Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR

(Judicial Department)

Criminal Appeal No. 975-P/2019 with Murder Reference No.38-P/2019.

Fazal Dayan Vs The State, etc.

JUDGMENT

Date of hearing.	**23.02.2021.**
Petitioner(s) by:	**Mr. Khizar Hayat Khazana Advocate.**
State by:	**Mr. Mujahid Ali Khan AAG.**
Complainant by:	**Mr. Gul Rahman Mohmand Advocate.**

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S M ATTIQUE SHAH, J:-Through instant criminal appeal filed under Section 410 Cr.PC, the appellant Fazal Dayan alias Fazal Gujjar has challenged the impugned judgment dated 20.07.2019, rendered by learned Additional Sessions Judge-IV, Peshawar; whereby appellant involved in case FIR No.1205 dated 23.05.2016 under Sections 302/34/109 PPC, Police Station Faqir Abad, Peshawar, was convicted under Section 302(b)/34 PPC as *Tazir* and sentenced to death alongwith Rs.10,00,000/- as compensation to the legal heirs(if any)

of the deceased under Section 544-A Cr.PC, for causing death to Ali Shah and in default of compensation, he shall suffer Simple Imprisonment for six months. The compensation amount shall be recoverable as an arrear of land revenue. He shall be hanged by the neck till declared dead; subject to confirmation by this Court. Benefit of Section 382-B Cr.PC was extended to the appellant/convict.

2. As per prosecution case, Ali Shah (transgender) was present on the spot; when in the meanwhile, appellant alongwith three unknown accused, came there and; appellant started firing at him, as a result of which he sustained injuries. He was shifted to the LRH, Peshawar; where in injured condition he reported the matter to the local police present at casualty LRH, Peshawar; on the basis of his report, initially FIR was registered under Section 324 PPC. However, after death of complainant, section of law was altered to Section 302 PPC. Lateron, co-accused Rehmat Ullah was also nominated as accused in the instant case.

3. After completion of investigation, complete challan against accused was submitted before the learned

trial Court; where after framing of formal charge against appellant as well as co-accused Rehmat Ullah, the prosecution in support of its case, examined as many as 12 PWs. On close of prosecution evidence, statements of accused under Section 342 Cr.PC were recorded; wherein they denied the allegations levelled against them; however, they did not opt to be examined on oath under Section 340(2) Cr.PC or to produce defence evidence. After hearing learned counsel for the parties, the learned trial Court convicted and sentenced the appellant/ convict vide impugned judgment dated 20.07.2019; whereas co-accused Rehmat Ullah was acquitted from the charges levelled against them. Hence instant criminal appeal has been filed by the appellant/convict while Murder Reference No.38-P/2019 was sent by learned trial Court for confirmation of death sentence awarded to the appellant/convict.

4. Arguments heard and record perused.

5. The contents of murasila Ex.PW.4/1 depicts that occurrence has taken place at 11.00 PM; but no source of light has been disclosed by deceased then injured in his report; that how he identified the accused in

a pitch dark; where no source of light was available. The entire case of prosecution is based upon dying declaration of complainant as well as recovery of crime pistol from possession of appellant; which had allegedly been matched with three empties of .30 bore recovered from the spot as per FSL report. No doubt dying declaration is a valuable piece of evidence made by a person in the extremity when he/ she is at the point of death and every hope of survival has vanished. Since the deponent cannot be subjected to cross examination; therefore, close scrutiny of dying declaration should be made so as to ascertain its reliability and; therefore, before taking such statement into consideration the Court in order to satisfy itself regarding fitness of mind of deceased then injured, shall look into the medical opinion. Besides, it has been laid down by superior Court that dying declaration by itself is sufficient to sustain conviction thereon; provided following conditions are fulfilled:- *(i) Whether there was no chance of mistaken identity? (ii) Whether deceased was capable of making statement? (iii)After how-long time after sustaining injury deceased made statement? (iv)Whether statement rings true? (v)Whether it was free from*

promptness of outside? (vi) Whether deceased was a man of questionable character?

6. So far as identification of accused by deceased then injured is concerned, admittedly no source of light has been mentioned by deceased then injured in his report; besides no bulb or tube-light has been taken into possession by local police from the spot; being lit at the time of occurrence; which fact was duly affirmed by PW.4 Qadar Shah ASI; who incorporated the report of deceased then injured into murasila Ex.PW.4/1; by stating that no source of light has been shown in the murasila. Likewise, PW.3 Naveed Khan ASI; who partially investigated the case and; prepared site plan Ex.PW.3/1 in the case; has denied recovery of any bulb from the spot; rather stated that he prepared site plan through torch light; however, he failed to mention this fact in the headnote of the site plan; meaning thereby that at the time of occurrence, it was pitch dark and; identification of actual culprit in absence of any light, was not possible.

7. Coming to the question as to whether deceased then injured was capable of making statement at relevant time, it is not established that who brought the

deceased to the hospital. Murasila is silent qua person; who brought the complainant to the hospital; however, as per PW.4, the complainant was brought by a passerby; but neither name of said passerby has been mentioned nor was he examined by local police in support of its case. Likewise, Farzana Riaz (PW.7-A), who being transgender and friend of complainant; introduced himself to be present with the complainant at the time of report and also thumb impressed the said report being rider of the same; but the murasila does not bear any other thumb impression except that of alleged deceased then injured. Though as per PW.4, complainant was in well oriented condition at the time of report; but as per statement of PW.7-A; when he reached the hospital, Ali Shah was in Operation Theater and; after laparotomy as well as becoming conscious, complainant reported the matter to the local police in her presence. Had he/she been present at time of report in casualty LRH, Peshawar, she would have been mentioned as rider of the same; but neither scriber of murasila nor the Investigation Officer has shown him present at the time of report. Even PW.3, who conducted partial investigation, has deposed that when he

went to LRH, Peshawar, the deceased then injured was unconscious and; was not capable of giving statement that is why his statement was not recorded at that time. His assertion was further affirmed by PW.6 Dr.Anwar Ahmad; who initially examined the deceased then injured; by stating that complainant received in casualty LRH, Peshawar at 22.41 hours in semi conscious condition through casualty slip Ex.PW.6/1; which assertion not only smashes the report Ex.PW.4/1 of complainant; whereby time of occurrence has been shown as 11.00 PM; but also the depositions of PW.4 and PW.7-A; as according to him, complainant was in shock and sufficient amount of blood might have been lost and; at the time of examination, the patient was not responding to his questions being in shock. Had the occurrence had taken place at 11.00 PM, then how the deceased then injured was received in the hospital at 22.40 PM, prior to the alleged occurrence, creating doubt qua authenticity of alleged dying declaration as well as the mode and manner of the occurrence. All the witnesses are only at one page qua oozing of sufficient blood from the deceased then injured; due to which there was possibility of going in shock of

complainant as well as incapability of making his statement. In light of above, it can be presumed that the deceased was done to death by some unknown persons prior to 22.40 hours and subsequently on arrival of PW.7-A, the alleged dying declaration was manipulated at his behest; thereby nominating the accused in instant case on the basis of previous motive of ill-will of appellant with the deceased. No doubt dying declaration is a strong piece of evidence but such evidence could only be believed when it comes through mouth of independent and uninterested witnesses; whose credibility and impartiality was otherwise, not questioned; but in instant case no such independent witness had come forward to lend corroboration to such piece of evidence; therefore, the said statement/ dying declaration does not ring true. Moreover, the august Supreme Court of Pakistan in case titled ***"Mst. Zahida Bibi .Vs. the State" reported in PLD 2006 SC 255,*** has held that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reasons that the person is not expected to tell a lie.

8. So far as other circumstantial evidence qua recovery of crime pistol as well as its matching with empties recovered from the spot as per FSL report is concerned, admittedly the empties of .30 bore were recovered from spot on 22.5.2016; but these were not sent to the FSL on the same day in order to ascertain as to whether these were fired from one and same weapon or more. Likewise, appellant was arrested on 29.5.2016 alongwith pistol and: FIR No.1231 dated 29.05.2016 under section 15 AA, was registered against him at Police Station Faqir Abad, Peshawar; however it was taken in the case in hand by Investigation Officer (PW.9) on 7.6.2016 with a delay of (08) eight days. Moreover, the same was sent to the FSL for its comparison alongwith recovered empties, which were received in FSL on 10.06.2016, after three days of its so receipt by the Investigation Officer; therefore, the positive report of FSL qua pistol is of no help and support to the prosecution. The record is silent qua safe custody of the recovered empties of .30 bore, from 22.5.2016 till arrest of accused on 29.5.2016 and; subsequently crime pistol and recovered empties till 10.6.2016. The prosecution has not examined any concerned official/officer in whose safe custody these were lying during this period; which creates doubt qua recovery of crime pistol and empties of .30

bore. ***"Mushtaq Ahmad & 3 others Vs The State" (PLD 2008 SC 1) and "Ali Sher & others Vs The State" (2008 SCMR 707).***

9. It has been advocated by the opposite side, that appellant has been convicted under Section 15 AA and sentenced to 8 months RI by Miss Saifa Irfan JMIC, Peshawar; however, in support of its case, neither any judicial order/record of the concerned Court was produced before the learned trial Court nor the representative of jail authorities examined by learned trial Court as CW.3 was in a position to explain that on what ground appellant was convicted and sentenced.

10. Moreover, there is no eye witness of the occurrence and; being a dark night occurrence, identification of actual culprits in absence of any source of light, is not possible. Besides, appellant has not confessed his guilt before the competent Court of law despite remaining in police custody for sufficient time; therefore, his mere nomination on the basis of a manipulated dying declaration without corroboration by other strong and cogent evidence, is not sufficient to establish guilt of accused for the offence carrying capital punishment.

11. The motive advanced in the instant case for commission of offence has not been satisfactorily proved by the prosecution; as there is nothing on record which could show that appellant has ever made any demand of extortion from deceased; nor any report in this regard has been made by deceased or PW.7-A in any Police Station against appellant; which could support the motive advanced by the prosecution.

12. It is primary and legal duty of prosecution to prove its case beyond reasonable doubt and the standard of evidence shall be at par with the punishment provided for a capital offence. It is a well settled principle of law that one who makes an assertion has to prove it. Thus, the onus rests upon the prosecution to prove guilt of the accused beyond reasonable doubt throughout the trial. Presumption of innocence remains throughout the case until such time the prosecution on the evidence satisfies the Court beyond reasonable doubt that the accused is guilty of the offence alleged against him. There cannot be a fair trial, which is itself the primary purpose of criminal jurisprudence, if the judges have not been able to clearly elucidate the rudimentary concept of standard of proof

that prosecution must meet in order to obtain a conviction. Two concepts i.e., "proof beyond reasonable doubt" and "presumption of innocence" are so closely linked together that the same must be presented as one unit. If the presumption of innocence is a golden thread to criminal jurisprudence, then proof beyond reasonable doubt is silver, and these two threads are forever intertwined in the fabric of criminal justice system. As such, the expression "proof beyond reasonable doubt" is of fundamental importance to the criminal justice: it is one of the principles which seeks to ensure that no innocent person is convicted. Where there is any doubt in the prosecution story, benefit should be given to the accused, which is quite consistent with the safe administration of criminal justice. Further, suspicion howsoever grave or strong can never be a proper substitute for the standard of proof required in a criminal case, i.e. beyond reasonable doubt. The lacuna occasioned in evidence of prosecution, creates serious doubt not only qua mode and manner of the occurrence; but also a big question mark on the alleged dying declaration of deceased then injured. Needless to mention that while giving the benefit of doubt

to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused; then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession; but as a matter of right. It is based on the maxim, *"it is better that ten guilty persons be acquitted rather than one innocent person be convicted".*

13. For what has been discussed above, we are unanimous in our view that the prosecution has not proved its case beyond reasonable doubt against the appellant and the learned trial Court has not properly appreciated the evidence and other material produced before it while awarding conviction and sentence to the appellant vide impugned judgment, which is not sustainable in the eye of law. As such, this appeal is allowed, the impugned conviction & sentence recorded by learned trial Court/ Additional Sessions Judge-IV, Peshawar vide judgment dated 20.07.2019 is set aside and the appellant/convict is acquitted of the charges levelled against him. He is in custody, be released forthwith if not wanted in any other case.

14. The Murder Reference No.38-P/2019 is answered in negative.

The above are reasons of our short order of even date.

Announced:
23.02.2021.

Senior Puisne Judge

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