JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. No.597-P/2011

Date of hearing: ***29.04.2015***

Date of Announcement:_____

Appellant (s) : ***Faqir Said, Taimur Said and Daud Said by Mr. Javed A. Khan, Advocate.***

Respondent (s) : ***Complainant Behramand by Mr. Tanveer Minhas, Advocate and the State by Mian Arshad Jan, AAG.***

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- At a trial held by learned Additional Sessions Judge-IV, Swabi, appellants ***(1) Faqir Said (2) Taimur Said and (3) Daud Said***, were found guilty of committing the Qatl-e-Amd of deceased Fazal Mehmood, thus, vide judgment dated 27.09.2011, each of them was convicted under section 302 (b) PPC and sentenced to undergo ***life imprisonment*** and to pay Rs.50,000/-, as compensation to LRs of the deceased in terms of S.544-A Cr.P.C. or in

default thereof to undergo 06 months S.I. further. Benefit of S.382-B Cr.P.C. has been extended to them.

2. Through the instant appeal, the appellants have questioned their conviction and sentences, while connected Criminal Revision Petition ***No.184-P/2011, titled, "Behramand Vs Faqir Said etc",*** has been filed by petitioner Behramand for enhancement of sentence of the convicts from life imprisonment to normal penalty of death. Since both, the appeal as well as the revision petition, are stemming out from one and the same judgment of the learned Trial Court dated 27.09.2011, therefore, we intend to dispose of the same through this common judgment.

3. The epitome of the prosecution case is that on 01.03.2010 at 1305 hours, Fazal Mehmood deceased then injured reported to Safdar Khan ASI (PW.11), in Kalu Khan hospital Swabi, that on the fateful day, he alongwith his brother Farman Ali, was present in front of his house, when in the meantime at 1245 hours, Daud Said, Faqir Said

and Taimur Said sons of Purdil, residents of village Tarlandi Mohallah Shakai (appellants-convicts herein), came there; that on his query qua their visit to their village, the appellants got infuriated and opened fire at him with their respective pistols with the intention to commit his Qatl-e-Amd, as a result he got hit and sustained injuries. After commission of the offence, the appellants decamped from the spot. Previous ill will has been alleged as motive behind the incident. Report of the deceased then injured was taken down by Safdar Khan ASI (PW.11), in the shape of murasila Exh.PA/1, endorsed by Dr. Jamal Khan and verified by Farman Ali (PW.7). He prepared injury sheet Exh.PW.5/1 of the injured and referred him to Medical Officer for examination. After administration of first aid, the deceased then injured was directed to be shifted to Mardan hospital, but he succumbed to injuries on the way therefore, PW.11, prepared his inquest report Exh.PW.5/4

and shifted his dead body to the mortuary for postmortem examination.

4. Dr. Ajmal Khan Medical Officer (PW.5), on initial examination of the deceased then injured on 01.03.2010 at 1.05 p.m., found the following injuries on his person:-

1. Firearm entry wound about ½ MM in diameter on the epigastrium.
2. Firearm exit wound about 1 mm in diameter on back.
3. Firearm entry wound about ½ mm in diameter on right lower chest wall.
4. Firearm exit wound about 1 mm in diameter on the back .
5. Firearm entry wound about ½ mm in diameter on the abdomen.
6. About 1-2 mm lacerated wound on the abdomen (skin deep).

The patient was fully conscious in time, space and person. He was oriented. Because of non-availability of expert surgeon, patient was referred to DHQ hospital Mardan.

Nature of Injuries: firearm-dangerous.

Weapon used: firearm.

Probable duration between injuries: ½ to 01 hours.

On expiry of the deceased then injured, the same Medical Officer, on the same day at 1.45 p.m., conducted autopsy on his dead body and found the same wounds on his person as referred above.

Opinion:

According to opinion of the doctor, cause of death of the deceased was firearm injuries to his vital organs like lever and major blood vessels leading to shock and death.

Probable time between injuries and death has been given as 1 to 2 hours while between death and postmortem as 1 to 2 hours.

6. Namir Khan SI (PW.8) conducted investigation in the case. He proceeded to the spot and during spot inspection recovered four empties of 30 bore vide recovery memo Exh.PC. He also took into possession a phial containing spent bullet sent by doctor, extracted from the dead body of the deceased at the time of autopsy, alongwith his bloodstained clothes vide recovery memo Exh.PC/1, prepared site plan Exh.PB at the instant of eyewitness, and recorded statements of the PWs under section 161 Cr.P.C. Accused-appellant Taimur Said was arrested by Sultan Mehmood Khan ASI near GHS Mansabdar on Mardan Swabi road alongwith 30 bore pistol with loaded charger containing 6 live rounds and a separate case under section13 of the Arms Ordinance, was registered against him. Similarly, Khalid Iqbal ASI arrested accused-appellant Faqir Said on the same day of incident i.e. 01.03.2010 at 1540 hours near Shaheed Baba village Mansabdar and recovered from his possession 30 bore pistol No.C.9040

with loaded charger containing 4 live rounds, issued his arrest card Exh.PW.1/1. Both the accused-appellants named above, were handed over to Namir Khan SI alongwith the recovered pistols from them, which he took into possession by him vide recovery memos Exhy.PW.8/3 and Exh.PW.8/4. During interrogation, both the appellants disclosed about the recovered pistols to be the crime weapons, therefore, I.O. sent the same to the FSL alongwith crime empties vide application Exh.PW.8/8, report whereof is Exh.PL/1. He initiated proceedings under sections 204 and 87 Cr.P.C. against absconding co-accused/appellant Daud Said and after completion of investigation submitted challan against the accused. Later on, accused/appellant Daud Said was also arrested; therefore, supplementary challan was submitted against him.

7. The learned Trial Court on receipt of the challans, formally charge sheeted the appellants, to which they pleaded not guilty and claimed trial. To prove its case

prosecution examined as many as eleven witnesses. After closure of the prosecution evidence, statements of the appellants were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed their innocence. They, however, declined to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, learned trial Court after hearing both the sides, convicted and sentenced the appellants, as mentioned above.

8. Learned counsel for the appellants argued that appellants are innocent and have been falsely implicated in the case on mere suspicions; that the occurrence is unseen and PW Farman Ali being real brother of the deceased is a procured witness; that keeping in view injuries on vital parts of the body of the deceased, it cannot be believed that he was able to talk, therefore, his alleged initial report being a fictitious and fabricated document, learned Trial Court, has wrongly considered the same as a dying declaration;

that the charge has been exaggerated as three real brothers/appellants have been implicated while the incident seems to be the doing of single person and that who was that single person, the prosecution has badly failed to prove the same; that recovery of alleged crime weapons from the two appellants is highly doubtful and the same has been planted against them, therefore, positive FSL report in respect thereof would not advance the case of the prosecution; that nothing incriminating has been recovered from possession of appellant Daud Said; that in such like cases, the Court is always required to seek corroboration qua each accused, but no such evidence has been brought on record; that in absence of direct evidence, mere recovery of blood from the spot, bloodstained garments of the deceased coupled with serologist report and autopsy report of the deceased, being only confirmatory and corroborative pieces of evidence would not be sufficient to prove the guilt of the appellants; that the impugned

judgment being against the law, facts and evidence available on record, is therefore, liable to be set aside.

9. Conversely, learned AAG assisted by learned counsel for the respondent contended that all the appellants have been directly charged by the deceased then injured in his dying declaration, recorded in accordance with law in presence of Medical Officer, PW Farman Ali as well as Safdar Khan ASI (PW.11) the author of the report; that all these PWs have proved in their statements that the deceased then injured at the time of making report was fully conscious, well oriented in time and space and able to talk; that being a broad daylight incident, took place near the house of the deceased then injured, question of mistaken identity does not arise and presence of PW Farman Ali with the deceased at the time of incident does appeal to a prudent mind; that not a single suggestion has been put on the above named PWs by the defence to question the condition of the deceased then injured that he was unable and incapable to

make a statement/talk; that dying declaration of the deceased then injured is corroborated by ocular account furnished by Farman Ali PW.7, arrest of the two appellants on the same day alongwith crime weapons, positive FSL report qua the empties and recovered pistol from their immediate possession, positive Serologist report qua the blood recovered from the spot and bloodstained garments of the deceased; that mere non-recovery of crime weapon from appellant Daud Said would not exonerate him from the commission of offence as he after the incident went into hiding and destroyed the prosecution evidence, therefore, he cannot get premium of his unexplained noticeable abscondance. They contended that the learned Trial Court by properly evaluating and appreciating the evidence, has reached to a right conclusion by holding the appellants guilt of the offence to which no exception can be taken. They, however, added that when the guilt of the appellants was proved upto the hilt and there was no mitigating

circumstance, the learned Trial Court ought to have awarded them normal penalty of death. They sought dismissal of the appeal and requested for enhancement of sentence of the appellants.

10. We have given our anxious consideration to the respective arguments of learned counsel for the parties and learned AAG for the State. Record perused with their able assistance.

11. It is cardinal rule in the law of evidence that the direct evidence is the best evidence, having great probative force, as it is original, positive and is pregnant with fresh and firsthand knowledge. Law makes great emphasis on the production of direct evidence and it is mandatory to rely upon the same if forthcoming. The word "direct" is opposed to mediate or alternate or what is technically called hearsay or second hand knowledge. Principles of necessity have successfully been able to carve its way to get admissible derivative or second hand proofs

to be receivable in evidence. Article 46 of the Qanun-e-Shahadat Order, 1984 is one of the most important Article, making way to the use of hearsay evidence. It provides cases in which statement of relevant fact by a person who is dead or cannot be found is relevant. According to this Article, statements written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without any amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant fact. It is an established rule of evidence that hearsay evidence is not admissible but this Article is an exception to the said rule.

12. We would like to first take the initial report of the deceased then injured Fazal Mehmood Exh.PA/1, so as to determine whether the same has been recorded in accordance with law and can be termed as a dying

declaration, and if yes, to what extent it finds corroboration qua each accused. Dying declaration is a statement of deceased person as to his cause of death when he is at the point of death. Sanctity is attached to a dying declaration because a dying man is not expected to tell lies, but being weak kind of evidence, it required close scrutiny and corroboration. Some of the well known tests for determining the genuineness of dying declaration are whether it rings true, whether the dying man was capable of making it, whether it was free from outside prompting and was not inconsistent with other evidence, facts and circumstances of the case. Dying declaration is a substantive piece of evidence and if the Court is satisfied about its genuineness, it can be acted upon without any corroboration. Dying declaration where possible should be recorded by a Magistrate, and if Magistrate is not available, injured should be examined by a medical Officer to ascertain fact that he was fit to make statement. To find out

truth or falsity of a dying declaration a case is generally considered in all its physical environment and circumstances. It is necessary to find out how far the evidence or its different parts fit in with the circumstances and possibility that can safely be deducted in a particular case. Therefore, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that such statements are made in absence of an accused, which has no opportunity of testing the veracity of the statement by cross examination. But once the Court comes to the conclusion that dying declaration is the truthful version as to the circumstances of the death, conviction can be recorded on such dying declaration alone.

13. It appears from the record that incident took place at 12.45 p.m. near the house of deceased then injured situated in village “Doob Lakhtai” Kalu Khan, which has been reported with promptitude at 1.05 p.m. i.e. one hour

and 05 minutes, eliminating possibility of consultation and deliberation. Dr. Ajmal Khan Medical Officer (PW.5), who examined the deceased then injured at first instance at 1.05 p.m. has clearly mentioned in medico legal report of the deceased then injured that he was fully conscious in time, space, and person and well oriented. Farman Ali (PW.7), rider of report of the deceased then injured in his statement categorically stated that deceased then injured was fully conscious and able to talk at the time of report. Similar is the statement of Safdar Khan ASI (PW.11), the author of report. He has mentioned in clear words in murasila report Exh.PA/1 about consciousness of the deceased then injured at the time of report. The report of the deceased then injured bears the endorsement of Medical Officer, who examined the injured. In cross examination Medical Officer (PW.5) deposed that report of the deceased then injured bears his attestation which means that it was drafted in his presence. These three PWs have been subjected to cross-examination

by the defence but failed to create any dent in their testimony. They all are consistent with each other on the point of consciousness of the deceased then injured and his ability to talk at the time of report. Not a single suggestion has been put by the defence on these PWs to question the condition of the deceased then injured that he was unable and incapable to talk at the time of report because of his injuries. Rather from the statement of these PWs, particularly, medical Officer, it has been squarely established that deceased then injured was fully conscious, in time, space and in person as well as oriented and was capable to talk and make statement. The report of the deceased then injured has been reported in presence of Police Officer, Medical Officer and PW Farman Ali in accordance with law coupled with the fact he was fully conscious to make a statement, therefore, we are firm in our view that report of the deceased then injured can be held as a "Dying declaration".

14. The next moot question before us would be as to what extent the dying declaration of the deceased then injured get corroboration from other circumstances of the case. Since, for single deceased three accused have been charged, therefore, corroboration qua each accused would be the essential criteria. The ocular account furnished by PW Farman Ali, corroborates the dying declaration of the deceased. No doubt, he has not sustained any injury in the incident but it is equally true that it is not the case of the prosecution that the accused also fired upon him. All the appellants are specifically charged for firing at the deceased. The incident took place in front of house of the deceased then injured, therefore, presence of PW Farman Ali, being brother of the deceased, at the time of occurrence with the deceased does appeal to mind. As per autopsy report of the deceased, he sustained three firearm entrance wounds and a lacerated wound while three appellants, who are brothers inter-se, have been charged

for the occurrence. The dimension of all the entrance wounds is one and the same i.e. ½ mm, but since one and the same weapon i.e. 30 bore pistol has been attributed to all the appellants, therefore, we cannot hold these injuries to be the job of single person, particularly, in presence of positive FSL report qua the crime empties and two pistols recovered from appellants Faqiar Said and Taimur Said, who were arrested on the same day of occurrence, which squarely corroborates the dying declaration and ocular account to prove the participation of the two appellants Faqiar Said and Taimur Said in the commission of offence. The recovery of blood from the spot, bloodstained garments of the deceased coupled with positive Serologist report confirm the crime venue as alleged by the prosecution. The recovery of pistols from immediate possession of both the appellants has been squarely proved by the prosecution through cogent and confidence inspiring

evidence of the PWs, who have no enmity or ill will with the appellants to falsely implicate them.

15. As regard the role of appellant Daud. Albeit, he too has been charged directly by the deceased then injured and PW Farman Ali, but no crime weapon has been recovered from his direct or indirect possession nor has he confessed his guilt before competent court of law, nor any other incriminating article to prove his participation in the commission of offence has been recovered from his possession or on his pointation. Therefore, this aspect of the case create doubt about the participation of appellant Daud Said in the commission of offence and to his extent doubt arises that the deceased then injured and PW Farman Ali, have exaggerated the charge. However, on this sole ground we cannot throw away the entire dying declaration of the deceased then injured corroborated by ocular/direct evidence of Farman Ali, rather the principle of sifting grain from the chaff

would be the best course to be adopted in the case, as by now the principle of falsus in uno falsus in omnibus, has been done away with. Rather the Courts while appreciating evidence, apply the principle of sifting the grain from the chaff. This principle has been laid down by the apex Court in case titled, **"Tawaib Khan and another Vs the State" (PLD 1970 Supreme Court 13)** in the following words:-

> "The maxim 'falsus in uno falsus in omnibus" has all along been discarded by the Courts in this country. Similarly, the rule that the integrity of a witness is indivisible, despite its normal virtue has not been endorsed by the superior Courts of this country without reservation and cannot be accepted as one of universal applications. In the last analysis, as stated in some of the eminent judicial decisions, "the grain has to

be sifted from the chaff" in each case, in light of its own particular circumstances.

This principle has been reiterated by the apex Court in case titled, **"Bakka Vs The state" (1977 SCMR 150), as follow:-**

"The principle falsus in uno falsus in omnibus has long since ceased to be applied by the Courts in this country, and they have always endeavored to separate the grain from the chaff".

The same principle has been observed by the Hon'ble Supreme Court in plethora of judgments in various cases, some of which are referred as titled, "**Muhammad Haleem and G.Safdar Shah.JJ Khairu and another Vs the State (1981 SCMR 1136, "Ghulam Sikandar and another Vs Mamaraz Khan and others" (PLD 1985 Supreme Court 11), "Irshad Ahmad Vs The State" (PLD 1996 Supreme Court 138), "Sarfaraz alias Sappi**

and 2 others Vs the State" (2000 SCMR 1758) and "Ziaullah Vs the State" (1993 SCMR 155).

16. For what has been discussed above, we are firm in our view that the evidence available on record is sufficient only to prove the murder of the deceased by appellants Faqir Said and Taimur Said, while participation of the appellant Daud Said in the commission of offence has not been proved through confidence inspiring evidence.

17. The next point for consideration is what should be the quantum of sentence to be awarded to the guilty appellants, to meet the ends of justice. It appears from the evidence that it was the deceased then injured who asked the appellants as to why they had come to their village, which resulted in the present incident. Probably the incident would not have occurred if the deceased did not inquire from the appellants, therefore, the incident seems to be a sudden flare up between the deceased and

the appellants, without any premeditation and plan, as such considering this aspect of the incident as a mitigating circumstance, the sentence awarded by the learned Trial Court would be sufficient to meet the ends of justice.

18. Accordingly, this appeal is partially allowed. We while extending benefit of doubt, to appellant Daud Said, set aside his conviction and sentence recorded and awarded by the learned Trial Court vide impugned judgment and acquit him of the charge leveled against him. He be set at liberty forthwith, if not required in any other case. To the extent of appellants Faqiar Said and Taimur Said, this appeal stands dismissed. Their conviction and sentence recorded by the learned Trial Court vide impugned judgment dated 27.09.2011 are maintained.

Announced.
26.05.2015

J U D G E

J U D G E

M.Siraj Afridi P.S. D