OFFICER (M) PRIMARY SWABI

No. _____

Dated 17.12.1999

To

The District Education Officer,
(M), Primary Swabi.

Subject: **SUSPENSION ALLOWANCE**

Memo:

It is requested that one Mr. Sabib Zar, PTC have been involved U/S 302 PPC murder case as per FIR in the Police Station, Kalu Khan.

As enquiry has been conducted against the accused by ASDEO (H) Charbagh which is enclosed herewith along with the original enquiry copy for taking further necessary action as desired please.

Sd/- Divisional Education Officer (M),
Primary Swabi.

Endst. No.2989-90;

Dated 17.12.1999.

Copy to the:-

1. ASEO (H) for information please.

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To: The District Education Officer,
Male (Primary) Swabi.

Through: Proper Channel

Subject: SUSPENSION ALLOWANCE

Sir,

It is submitted that I have been involved in the article 902 murder case as per F.I.R. in the police station Kalak Khan consequently I am passing my days in sub-jail Swabi. My suspension has been taken effect from the date of lodging F.I.R. dated 19-8-1996. I am innocent for the case which is lodged against me. But due to personal grudges and grievances my name has been included in the said F.I.R.

I am a poor teacher and have ~~performed~~ performed my duty so far efficiently and honestly. I approach your kind honour with the request to kindly arrange for drawl of my suspension allowance regularly and make sure payment to me please.

Yours Obadiently,

[Signature]
Sahib Sar, P.O.
J.P.S. Palu Dhand Pagan,
Swabi.

*Forwarded in original to the
District Education Officer (M) Primary
Swabi for sympathetic consideration.
Please. The decision was admitted as
under trial process in the file on 12-10-98 vide F112
No 5510-198-11/3
30/3/1998
Kali. Khan
8/6/12/98*

[Signature]

BETTER COPY

OFFICE OF THE SUB DIVISIONAL EDUCATION OFFICER (M) PRIMARY SWABI

No. _____

Dated 17.12.1999

To

The District Education Officer,
(M), Primary Swabi.

Subject: **SUSPENSION ALLOWANCE**

Memo:

Reference your No.5713; dated 18.11.1999.

Mr. Sahib zar, PTC was involved in the murder case U/S 302/306 vide FIR No.692 dated 19.08.1996 Police Station, K. Khan. But he has not been suspended so far and his pay has been stopped since 7/1996.

Inquiry has been conducted by ASDEO which is enclosed herewith along with the copy of FIR etc.

According to the Inquiry Report the accused teacher remained absconder w.e.f 16.08.1996 till 5.10.1999 and at present he is under police custody.

It is requested that the teacher concerned may please be suspended w.e.f from 16.08.1999 and the absconder period be treated without substances allowance.

Sd/- Sub Divisional Education Officer,
(M) Primary, Swabi.

Endst. No.2902;

Dated Swabi, the 01.12.1999

Copy forwarded for information to the Circle Officer, Charbagh Swabi with reference to his No.224; dated 27.11.1999 for information please.

Sd/- Sub Divisional Education Officer,
(M) Primary, Swabi.

H/T to action
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OFFICE OF THE SUB-DIVISIONAL EDUCATION OFFICER (M) PRIMARY SWABI.

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No. _____ Dated Swabi the 27.11.99.

The District Education Officer,
(M) Primary Swabi.

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Subject: SUSPENSION/CONTINUED

MEMO,

reference your No. 5713 dated 18.11.1999.

Mr Sahibgar PTC was involved in the murder case U/S 302/306 vide PTR No. 692 dated 22.12.96 Police Station Khan. But he has not been suspended so far and his pay has been stopped since 7/1996.

Inquiry has been conducted by Katta ASDSO which is enclosed herewith alongwith a copy of P.I.R. etc.

According to the inquiry report the accused teacher remained absconder w.c.f. 16.08.1996 till 5.10.1996 and at present he is under police custody.

It is requested that the teacher concerned may please be suspended w.c.f. 16.08.1996 and the absconder-period be treated without sustenance-allowance.

Encl: As Above.

sdl
SUB-DIVISIONAL EDUCATION OFFICER
(M) PRIMARY SWABI.

Order No. 2902 Dated Swabi the 27.11.1999.

Copy forwarded for information to the Circle Officer Chahbagh Swabi with reference to his No. 224 dated 27.11.1999 for information please.

C.H.T. C. C. C.

Sub-Divisional Education Officer
(M) Primary Swabi.

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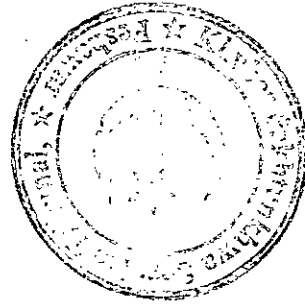
0/H/ 44

BEFORE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.

SERVICE APPEAL NO. 1272/2012

Date of institution ... 21.11.2012

Date of judgment ... 19.04.2016



Sahib Zar, PTC,
GMPS, Abu Banda, Salim Khan
District Swabi.

... (Appellant)

VERSUS

1. The D.C.O Swabi.
2. The EDO (E&SE), Swabi.

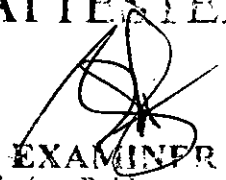
... (Respondents)

APPEAL UNDER SECTION-4 OF THE KHYBER PAKHTUNKHWA
SERVICE TRIBUNAL ACT, 1974 FOR ADJUSTMENT AGAINST PST
POST WITH EFFECT FROM 09.06.2010 AND AGAINST NOT TAKING
ACTION ON THE APPEAL OF APPELLANT WITHIN 90 DAYS.

Mr. Muhammad Asif Yousafzai, Advocate.
Mr. Ziaullah, Government Pleader.

.. For appellant.
.. For respondents.

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EXAMINER
Khyber Pakhtunkhwa
Service Tribunal,
Peshawar

MR. ABDUL LATIF
MR. PIR BAKHISH SHAH

.. MEMBER (EXECUTIVE)
.. MEMBER (JUDICIAL)

JUDGMENT

ABDUL LATIF, MEMBER: Facts giving rise to the instant appeal are that the appellant joined the Department as PST/PTC on 17.12.1989 and perform his duty till 19.08.1996. As the service record has been misplaced by the respondents, therefore, the appellant is unable to annex the same with the appeal. However, the appellant annex the affidavit to that effect. That on 19.08.1996 the appellant was charged in a case under section 302/34 PPC in FIR No. 962 of Police Station Kalu Khan Swabi. The appellant was convicted

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for life imprisonment and fine of Rs. 50000/- by the Session Judge Swabi. The appellant filed appeal in the Peshawar High Court but the sentence was maintained by High Court vide judgment dated 20.05.2000 and 21.11.2002. That the appellant during his arrest had also filed application for payment of pay etc during his suspension which was duly forwarded to EDO by the concerned office on 17.12.1999. That after release from jail, the appellant filed application for adjustment being not terminated so far till that date. The appellant was orally asked to wait till proper order. That finally the appellant filed appeal on 26.07.2012 as no positive response was given to appellant on previous application. The appellant waited for statutory period but no action was taken on the appeal till date and hence the present appeal with prayer that on acceptance of this appeal the respondents may be directed to adjust the appellant as PST w.e.f 09.06.2010 with all back benefits being still on the strength of Department and has not been terminated so far. Any other remedy which this august Tribunal deems fit may also be awarded in favor of appellant.

2. Learned counsel for the appellant argued that not adjusting the appellant in spite of being on the strength of the respondent-department and not taking action on the appeal of the appellant was against the law, rules, norms of justice and material on record therefore not tenable. He further argued that appellant was discriminated against because the department adjusted many similarly placed teachers who were convicted by the Court but were adjusted after release from jail. The appellant also deserved similar treatment and in support cited case of two teachers Mr. Abdul Quddus SV teacher adjusted vide order dated 21.09.1994 and Mr. Shams-ur-Rahman PTC vide order dated 08.09.2004. He further contended that appellant was still on the strength of the department as his services were not terminated and no orders were ever communicated to him till date, though he had the right to be adjusted against the PST post. He prayed that on acceptance of this appeal the appellant may be adjusted as PST w.e.f 09.06.2010 with all benefits.

Learned Government Pleader resisted the appeal and argued that the appellant failed to inform the concerned authorities of the department about his involvement in the murder case and kept his involvement hidden from them in violation of Conduct Rules 1987. He remained

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Khyber Pakhtunkhwa
Services Tribunal,
Peshawar

absent, though his pay was stopped and he remained absconder for more than 3 years. He further argued that service book and other documents of the appellant remained untracable and the appellant was suspended by the DEO from the date of lodging of FIR against him on 18.08.1996 without subsistence allowance as the department was unaware of his arrest and came to know from his arrest on 06.12.1999 from his application for subsistence allowance. He further argued that the appellant remained absent for more than thirteen years and under FR-18 ceased to be an employee of the department and had no right of adjustment furthermore he being convicted person who spent imprisonment and deposited fine could not be accepted as employee in the government service.

4. Arguments of learned counsels for the parties heard and record perused with their assistance.

5. From perusal of the record it transpired that the appellant who was working as PST was charged in a murder case vide FIR No. 692 on 19.08.1996 and was convicted for life imprisonment as well as fine of Rs. 50000/- by the concerned District & Session Judge and his appeal was dismissed by the Peshawar High Court who maintained the said punishment. The appellant was initially suspended by the competent authority who reportedly remained unaware of the arrest of the appellant as he failed to inform the departmental authorities of the incident for fear of punitive action. No proceedings on account of prolonged absence of the appellant were taken by the department so much so that he was convicted for life imprisonment and on expiry of the imprisonment he was released from jail on 09.06.2010. The case record reveals that appointed in the year 1989 the appellant has active service of seven years at his credit and remained absent for almost 14 years during which period the department failed to take appropriate disciplinary proceedings under the law against him and failed to pass appropriate orders. In the absence of any adverse order, the Tribunal is not in a position to pass any orders.

We however deem it appropriate to remit the case to the respondents with direction to pass orders, on the departmental appeal dated 25.07.2010 and 26.07.2012 needless to mention that

in the absence of any express orders the appellant still remain on the roll of the department and FR-18 being not in the field the termination of service of the appellant was not automatic as

interpreted by the respondents. The appeal is decided in the above terms. The appellant will be

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EXAMINER
Khyber Pakhtunkhwa
Service Tribunal,
Peshawar

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at liberty to appeal to this Tribunal in case any adverse orders are passed by the respondent-department against him. Parties are, however, left to bear their own costs. File be consigned to the record room.

ANNOUNCED
19.04.2016

sd/- Abdul Latif, Member
sd/- Pir Bakhsht Shah, Member

Certified to be true copy

EXAMINER
Khyber Pakhtunkhwa
Service Tribunal,
Peshawar

Date of Presentation of Application 22-04-2016
Number of Words 1600
Copying Fee 10-00
Urgent -
Total 10-00
Name of Copyist MMJ
Date of Completion of Copy 02-05-2016
Date of Delivery of Copy 02-05-2016

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OFFICE OF THE DISTRICT EDUCATION OFFICER (MALE) SWABI

Dismissal from Government Service:

Whereas you (Mr Sahib Zar Ex PST GPS, Abo Banda District Swabi) were charged in a murder case under section 302/34 PPC in FIR No 692 Police Station Kalu Khan Swabi on 19/8/1996 in summer vacation. You became absconder and did not inform the department of the fact until you were arrested by police on 6/10/1999 after remaining absconder for a spell of more than three years and thus violated Rule No 20 of the civil servants conduct rules 1987. The absence period shall be treated as un-authorized absence

Whereas your case was reported by the then SDEO(Male) in very belated stage and enquiries were conducted and you have been suspended from Government service from the date of accusation i, e 19/8/1996 on 10-01-2000. You appealed to the department for subsistence allowance on the basis of that suspension which has not been honoured until the court convicted you for life imprisonment and announced a fine of Rs 100000/-too on 20/5/2000 by the District and session Judge Swabi and the same has not been interfered by the Hounrable Peshawar High Court on 21/11/2002.

Whereas you failed to keep contact with department and kept the department unaware of the proceedings in the court and thus the department could not extend your suspension till the date of conviction. You kept all these hidden to be escaped from any punitive action as revealed in the decision of the services tribunal.

Article 194 & 194-A says that " a Government servant committed to prison either for debt or on a criminal charge should be considered as under suspension from the date of his arrest and until the termination of the proceedings against him i.e his suspension is automatic from the date of arrest till termination of proceedings against him". Enquiry against you dispensed with under article 194 &194-A.

Whereas you failed to submit the session court as well as High court's decisions in time to the department and thus remained absent from your post for more than 14 years and come under the provision of F.R. 18

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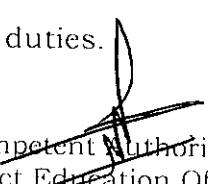
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which says "Fundamental rule 18 is not ultra vires the civil servants act, 1973, it is continued as a statutory rule on the strength of S.22; Civil servants act, 1973 and no procedural requirement exists for giving effect to it. Remedy under rule 18 lies in approaching the designated authority and not challenging the legal effect of the rule itself. PLD 1990 SC 666.

Whereas the charges leveled against you under section 302/34 in the FIR No 620 dated 19/8/1996 have been proved and you have been convicted for life imprisonment for two counts and also fined Rs 50000/as compensation to be paid to the legal heirs of each deceased.


Whereas your appeal for adjustment has been remitted to this department for passing an appropriate action, on your appeals submitted to this department on 25/7/2010 and 26/7/2012, so the competent authority has been pleased to impose the major penalty of dismissal from Government service from the date of your conviction that is 20/5/2000 under rule 5 (b) (I & ii) of Khyber Pakhtun Khwa Efficiency and Disciplinary Rules 2011. Necessary entry to this effect should be made in his service book.

However, the subsistence allowance for the period from the date of his custody that is 5/10/99 to 19/5/2000(5 months and 14 days) will not be paid under F.R.54 which says that " the Government with concurrence of the Auditor General have decided that F.R. 54 applies to departmental punishments and not to cases of punishment by a court of law for an alleged offence which has nothing to do with his official duties.


Competent Authority
District Education Officer
(Male) Swabi

Endst No. 5752-55/Sahib Zar/PST/Court Case/Dated Swabi the 18.05/2016

- Copy to the forwarded:
1. SDEO (Male) Swabi.
 2. DAO Swabi
 3. EMIS Cell Local Office
 4. Official concerned


Competent Authority
District Education Officer
(Male) Swabi

ATTESTED


J (50)
47

OFFICE OF THE DIVL:DIRECTOR OF EDU:(S)HAZARA DIVN:ABBOTTABAD
20.10.94 / dated 21/9/94

RE-INSTATEMENT/ADJUSTMENT.

Mr. Abdul Qudus formerly of CHS Sirikot(Haripur) who was suspended from 5.6.1985 vide this office order No.94 dated 12.11.1985 issued under ordst:20655-55/AE-V of even date, is hereby re-instated into Govt:service with immediate effect as he has been released from Jail after the completion of imprisonment in murder case.

The period of his suspension with effect from 5.6.85 to 20.9.1994(3395) days is hereby treated as EOL without pay interm Rule, 2, 11 of the West Pakistan Civil Servant Pension Rules, and S.No.13 Appendix ('A') to the West Pakistan Civil Services(delegation of powers)Rules-1962.

He is further adjusted against vacant S.V. post in the same school i.e. CHS Sirikot(Haripur)with effect from 21.9.1994 on his own pay and BPS with full benefits of existing pay scales revised from time to time.

- NOTE:
1. Charge reports should be sent to all concerned.
 2. He will have to take over charge on 21.9.1994 positively.
 3. Necessary entry to this effect should be made in his Service Book.

(HAJI SAFERAZ KHAN)
DIVL:DIRECTOR OF EDU:(S)
HAZARA DIVN:ABBOTTABAD.

Ordst:No. 15450-52 / AE-V / Suspension/S7. Dated the 21/9/94

Copy to :-

- 1- The Distt:Edu:Officer(W/S)Haripur.
- 2- The Headmaster, CHS Sirikot(Haripur)alongwith Service Book of above named teacher.
- 3- The Distt:Accounts Officer, Haripur.
- 4- Office Order File.

SMHaroon

FOR/DIVL:DIRECTOR OF EDU:(S)
HAZARA DIVN:ABBOTTABAD.

IN Respect of MR. NAHEEM Khan
AS.P.SB

Sham Malik Shad Pervez

Attended
afu

OFFICE OF THE
DISTRICT CO ORDINATION OFFICER, SWABI.
NO. 1753 /12 DCO: Dated 8 /09/2004.

(SE) K (SI)
(L)

To;


The Executive District Officer (S&L)
SWABI.

SUBJECT:- APPROVAL FOR EXPULSION FROM SERVICE (DISMISSAL)
OF MR. SHAMSUR RAHMAN PTC GPS NO.2 KOTHA (SWABI).
Memorandum.

Reference your letter No. 3030 dated 20.3.2004 on the
subject cited above and to convey necessary approval of the
competent authority as under :-

1. The period undergone imprisonment be treated as
leave without pay.
2. One increment during the involvement of the official
in the criminal case be withheld for the year 2003.

Further orders may be issued in light of government
policy and decision in letter and spirit at your end


8/9/04
ASSISTANT CO ORDINATION OFFICER,
SWABI.

S. JEHANZEB.
07/2004.

Attested
for

VAKALAT NAMA

NO. _____/20

IN THE COURT OF Service Tribunal Peshawar

Sahib Zai

(Appellant)
(Petitioner)
(Plaintiff)

VERSUS

Education Dept.

(Respondent)
(Defendant)

I/We Sahib Zai (Appellant)

Do hereby appoint and constitute **M.Asif Yousafzai, Advocate, Peshawar**, to appear, plead, act, compromise, withdraw or refer to arbitration for me/us as my/our Counsel/Advocate in the above noted matter, without any liability for his default and with the authority to engage/appoint any other Advocate/Counsel on my/our costs.

I/we authorize the said Advocate to deposit, withdraw and receive on my/our behalf all sums and amounts payable or deposited on my/our account in the above noted matter. The Advocate/Counsel is also at liberty to leave my/our case at any stage of the proceedings, if his any fee left unpaid or is outstanding against me/us.

Dated _____/20

[Signature]
(CLIENT)

ACCEPTED

[Signature]
M. ASIF YOUSAFZAI
Advocate

[Signature]
TAIMUR ALI KHAN
Advocate

[Signature]
SYED NOMAN ALI BIKHARI

M. ASIF YOUSAFZAI
Advocate High Court,
Peshawar.

OFFICE:

Room No.1, Upper Floor,
Islamia Club Building,
Khyber Bazar Peshawar.
Ph.091-2211391-
0333-9103240

6459

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.

Service Appeal No.685/2016

1. Sahib ZarAppellant
VERSUS

1. Secretary E&SE Khyber Pakhtunkhwa Peshawar
2. Director, E&SE Khyber Pakhtunkhwa, Peshawar.
3. District Education (E&SE) Male Swabi

.....Respondents

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1	Parawise Comments with affidavit	-	01-03
2	Dismissal order	-	04-05

S. A. to Director E & S E
Khyber Pakhtunkhwa Peshawar
No. 1709
Dated 18/8/16

ADDE
17/8
2016

~~DISTRICT EDUCATION OFFICER~~
~~(MALE) SWABI~~
Distt: Education Officer
(Male) Swabi

AD (kt-11)

18/8

1644
18/8

BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL,
PESHAWAR.

Service Appeal No.685/2016

1. Sahib ZarAppellant

VERSUS

- 1. Secretary E&SE Khyber Pakhtunkhwa Peshawar
- 2. Director, E&SE Khyber Pakhtunkhwa, Peshawar.
- 3. District Education (E&SE) Male Swabi

.....Respondents

PARAWISE COMMENTS ON BEHALF OF RESPONDENTS 01 TO 03

Respectfully Sheweth,

PRELIMINARY OBJECTIONS.

- 1. That the Appellant has no locus standi or cause of action to file the instant Appeal.
- 2. That the instant Appeal is badly time barred.
- 3. That the Appellant has filed the instant Appeal just to pressurize the respondents.
- 4. That the Appeal is bad for misjoinder and non joinder of necessary party.
- 5. That the Appellant has not come to the Tribunal with clean hands.
- 6. That the Appellant concealed the material facts from Honourable Tribunal.
- 7. That the Appellant is, estopped by his own conduct.
- 8. That, the Appeal is not maintainable in the present form and also in the present circumstances of the issue.
- 9. That the instant Appeal is against the prevailing law and rules.
- 10. That the appeal is prima facie not sustainable and it is liable to be rejected.

ON FACTS.

- 1. That the Para relates to the previous Service record of the appellant.
- 2. Admitted. As per rule-20 of the Khyber Pakhtunkhwa Government servants (Conduct) rules,1987," If a Government Servant is involved in as an accused in criminal case, he shall bring the fact of such involvement or conviction, as the case may be, to the notice of the head of the office or department immediately or, if he is arrested and released on bail, soon after such release. The appellant failed to do so.
- 3. Incorrect, and denied, the appellant did not inform the department, about his case, he remained absconder for about three (03) years and when he was arrested by police, he filed application for pay/suspension allowance. his application had not been honoured by the then authority under F.R.54, which says that subsistence allowance will be paid only in departmental cases and not in murder case.
- 4. Denied, irrelevant, the causes of delay have already been submitted in detail, however it is once again clarified that SDEO(M) and ASDEO of that time asked for the submission of Court decision on the direction of DEO Male/EDO to proceed into the matter but the appellant did not cooperate and made the false excuse that he has not been terminated in time and he was still on the roll of the department.

- 69
5. Incorrect and denied, the appellant submitted an appeal to the August Service Tribunal for adjustment which was unique in its nature, because the appellant has been declared convicted by the Session Court and the same has been maintained by the Honourable Court and even then the person is asking for reinstatement/adjustment which is astonishing and unlawful.

The appellant admits the fact in the para that the August Service Tribunal has not accepted the appeal but remitted it to the respondents for passing appropriate order. The respondent No.3 passed the order as the PST post is a District Cadre and relates to District. The appeal was remitted to the department on 19.04.2016 and after complete scrutiny of the record and nature of offence and in the light of the existing rules and laws an appropriate order has been passed which is the perfect disposal of the instant case. Although the order is late but the present setup as and when received the case, took stern, due and appropriate action under the existing E&D rules, 2011 within the prescribed limit of time.

The instant case has a social aspect too with all others. The appellant a teacher and was suppose to teach morals, good thinking, positive approaches to the coming generations but he did not take into account his social position, his status given to him by the Education Department but assassinated innocent person in the bright day light and bore the punishment and paid fine, all these prove that he has intended to do such a criminal act, so after such an act, has he the right to train the little kids and teach them humanity? it is further added that the advertisement appear in the Daily News Papers clearly state that any person, who has been sentenced by any Court of Law is not eligible to apply.

6. Incorrect and denied, the case has been remitted to the right forum for taking appropriate action. The respondent No.3 is the competent authority for the PST post. The appellant should go to the respondent No.2 who is the appellate authority, but the appellant by passed him and directly came to the Court again.
7. That the appellant has no cause of action to file the instant appeal and appeal in hand is liable to be dismissed on the following grounds.

GROUND.

- A. Incorrect and denied, the impugned order has the reference of E&D rules. 2011 under which the action has been taken, so how it can be called against the law, facts and norms of justice.
- B. Incorrect and denied, The appellant has not violated any law, article of the constitution, the Court has demanded for an appropriate action/order, the department has obeyed the direction of Court and removed a criminal from the department.
- C. Incorrect and denied, the appellant has not been discriminated from any angle. The reinstatement orders appended with the appeal do not clarify the charges against the teacher/sections have not been mentioned. It is further added that most of accused have been convicted and then released honourably on the basis of compromise or withdrawal of allegations. The appellant has done a cruel act and has been sentenced rightly by High Court and department.
- D. Incorrect and denied, the order dated 18.05.2016 is passed by lawful authority because the August Tribunal remitted the case for passing an appropriate order for which the respondent No.3 DEO(M) Swabi is the competent authority and in the Court direction there is not a single word exist of the appellate authority.

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- E. Incorrect and denied, the impugned order is according to law.
- F. Incorrect and denied, the August Service Tribunal has directed for passing an appropriate order and respondent No.3 being a competent authority has passed an order.
- G. Incorrect and denied, replied and commented in para- E but it is once again clarified that it was not a departmental case it is was a double murder case.
- H. The department has frequently asked for his service book and other relevant record but due to non cooperation of the appelland and death of the ASDEO, the transfer the SDEO and abolishment of previous local Government act 2012, causes the delay, however the order has now been passed and it is according to the law.
- I. Incorrect and denied, killing of father and son at a time is very harsh action than the punishment. Using the words "without any fault" is ridiculous. He has served for about seven (07) years and not ten (10) year or more.
- J. The appelland has nothing to produce in his favour. So it is prayed that the appeal may be dismissed and he must be left a precedent for others. accepting such appeal will open a way for all criminals and thus the whole system would be spoiled. Moreover the respondents seek leave to raise additional grounds at the time of arguments.

In wake of the above submissions, it is requested that this Honourable Tribunal may graciously be pleased to dismiss the instant appeal with cost in favour of the respondents.

~~Signature~~
 District Education Officer
 (Male) Swabi
~~Dist. Education Officer~~
 (Male) Swabi

~~Signature~~
 Director E& SE,
 Khyber Pakhtunkhwa, Peshawar
 Director
 Elementary & Secondary Education
 Khyber Pakhtunkhwa Peshawar

~~Signature~~ 24/8/16
 Secretary Elementary & Secondary Education
 Department Govt:of KPK

AFFIDAVIT

I do hereby solemnly affirm declare that the contents of the comments submitted by respondents is true and correct to the best of my knowledge and belief that nothing has been concealed from this Honourable Court.

~~Signature~~
 DISTRICT EDUCATION OFFICER
 (MALE) SWABI
 Dist. Education Officer
 (Male) S

bp

OFFICE OF THE DISTRICT EDUCATION OFFICER (MALE) SWABI

Dismissal from Government Service:

Whereas you (Mr Sahib Zar Ex PST GPS, Abo Banda District Swabi) were charged in a murder case under section 302/34 PPC in FIR No 692 Police Station Kalu Khan Swabi on 19/8/1996 in summer vacation. You became absconder and did not inform the department of the fact until you were arrested by police on 6/10/1999 after remaining absconder for a spell of more than three years and thus violated Rule No 20 of the civil servants conduct rules 1987. The absence period shall be treated as un-authorized absence.

Whereas your case was reported by the then SDEO(Male) in very belated stage and enquiries were conducted and you have been suspended from Government service from the date of accusation i, e 19/8/1996 on 10-01-2000. You appealed to the department for subsistence allowance on the basis of that suspension which has not been honoured until the court convicted you for life imprisonment and announced a fine of Rs 100000/-too on 20/5/2000 by the District and session Judge Swabi and the same has not been interfered by the Hounrable Peshawar High Court on 21/11/2002.

Whereas you failed to keep contact with department and kept the department unaware of the proceedings in the court and thus the department could not extend your suspension till the date of conviction. You kept all these hidden to be escaped from any punitive action as revealed in the decision of the services tribunal.

Article 194 & 194-A says that " a Government servant committed to prison either for debt or on a criminal charge should be considered as under suspension from the date of his arrest and until the termination of the proceedings against him i.e his suspension is automatic from the date of arrest till termination of proceedings against him". Enquiry against you dispensed with under article 194 &194-A.

Whereas you failed to submit the session court as well as High court's decisions in time to the department and thus remained absent from your post for more than 14 years and come under the provision of F.R. 18

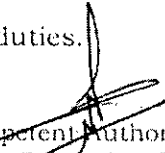
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which says "Fundamental rule 18 is not ultra vires the civil servants act, 1973, it is continued as a statutory rule on the strength of S.22; Civil servants act, 1973 and no procedural requirement exists for giving effect to it. Remedy under rule 18 lies in approaching the designated authority and not challenging the legal effect of the rule itself. PLD 1990 SC 666.

Whereas the charges leveled against you under section 302/34 in the FIR No 620 dated 19/8/1996 have been proved and you have been convicted for life imprisonment for two counts and also fined Rs 50000/as compensation to be paid to the legal heirs of each deceased.

Whereas your appeal for adjustment has been remitted to this department for passing an appropriate action, on your appeals submitted to this department on 25/7/2010 and 26/7/2012, so the competent authority has been pleased to impose the major penalty of dismissal from Government service from the date of your conviction that is 20/5/2000 under rule 5 (b) (i & ii) of Khyber Pakhtun Khwa Efficiency and Disciplinary Rules 2011. Necessary entry to this effect should be made in his service book.

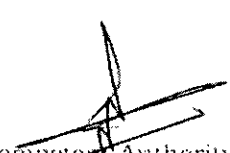
However, the subsistence allowance for the period from the date of his custody that is 5/10/99 to 19/5/2000(5 months and 14 days) will not be paid under F.R.54 which says that " the Government with concurrence of the Auditor General have decided that F.R. 54 applies to departmental punishments and not to cases of punishment by a court of law for an alleged offence which has nothing to do with his official duties.


Competent Authority
District Education Officer
(Male) Swabi

Endst No. 5752-55/Sahib Zar/PST/Court Case/Dated Swabi the 18.05/2016.

Copy to the forwarded:

1. SDEO (Male) Swabi.
2. DAO Swabi
3. EMIS Cell Local Office
4. Official concerned


Competent Authority
District Education Officer
(Male) Swabi

BEFORE THE KPK, SERVICE TRIBUNAL, PESHAWAR.

Service Appeal No. 685/2016

Sahib Zar

VS

Education Deptt:

.....
REJOINDER ON BEHALF OF APPELLANT
.....

RESPECTFULLY SHEWETH:

Preliminary Objections:

(1-10) All objections raised by the respondents are incorrect and baseless. Rather the respondents are estopped to raise any objection due to their own conduct.


FACTS:

1. Admitted correct by the respondents as the service record is present with the respondent department.
2. First portion of para 2 is admitted correct hence no comments while the rest of para is incorrect as during his arrest the appellant filed application for payment of pay etc during his suspension which was duly forwarded to EDO by the concerned office on 17.12.1999.
3. Incorrect. While para 3 of the appeal is correct.
4. Incorrect. While para 4 of the appeal is correct.
5. Incorrect. The case of the appellant was not forwarded to the appellate authority and directly passed the dismissal order of the appellant.
6. Incorrect. The appellant has good cause of action and is liable to be accepted on the following grounds.

GROUND:

- A) Incorrect. The impugned order is not in accordance with law, facts, norms of justice and material on record therefore not tenable and liable to set aside.
- B) Incorrect. While para B of the appeal is correct.
- C) Incorrect. While para C of the appeal is correct.
- D) Incorrect. While para D of the appeal is correct.
- E) Incorrect. The appellant impugned order is not according to law as the department did not fulfilled the codal formalities before passing the impugned order which is mandatory under law and rules.
- F) Incorrect. While para F of the appeal is correct.
- G) Not replied according to para G of the appeal. Moreover para G of the appeal is correct.
- H) Incorrect. The appellant should not be penalized for the fault of others as the appellant timely informed to the concerned EDO about the issue.
- I) Incorrect. While para I of the appeal is correct.
- J) Incorrect. The appellant has produces grounds in his favour and has also legal right to advance others grounds and proofs at the time of hearing.

It is, therefore, most humbly prayed that the appeal of appellant may kindly be accepted as prayed for.

Through: APPELLANT

(M. ASIF YOUSAFZAI)
ADVOCATE SUPREME COURT,
&
(TAIMUR ALI KHAN)
ADVOCATE HIGH COURT.

AFFIDAVIT

It is affirmed and declared that the contents of rejoinder are true and correct to the best of my knowledge and belief.



DEPONENT

ATTESTED
Cath Commissioner
Zakoor Khan Advocate
Distt: Court Peshawar
04 JAN 2017