PESHAWAR HIGH COURT, PESHAWAR.

ORDER SHEET

Date of Order or Proceedings	Order or others Proceedings with Signature of Judge or Magistrate and that of parties or counsel where necessary
1	2
21.9.2017	***Cr.A No. 671-P/2016.*** **Present:** Muhammad Amin Lachvi, Advocate, for the appellant. ****** ***IJAZ ANWAR, J.-*** This Criminal Appeal has been directed against the judgment dated 07.10.2016 passed by learned Additional Sessions Judge-V, Kohat, whereby the accused-respondent, Razeem, involved in case FIR No. 143 dated 11.5.2015, under section 302/34 PPC, registered at Police Station, Jarma, was acquitted of the charge under section 265-K Cr.P.C. **2.** The backdrop of the case, as reflected from the record, is that on 11.5.2012 Zahid Mehmood, lodged a report in emergency room of KDA hospital, Kohat, to the effect that he was present in the street near his house, when, in the meanwhile, at 17.50 hours accused Muslim, Zahoor, Razeem and Zarnam, came, who on seeing him, started firing at him, due to which he was hit and received injuries. The occurrence was stated to have been witnessed by his brother Rehman Shah. Later on, he succumbed to the injuries. The local police after registration of the case submitted completed challan against all the four accused.

Accused Zahoor Khan faced the trial, while rest of the accused absconded themselves. The learned trial Court after conclusion of the trial, acquitted Zahoor, while rest of the accused including the present accused-respondent were declared as proclaimed offenders, vide judgment dated 6.2.2014. Later on, the present accused-respondent was arrested and supplementary challan against him was submitted before learned Additional Sessions Judge-V, Kohat. The learned trial Court after observing the legal formalities within the meaning of Sec. 265- C, Cr.P.C, framing charge, recording evidence of nine prosecution witnesses and hearing the parties, acquitted the accused-respondent under section 265-K Cr.P.C, vide judgment dated 7.7.2016,hence, the present appeal.

3. Learned counsel for the appellant argued that respondents No.1 has been charged in a promptly lodged report and there is sufficient evidence in shape of direct as well as circumstantial, including longstanding abscondance, against him but in spite of that the trial Court acquitted him under section 265- K Cr.P.C, therefore, the findings of the trial Court are against the law and facts on record and liable to be set aside.

4. We have heard learned counsel for the appellant and perused the available record.

5. It is established from the record that four persons, who are brothers inter se, have been charged for

indiscriminate firing at the deceased, out of whom, accused Zahoor, after conclusion of trial, has been acquitted by learned Additional Sessions Judge-IV, Kohat, vide judgment dated 6.2.2014, against which no appeal has been filed by the prosecution and, as such, has gained the finality. It is also established from the record that the role of the present appellant is similar to that of his co-accused, who has been acquitted of the charge. Honourable, the apex Court in a case titled **Ghulam Sikandar and another vs. Mamaraz Khan and others Khan (PLD 1985 S.C 11)** has laid down guiding principles in such eventualities and has held that "*When witnesses are disbelieved qua the acquitted co-accused to whom same and similar role was attributed then they shall not be relied upon with regard to the other co-accused unless they are strongly corroborated by evidence coming from independent source.*". This judgment of the apex court has repeatedly been followed in number of judgments. Reference can be made to **2002 SCMR 1855, 1996 SCMR 1742 and 2009 SCMR 946.** Recently, the apex Court again reiterated the same view in the case titled **Irfan Ali vs. The State, (2015 SCMR 840)** and observed that "*Whenever witnesses were found to have falsely deposed with regard to the involvement of one co-accused then, ordinarily, they could not be relied upon qua the other co-accused unless their testimony was sufficiently corroborated through strong corroboratory evidence, coming from an unimpeachable source. Evidence of a witness was divisible, however, pre-condition was that evidence of the same set of witnesses may be rejected against some of the accused and it could*

be relied upon with regard to the other set of the accused, provided it was getting strong independent corroboration from unimpeachable source while recording conviction on a capital charges.

6. The record divulges that the instant case has been registered on the report of deceased then injured. No doubt, a statement of a deceased person in the form of an F.I.R. can be treated as a dying declaration under Article 46 of Qanun-e-Shahadat Order, 1984, for sustaining conviction on a capital charge, however, to make it basis for conviction, the prosecution is required to establish, firstly, that the dying man was in full senses, conscious and alert to surrounding, was fully oriented in space and time and was able to make a coherent statement, secondly, the dying declaration rings true, thirdly, the doctor present at the occasion shall give a fitness certificate about the condition of the dying man but here in the instant case the doctor has not given any certificate on the Mursilla to the effect that the deceased then injured was conscious and could talk. The report has been recorded by Bahadar Nawaz ASI but he has not obtained any certificate from the doctor to the effect that the deceased then injured was able to talk or otherwise. Besides the above, the alleged dying declaration/Murasilla has been made in present of his brother Rehman Shah, therefore, his statement in presence of his relative is not worthy of credence. The august Supreme Court of Pakistan has laid down in the case of ***Nazim Khan and 2 others. v.***

The State (1984 SCMR 1092) *that Dying-declaration recorded in presence of relatives of deceased would not be worthy of credence.* In the case of **Mst. Zahida Bibi v. The State (PLD 2006 SC 255)** it was observed by the Hon'able supreme Court that *"dying declaration like the statement of an interested witness require close scrutiny and that it was a weak kind of evidence being without the test of cross examination".* In **Farman Ahmad v. Muhammad Inayat and another (2007 SCMR 1825)** *it was again reiterated by the apex Court that such a declaration would require close scrutiny and corroboration.*

7. In the present case, Rehman Shah and Raza Khan, claimed to have seen the occurrence, but as stated earlier, their statements have already been disbelieved by the learned trial Court in the previous trial, which judgment has gained the finality. Yes, there is absconsion in the account of respondent-accused but the same alone cannot be made basis for conviction, therefore, learned trial court has properly exercised its jurisdiction under the provision of Section 265-K Cr.P.C as there is no prospect of the accused being convicted of the charge levelled against him.

8. Apart from the above, it is by now a well settled principle of criminal dispensation of justice that after earning acquittal from the trial Court, double presumption of innocence is acquired by an accused. The court while sitting in appeal is always slow in reversing the judgment of acquittal, unless it is found arbitrary, fanciful and capricious on the face of it or is the result of bare

misreading or non reading of any material evidence. We, therefore, do not feel persuaded to admit this appeal to regular hearing, which would amount to an exercise in futility and wastage of Court's time. It is, thus, dismissed in *limine*.

Announced.
Dt. 21.9.2017

JUDGE

JUDGE

Office
03/10/2017

(M.Zafral P.S) (DB of Hon'able Mr. Justice Waqar Ahmad Seth and Hon'able Mr. Justice Ijaz Anwar.)