

SHAMOON alias SHAMMA**versus****THE STATE****1995 SCMR 1377****JUDGMENT**

SAIDUZZAMAN SIDDIQUI, J.-The appellant was tried alongwith co-accused Umar Hayat alias Umroo by the Additional Sessions Judge, Faisalabad, for offences under section 302, P.P.C. and section 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, hereinafter to be called 'the Ordinance' only. The trial Court found the appellant guilty of the offence under section 302, P.P.C. only for having caused murder of Muhammad Yousaf while he was acquitted of the charge under section 17 of the Ordinance. Co-accused Umar Hayat in the case was acquitted on both the charges. On appeal, the learned Federal Shariat Court maintained the conviction and sentence awarded to the appellant by the trial Court. Leave was granted in the above case to consider the following legal contentions:--

It is an admitted position in the case that the trial court did not believe the ocular testimony in the case. However, relying on the first part of the statement of the accused under section 342, Cr.P.C., that he killed Muhammad Yousaf, the Court convicted him under section 302, P.P.C. and awarded life imprisonment. The latter part of the statement of accused under section 342, Cr.P.C. that he killed the deceased under grave and sudden provocation having seen his wife in a compromising position with the deceased, was discarded by the trial Court on the grounds that the burden of proving grave and sudden provocation was on the appellant which- he failed to discharge and secondly if he would have seen his wife in this condition she would not have escaped unhurt.

The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defense. Failure of prosecution to prove the case against the accused entitles the accused to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case. Where the prosecution succeeds in establishing its case against the accused beyond reasonable doubts, then the stage arrives for consideration of the plea of the accused in defense and the question of burden of proof becomes relevant. Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defense does not arise. However, if the Court decides to convict the accused' on the basis of his confessional statement or his plea under section 342, Cr.P.C. then it is not open to the Court to accept a part of the statement of the accused and reject another part for the purpose of convicting him for the offense. It is quite clear

from the orders of the Courts below that the conviction of the appellant has been based solely on the basis of his admission/statement under section 342, Cr.P.C. In these circumstances, it was not open to the Courts below to have relied only that part of his statement under section 342, Cr.P.C. in which he admitted having killed the deceased Muhammad Yousaf and discard that part of his statement in which he stated that it was done under grave and sudden provocation as he had found the deceased in a compromise position with his wife in the early hours of morning. As earlier pointed out, the Court could either accept whole of this statement or reject the same. The Court could not take exception to the part of the statement of the accused which stated that he had seen his wife Mst. Wallan in the early hours of morning in a compromise position with the deceased Muhammad Yousaf on the ground that she escaped unhurt in the incident. We, accordingly, allow this appeal and convert the sentence of appellant from section 302, P.P.C. to section 304, P.P.C., Part II. The sentence awarded to the appellant is reduced to the period already undergone. The accused is directed to be set free unless required by the authorities in some other case.

N.H.Q./S-966/S

Order accordingly