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ORDER SHEET
LAHORE HIGH COURT
BAHAWALPUR BENCH BAHAWALPUR
JUDICIAL DEPARTMENT

Criminal Appeal No.76 of 2017

(Imam Bakhsh Versus The State, etc.)

Murder Reference No.06 of 2017

(The State Versus Imam Bakhsh)

J U D G M E N T

Date of Hearing	***03.03.2021***
Appellant (Imam Bakhsh) represented by:	***M/s Syed Zeeshan Haider and Hassan Muhammad Ch. Advocates.***
The State represented by:	***Mr. Najeeb Ullah Jatoi, Deputy Prosecutor General***
Complainant (Khalid Hussain) represented by	***Mr. Muhammad Shamoon Bhatti, Advocate***

SARDAR AHMED NAEEM, J.:- *This judgment shall dispose of Criminal Appeal No.76 of 2017 titled as* ***Imam Bakhsh Versus. State etc*** *filed by Imam Bakhsh (appellant) and Murder Reference No.06 of 2017 titled as* ***The State Versus Imam Bakhsh,*** *transmitted by the learned trial Court for confirmation or otherwise of the sentence of death awarded to the appellant Imam Bakhsh, being originated from the same judgment dated 28.01.2017 passed by the learned Additional Sessions Judge, Hasilpur in case F.I.R. No.330/2013 dated 26.03.2013 under Sections 302/34, registered at Police Station Saddar Hasilpur, District Bahawalpur, whereby appellant was convicted and sentenced as under:-*

> ***Under Section 302(b) PPC:*** *Sentenced to death with the direction to pay Rs.5,00,000/- as compensation to the legal heirs of the deceased under Section 544-A, Cr.P.C. and in case of default to further undergo simple imprisonment for six months.*

2. The learned trial court, however, vide same judgment acquitted Muhammad Munir co-accused by extending benefit of doubt.

3. The prosecution story, in brief, was that on 26.08.2013 at about 4.00 a.m., Imam Bakhsh appellant armed with Rifle alongwith one unknown accused riding on motorcycle entered into the Dera of the deceased. The appellant fired at Khalid Hussain, deceased hitting in his abdomen, who after sustaining fire shot fell on the ground and the appellant alongwith his co-accused fled away from the spot.

4. After usual investigation, challan against the accused persons was submitted in Court. The learned trial court after observing all the pre-trial codal formalities, charge sheeted the appellant to which he pleaded not guilty and claimed to be tried.

5. The prosecution, in order to prove its case, produced as many as ten witnesses during trial..

6. Doctor Hassan Mahmood (P.W.1) medically examined Khalid Hussain then injured and observed following injuries on his person:-

1. **(a) A lacerated wound of size 1.5 cm x 1 cm x going deep blindly with inverted margins present on apigestric region KUO.**

2. **(b) A lacerated wound of size 2 cm x 1.5 cm going deep blindly with inverted margins present on apigestric region at a distance of 2 cm from injury No.1(a) KUO.**

The duration of injuries was between 5/6 hours. MLC No.HM 558/2013 Ex.PC was the correct computerized copy of the same and was signed by the (PW.1).

7. Muhammad Nawaz A.S.I. (P.W.2) conducted partial investigation of the case. Naseeb Ahmad S.I. (P.W.3) also conducted investigation.

8. Sajjad Hussain (P.W.4) identified the dead body of the deceased. Muhammad Shahid Bashir ASI (P.W.5) was

witness of recovery of rifle from Muhammad Munir (acquitted co-accused).

9. Doctor Muhammad Zahid Farooq (P.W.10) conducted post mortem examination on the dead body of Khalid Hussain deceased and observed following injuries on his person:

1. ***Wound in epigastric 1 cm below xiphisternum 2 x 2 cm with omentum coming out of the it.***
2. ***Abdomen was tender and patient was dyspneic right side breath sound were not audible.***
3. ***On abdomen exploration three litters blood in peritoneal cavity torn falciform ligament shattered liver and 600 ml of blood in pleural cavity.***
4. ***Injury of intrahepatic biliary channels.***

The probable time between injury and death was within two months & 21 days and the time between death and post-mortem was about 8 to 10 hours.

In his opinion, all the injuries were ante mortem and caused by some fire arm weapon which caused destruction of vital organs like liver right lung leading to hypovolemic shock and later on developed septicemia and leads to death. Post Mortem Report No.22/2013 dated 2.12.2013 Ex.PT/1-6 was the true computerized copy of the original. The doctor formed his opinion on the basis of MLC notes B.V. Hospital Bahawalpur Ex.PU.

10. The prosecution while giving up Muhammad Naeem, Muhammad Shameer PWs being won over, Irshad Hussain, Muhammad Ramzan, Atta Muhammad, Muhammad Azam, Fazal, Ahmad Yar, Ghulam Murtaza Constable and Allah Rakha being unnecessary, closed its evidence.

11. The statement of the appellant under Section 342, of The Code of Criminal Procedure, 1898, was recorded. He refuted the allegations levelled against him and professed his innocence. Responding to the question "why this case was registered against you and why the PWs deposed against you?," Imam Bakhsh appellant replied as under:

"Neither I along-with any other person on motor bike went to the place of occurrence on 26.8.2013 nor I caused any fire shot on the person of the deceased as alleged. Neither the injured/ the deceased was directly shifted from the alleged place of occurrence to THQ, Hospital, Hasilpur nor he was conscious to make his statement as alleged by the prosecution. Factually, the injured/the deceased did not make any statement before Muhammad

Nawaz SI and his alleged statement Exh.PD is a fabricated document maneuvered by the I.O on the asking of Irshad Hussain & Sajjad Hussain the real brothers of the deceased just in order to falsely involve me in this case. Neither the injured/the deceased was attended by Shameer, Munir & Naeem Khan PWs as alleged nor they shifted him to the THQ, Hospital Hasilpur. In fact, the injured/ the deceased had sustained fire arm injuries on his person at the hands of some un-known assailants during the odd hours of the night and his brother Sajjad & Irshad firstly shifted him from the place of occurrence to DHQ Hospital,Vehari and thereafter they brought him to THQ, Hospital Hasilpur and there they maneuvered the preparation of alleged report of doctor Exh.PA/1 and then his alleged statement Exh.PD with the connivance of the police. In fact, the alleged occurrence was committed by some un-known persons and I have got no concern with the commission of alleged crime. We both the parties belonged to the same locality and we are supporting rival political groups due to said reason, I have been involved in this case by the complainant party on the asking of my rivals."

The appellant neither appeared as his own witness on oath as provided under Section 340(2) of The Code of Criminal Procedure, 1898 in disproof of the allegations levelled against him nor produced evidence in his defence.

12. The learned trial Court vide its judgment dated 28.01.2017, held the appellant guilty, convicted and sentenced him as mentioned and detailed above.

13. Learned counsel for the appellant argued at some length. The crux of his arguments was that the case of prosecution was entirely based on the statement of the injured/the deceased, which was neither proved nor supported by the PWs nor through the attending circumstances, thus, the conviction awarded to the appellant on the basis of dying declaration by the learned trial Court cannot be sustained.

14. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed this appeal with vehemence and submitted that the occurrence was promptly reported to police by the injured, which excluded the

possibility of any deliberation or consultation; that the appellant was nominated with specific role of causing fatal injuries to the deceased, which gets support from the medical evidence; that the dying declaration was duly proved and was rightly relied upon; that the appellant remained absconder for a considerable period, another additional factor which goes against the appellant. Added that even if the corroborative pieces of evidence including the recovery, absconsion are excluded from consideration even then, the prosecution proved the dying declaration of the deceased, thus, the appeal deserves dismissal.

15. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and have perused the record with their able assistance.

16. The occurrence in this case took place on 26.8.2013 at 4:00 a.m when the deceased along-with Muhammad Akram, Jannat Bibi (mother), Nawaz Bibi(sister of Muhammad Akram) was sleeping in their dera situated at Mauza Khairu Deh. The deceased got up on the arrival of motorbike driven by unknown accused having appellant as pillion rider. The appellant raised a lalkara that the deceased would be done to death. He was armed with a rifle and fired straight at the deceased hitting in his abdomen. The alarm raised by the ladies attracted Muhammad Shamsher, Naeem Khan (both given up PWs) and Muhammad Munir (PW). The motive behind the occurrence was old enmity between the parties.

17. At this stage, it may be mentioned that Muhammad Shamsher and Naeem Khan (PWs) were given up being won over, whereas, Muhammad Munir (PW) was nominated as accused by real brother of the deceased, namely, Irshad Hussain on 17.11.2013. However, he did not appear during trial as a witness. So far as, Jannat Bibi and Nawaz Bibi are concerned, they neither joined the investigation nor examined

at trial, thus, the case of the prosecution is entirely based on the statement of the injured/ the deceased(Exh.PD), reduced into writing by Muhammad Nawaz ASI (PW.2). He received the information regarding the occurrence at Batalian Adda and reached straight at Tehsil Headquarter Hospital, Hasil Pur. The deceased mentioned the names of the witnesses including Muhammad Shamsher, Naeem Khan, Jannat Bibi, Nawaz Bibi and Muhammad Munir in his statement (Exh.PD). Their statements under section 161, Cr.P.C. were also recorded by PW.2 who submitted written application Exh.PA before the medical officer in order to ascertain whether the injured was in a condition to make the statement. The medical officer opined vide his report Exh.PA/I, that the injured was capable to make the statement. He prepared the injury statement Exh.PB and then he handed over the injury statement to medical superintendent through Muhammad Hussain constable. He then recorded statement of the injured Exh.PD which is in his hand writing and thumb marked by the injured. Later on, on the basis of Exh.PD dispatched through Allah Rakha PQR, FIR was registered.

18. The only evidence available on record is the dying declaration of the deceased and now it is to be seen if it was proved and the conviction awarded to the appellant by the learned trial Court on the basis of said statement can be sustained.

19. Article 46(1) of the Qunoon-i-Shahadat, 1984 explores the concept of dying declaration. Article 46 deals with the cases related to that person who is dead or who cannot be found. A dying declaration is called as "Leterm Mortem", which means "words said before death". Dying declaration is a very important documentary evidence. It is hearsay evidence but even then it is given a lot of weightage. Recording of dying declaration is also important and if it is recorded properly by a proper person keeping in mind the

essential ingredients of the dying declaration, it retains its full value. Missing any single ingredients of dying declaration makes it suspicious and then the accused may get the benefits of its shortcomings.

20. Dying declaration is based on maxim "Nemo moriturus praesumitur mentire" i.e. a man will not meet his maker with a lie in his mouth. Hearsay evidences are not given any weightage in the courts because the person who is giving this evidence is not telling his experiences but that of another person and who cannot be cross-examined to verify the facts. Dying declaration is an exception to this rule because if this evidence is not considered very purpose of the justice will be forfeited in certain situation when there may not be any other witness to the crime, as in this case, except the person who has since died. Sometimes it is the best evidence in such situations. Its admissibility is explained in Article 46(1) of The Qunoon-i-Shahadat 1984. According to this situation, when the statement is made by a person as to the cause of his death, or any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who has made this was expecting his death or not.

21. The most important point of the consideration is that the victim was in a fit condition of mind to give the statement when recording was started and remained in fit condition of mind till the recording of the statement finished. Merely stating that patient was fit will not serve the purpose. This can be best certified by the doctor who knows best about the condition of the patient. But even in conditions, where it was not possible to take fitness certificate from the doctor, dying declarations have retained their full sanctity but there are other witnesses to testify that victim was in such a condition of the mind, which did not prevent him from making

statement. Medical opinion cannot wipe out the direct testimony of the eye witness stating that the deceased was in fit and conscious state to make dying declaration.

22. Second most important point to be considered is that it should not be under the influence of any body or prepared by prompting, tutoring or imagination. Even if any one of these points is proved then dying declaration is not considered valid. If it becomes suspicious then it will need corroboration.

23. The dying declaration will be admissible in evidence only when the person making statement dies and if the cause of the person's death comes into question. If the person who has made a dying declaration survives, such statement will not come within the purview of Article 46(1) of the Qunoon-i-Shahadat 1984. Dying declaration is an exception to the general rule of excluding the hearsay evidence. The burden of proving the dying declaration is always on the prosecution. Since an accused can be convicted solely on the basis of dying declaration, the Court is expected to carefully scrutinize the same. The dying declaration should inspire the confidence of the Court about truthfulness of such declaration. If the Court, after careful evaluation of the entire evidence, feels that the same was result of either tutoring, prompting or product of imagination, the Declaration will not be accepted. If the contents of the very dying declaration contradicts the core of the prosecution case, the declaration will not be the basis for conviction.

24. There is no particular form to be employed in making dying declaration. It can be oral, written, gestures and signs, thumb impressions, incomplete and can also be in form of question answer. However, there must be distinct and definite assertions on the part of the person who makes the statement. The declaration should be in written form in the exact words stated by the person who made the statement.

When a magistrate records the dying declaration then it should be in question answer form as the magistrate will opt to seek information rightly as in some other cases dying declaration becomes the sole way to help in conviction of the accused.

25. How to prove a dying declaration, we think, it is desirable to comment on. The evidence is defined in Article 2(c) of the Qunoon-e-Shahadat, 1984 as all statements which the Courts permit or requires to be made before it by the witnesses in relation to matters of fact under enquiry and all documents produced for the inspection of the Court. The Court is defined in Article 2(a) of the Qunoon-e-Shahadat, 1984 and include all the judges and magistrates and all persons, except arbitrators, legally authorized to take evidence.

26. The relevant provisions of Article 46 of Qunoon-e-Shahadat 1984 reads as under:

"46. Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant. *Sometimes, 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 an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:*

(1) ***When it relates to cause of death.*** *When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.*

(2) .....

(3) .....

(4) .....
(5) .....
(6) .....
(7) .....
(8) .....

27. Article 46 says that the statements, written or verbal, of relevant facts, made as to the cause of one's death, are themselves relevant facts. Article 47 of the Qunoon-e-Shahadat says that evidence given by a witness before any person authorized by law to take it is relevant for the purpose of proving the truth of the facts which it states when the witness is dead, or cannot be found.

28. Now, such statements must, of course, be proved whether they are written statements or verbal statements. If they are verbal statements, the persons who heard the deceased make the verbal statement must be examined on oath as witness, and if a person at the time made a record of the deceased's statement, he may refresh his memory under Article 155 or if he has no specific recollection of the statement made, he may, under Article 156 of the Qunoon-e-Shahadat 1984 testified to the facts mentioned in the document if he is sure that the facts were correctly recorded by him. In the latter case, it seems to us the witness must still depose by reference to the documents as to what the deceased said. We do not mean it is necessary for the witness to read out his statement and for the magistrate to record what the witness reads out. The witness may be said to testify to the facts mentioned in the documents if he produces the document and to take oath that all that is written therein was actually stated by the deceased.

29. If the statement to be proved is a written statement, as in this case, made by a person who is dead, then it must be proved that such statement was so made by the person who is dead. In that case, of course, the written statement itself becomes substantive evidence. What is to be decided is what

constitutes a written statement made by a person who is dead, therefore, the expression "written statement" made by a person who is dead means that the written statement must have been actually made by the deceased person.

Now, a person may make a written statement either by writing it out himself or by dictating it to some body else. Usually, a person who is in immediate expectation of death is too feeble to be able to write out his statement himself but if any written statement is produced in the Court purporting to have been made by a person who is dead, it must be shown, if that person did not write that statement himself that he dictated the statement and that he did not make the statement in answer to any questions except such a question as" will you please state what it is you wish to be written down?. It must be proved that the dictation has been taken down correctly.. The procedure to establish such statement is to show that the dictated statement was read over to the deceased and admitted by him to be correct but the proper procedure has not been adopted by Muhammad Nawaz ASI (PW.2) as the fact of reading out the statement to the deceased and admission of the deceased regarding statement to be correct is not mentioned in his statement recorded during trial.

30. To prove the capability of the deceased for making dying declaration, the prosecution also produced Dr. Muhammad Hassan Mahmood SMO. (PW.1), his certificate Exh.PA/I is available on the record, which reflected that the deceased was conscious and capable to make statement. He was cross-examined by the defence on this particular aspect. Relevant excerpt from his statement reads as under:

> ***"....As per my opinion in case any person had sustained fire arm injury on his belly six hours prior to his examination, he may be conscious. Volunteers in case he had sustained injury on any vital part like liver, heart, kidney then he cannot be conscious after six hours time but in case he had sustained injury on his stomach and intestine then he will***

be conscious after six hours. .... it is incorrect to suggest that the injured was unconscious at the time when I examined him and I did mention him as conscious due to pressure from the complainant 's side and with malafide intention"

31. Dr. Zahid Farooq appeared as PW.10 and in his final opinion commented that after thorough external and internal examination of the dead body all the injuries were observed as ante mortem and caused by firearm weapon which caused destruction of vital organs like liver, right lung, leading to hypovolemic shock and later on developed septicemia which led to death and as liver being one of the major organ of the human body was damaged as per statement of PW.10, thus, the capability of the deceased making statement appeared to be doubtful.

32. The occurrence in this case took place on 26.8.2013. The appellant in this case was arrested on 13.5.2016. Naseeb Ahmad ASI (PW.3) filed an application (Exh.PG), on 21.10.2013 for issuance of warrants for the arrest of the appellant whereupon, Ilaqa magistrate issued his warrants Exh.PH for his arrest. On 30.10.2013, he entrusted the said warrants to Ghulam Murtaza 1089-C for execution but he was not produced during trial to depose regarding execution of the non bailable warrants of the appellant. The record is totally silent if the appellant was proceeded against under section 87 or 88 Cr.P.C.

33. It is necessary that before treating an accused to be an absconder or fugitive from law, the Court is required to take into consideration all the factors such as evidence on the record or to be produced by the prosecution to support the absondance of an accused; the proceedings taken by the Court under sections 87 and 88 Cr.P.C, stand taken by an accused after his arrest; any evidence in rebuttal available with the prosecution regarding stand of the accused at the time of trial. In addition to that, it may be observed that if no

proceedings were taken under sections 87 and 88 Cr.P.C. by a trial Court, then the abscondence of an accused in our view is of no consequences. Reliance in this context can be made to the case reported in "Khan Mir versus Amal Sherin alias Kamal and 2 others" (1989 SCMR 1987), "Mumtaz versus The State"(1990 PCr.LJ 2055)

34. The resume of the above discussion is that the appellant was nominated being the principal offender in the statement of the injured/the deceased recorded by Muhammad Nawaz ASI but no other witness mentioned in the said statement was examined during trial. The medical evidence regarding capability of the deceased for making dying declaration was also open to objection. At this stage, we may also mention that the appellant closed his evidence on 27.1.2017 and placed on record (Exh.DA) which is a copy of record of a emergency ward of District Headquarter Hospital, Vehari wherein the name of the deceased is mentioned at serial No.7048 dated 26.8.2013 at 7:30 a.m. The defence suggested to PW.2 that the deceased was brought to THQ, Hospital Hasilpur from some other hospital but this fact has been suppressed by the prosecution. Above all, medico legal report (Exh.PC) suggested two injuries having inverted margins on the epigastric region whereas, the deceased in his dying declaration attributed only one shot to the appellant which is belied by the medial evidence. In addition to that, Irshad Hussain real brother of the deceased made an application during the investigation and nominated Muhammad Munir (acquitted co-accused) being the real culprit.

35. It is principle of criminal jurisprudence that the dying declaration by itself is not a strong evidence being not tested by way of cross-examination. The only reason for accepting the same is that a person apprehending death due to injury, caused to him is ordinarily not expected to speak the falsehood. To believe or disbelieve the dying declaration,

thus, is left to the ordinary human judgment. However, the Courts always insist upon strong, independent and reliable corroborative evidence for the sake of safe dispensation of justice. It has repeatedly been held by the apex Court that relying upon the dying declaration without proper scrutiny would be dangerous approach on the part of the Court of law. In case titled Mst. Zahida Bibi v. The State ***(PLD 2006 SC 255),*** *the Hon'ble Supreme Court of Pakistan has observed at page 262 as under:*

> ***"that except the dying declaration of the deceased, no other evidence, direct or circumstantial, was available. This is an admitted fact that the statement of the deceased was not recorded by the Sub inspector of Police in Hospital in presence of the doctor and further neither any member of the hospital staff was associated at the time of recording the statement nor it was got verified by any official of the hospital that the statement was actually made by the deceased. Be that as it may, the status of such a statement would be hardly a statement under section 161, Cr.P.C. and not a dying declaration of the deceased. This may be seen that the dying declaration or a statement of a person without the test of cross-examination is a weak kind of evidence and its credibility certainly depends upon the authenticity of the record and the circumstances under which it is recorded, therefore, believing or disbelieving the evidence of dying declaration is a matter of judgment but it is dangerous to accept such statement without careful scrutiny of the evidence and the surrounding circumstances, to draw a correct conclusion regarding its truthfulness. The rule of criminal administration of justice is that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell lie. This is a matter of common knowledge that in such circumstances in preference to any other person, a doctor is most trustworthy and reliable person for a patient to depose confidence in him with the expectation of sympathy and better treatment to disclose the true facts. In the present case, in the manner in which the statement of deceased was recorded by Sub inspector would seriously reflect upon its correctness and consequently could not be considered worthy of any credit to be relied upon as dying declaration.***
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> ***28. Similar view has been taken by the Hon'ble Supreme Court of Pakistan in case titled Tahir Khan v. The State (2011 SCMR 646) and Farhan Ahmed V. Muhammad Anayat (2007 SCMR 1825)."***

36. From the perusal of the impugned judgment of the trial Court, we came to the conclusion (Exh.PD) that the learned trial judge has not properly appreciated and scrutinized the

evidence produced during trial. The impugned judgment is based on misreading and non reading of evidence. The prosecution failed to prove the dying declaration and its case beyond reasonable shadow of doubt.

37. In the light of the above analysis, we are of the view that the dying declaration (Exh.PD) could not be treated as an admissible evidence and the conviction on the basis of such evidence on capital charge was not legal and that after excluding the dying declaration of the deceased which was the foundation of the prosecution case, remaining evidence would not be sufficient to sustain conviction. We, therefore, hold that the prosecution has not been able to prove the charge against the appellant beyond reasonable doubt. Resultantly, Criminal Appeal No.76 of 2017 is allowed. The impugned judgment is set aside. The appellant is acquitted of the charge. He is in custody, be released forthwith, if not required in any other criminal case.

Murder Reference No.06 of 2017 is answered in the negative and the death sentence is not confirmed.

(MUHAMMAD WAHEED KHAN)
JUDGE

(SARDAR AHMED NAEEM)
JUDGE

Irfan

Approved for Reporting

Judge