JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

JUDGMENT

Cr.Appeal No. 256-P of 2013

Date of hearing: 13.03.2018
Appellants: (Salim Khan and Azam Khan) By Mr. Jalal-ud-Din Akbar Azam Khan (Gara), Advocate.
Respondent: (State) By Mian Arshad Jan, A.A.G.
Mr. Saadatullah Khan Tangi, Advocate, for complainant party.

ISHTIAQ IBRAHIM, J.- Through the present criminal appeal, the appellants namely Salim Khan and Azam Khan have impugned the judgment dated 29.05.2013 of the learned Additional Sessions Judge-V, Kohat vide which they were convicted and sentenced as under:-

> **Under Section 302 (b) PPC: Life imprisonment each with compensation of Rs.2,50,000/- each within the meaning of Section 544-A Cr.P.C. or in default of payment 06 months S.I. and would be recoverable as arrears of land revenue.**

2. The prosecution case, in brief, is that Naeem Khan alias Khanoo, the deceased, then injured, on 6.8.2011 at 7:30 p.m. reported to police at

Emergency Room KDA Hospital Kohat that on the said date at 7:00 p.m. he was present in the street known as "Charbagh"; in the meanwhile, accused Rehmat alias Kakoo, (Respondent in connected Cr. Appeal), Azam Khan, Salim Khan (the appellants herein) and one unknown person, came there and on seeing him started firing at him, as a result thereof, he sustained injuries. The motive attributed was previous blood feud. This report was reduced in the shape of *Murasila* (Ex.PW 4/1) which was later on incorporated in F.I.R. No. 459 dated 06.08.2011 (Ex.PA). The complainant succumbed to the injuries on the same day. Section of law was altered from 324 PPC to 302 PPC.

3. After carrying out the requisite investigation, case was submitted for trial before Additional Sessions Judge-V, Kohat against the appellants while challan under Section 512 Cr.P.C. was submitted against the absconding accused Rehmat alias Kakoo. On 14.03.2012, the appellants were formally charge sheeted to which they pleaded not guilty and opted to face trial.

Tufail was not charged by name in the F.I.R. but was charged subsequently. He was acquitted vide impugned judgment and no appeal has been preferred against his acquittal.

4. In order to bring home charge, the prosecution examined eight witnesses and there after the appellants were examined under Section 342 Cr.P.C. wherein they also pleaded innocence. They neither wished to be examined on oath nor produced evidence in their defence. Consequently, appellants were convicted and sentenced as mentioned above.

5. We have heard arguments of the learned counsel for the appellants, learned A.A.G. for the State assisted by learned counsel for the complainant and perused the record with their valuable assistance.

6. The learned counsel for the appellants, inter alia, submitted that the deceased, then injured, was not in a position to make a coherent statement because the alleged dying declaration was recorded in the hospital but even then, the same was neither

attested by the doctor nor any certificate regarding the orientation and consciousness of the deceased, then injured, is available on the record, more so the medico legal certificate is also mute regarding this aspect of the case. He further submitted that there is no other evidence except the so-called dying declaration which is not getting support from the medical evidence and other circumstances of the case. He also added that four persons are charged without any specification of role and the dimension of the three entry wounds are one and the same size i.e. 1/8 x 1/8 inch. He lastly submitted that even dying declaration and motive were not put to the accused while he was being examined under Section 342 Cr. P.C., the same cannot be used against the appellants.

7. The learned A.A.G. assisted by counsel for the complainant vehemently opposed the grounds agitated by counsel for the appellants and submitted that it is a daylight occurrence. The deceased was in a position to make a coherent

statement; from the statement of the author of the dying declaration, it is clear that the deceased was in a position to make a coherent statement and the same is supported by other circumstances of the case, the cross report lodged by the appellants, motive, conduct of the appellants and prayed for dismissal of the appeal by supporting the judgment of conviction.

8. In order to appraise dying declaration and its worth, the superior Courts have laid down certain criteria and amongst them the foremost ground for believing the dying declaration is as to whether it is established from the available evidence that at the time of making statement the deceased was capable of making such a statement. In this case, the report of the deceased was recorded in the emergency room of KDA Hospital Kohat by Rafiullah ASI (Retired) PW-4 but ironically the medico legal report Ex/PW 4/2 is silent regarding the consciousness or otherwise of the deceased, then injured, at that point of time, more so a separate certificate and even endorsement on the report of the deceased have not been taken from

the concerned medico legal officer to fortify the stance of the prosecution that at the relevant time, the deceased, then injured, was in a position to make coherent statement. Wisdom is derived from the case of **Mst. Ghulam Zohra and another vs. Malik Muhammad Sadiq and another reported in (1997 S C M R 449) wherein it was held by the Apex Court:**

> ***"In the face of this medical evidence, the learned Judges of the High Court rightly observed that it was the duty of the Police Officer to have obtained a certificate from the Doctor before recording the statement of the injured that he was in a fit condition to give the statement. Such a certificate admittedly was not obtained and no reasonable explanation for this omission was given by the Police Officer. In the circumstances, fitness of the injured to make the statement Exh.14 remained doubtful and the High Court rightly so held."***

The same view was reiterated in case of **Mst. Miran and another vs. Abdur Rahim and another reported in (PLJ 2004 SC 294).**

9. Though at the trial, Dr. Fazal-ur-Rehman appeared as PW-5. In cross examination, he stated

that the injured was conscious, well oriented and was talking to him but he was further cross examined and he stated that I have neither mentioned this fact in my report nor he has any reason to explain as to why he has not done so at the time of his medico legal examination. This appears to us that this witness has made an abortive attempt to meet the question of consciousness of the injured during the trial. Prior to examination of this witness in the Court, there is nothing on record from where it can be safely said that the deceased, then injured, was in a position to make coherent statement. The documentary evidence i.e. medico legal evidence and initial report (Murasila) recorded in the hospital nowhere suggests that at the time of lodging the report, the deceased, then injured, was in a position to record his statement. Here we have documentary evidence as mentioned above in the shape of medico legal report/Murasila wherein it figures nowhere that anything has been mentioned regarding the condition of the deceased, then injured. The attempt of PW-5 Dr.

Fazal-ur-Rehman is just an oral assertion, that too, introduced during the course of cross examination which in our view will not overcome the documentary evidence prepared at the very initial stage of the case. Almost in similar situation, the same question has been dealt with by Apex Court in case **Azeem Khan and another vs Mujahid Khan and others reported in (2016 S C M R 274)** where a Magistrate who recorded a confessional statement during the trial tried to rectify the wrongs and illegalities which he had committed while recording the said statement was not relied upon by the Apex Court because the documents which were produced did not contain the said explanation. The relevant discussion is at page 285 in paragraph 19 which is reproduced as under:-

> **"At the trial, the Recording Magistrate made crude attempts to rectify the wrong/illegalities, he had committed in recording the two confessions however, the law of evidence is clear on this point that documentary evidence shall prevail over the oral statement made at a subsequent stage,**

contradicting the contents of documents. Therefore, his belated statement at the trial cannot be safely relied upon."

10. It is also in the prosecution evidence that at the time of recording of the statement of the deceased, then injured, private persons were also present with him. Even assuming for a while that the deceased then injured was in a position to make a statement, the same was recorded in the presence of the persons who were present at the relevant time. In such circumstances, dying declaration which is recorded in the presence of relatives or for that matter, private persons who were present with him, it cannot be ruled out that the names of the accused were put in the mouth of the deceased, then injured. In this regard, reference can be made to **Muhammad Latif and Another vs Muhammad Hussain and 9 others (P L D 1970 Supreme Court 406)** wherein it was held:

> **(a) Evidence Act (1 of 1872)---**
> ***---S. 32-Dying declaration— Murder-All eye-witnesses present in hospital when dying declaration was being recorded-Possibility that deceased was tutored by them could not be ruled out.***

11. All the three entry wounds sustained by deceased, then injured, were of the one and the same dimension i.e. 1/8 x 1/8 inch. It appears that it is job of one person. However, in present case, three persons were nominated by name and the fourth unknown accused was charged. No empty was recovered from the place of occurrence. Even in the report-cum-dying declaration, the word *Aslah Aatasheen* has been mentioned, no specific weapon has been attributed to the accused. It appears, this is a doing of one man, the charge has been exaggerated and the dying declaration on this score is liable to be thrown out of consideration and in this regard, wisdom is derived from **Farman Ali vs The State (P L D 1980 Supreme Court 201).**

12. The contention of the learned counsel for the complainant and A.A.G. that cross report was lodged on that particular day wherein the appellants Salim and Tufail were injured and the same establishes the presence of the appellants at the relevant time, we are unable to subscribe to

these submissions of the learned A.A.G. and the learned counsel for the complainant firstly on the premise that no document of that case was brought on the file of the present case by the prosecution and secondly the same was not put to the accused in their examination under Section 342 Cr.P.C. Furthermore, there is nothing on the record of the present case in the shape of document or ocular account regarding the nature of the cross case. We are of the considered view that the same cannot be looked into because it is by now well settled that evidence of one case cannot be read into another case unless that is duly brought on record of the present case in accordance with law. Reliance can be placed on **Wazid Moral alias Wazid Ali and 13 others vs The State and another (1970 S C M R 256)** wherein the Apex Court held:

> **"This can hardly be considered to be a satisfactory manner of disposing of a criminal appeal on facts. It is a well established rule that each criminal case has to be decided upon the basis of the evidence led in that case. It cannot be disposed of merely because the Court has in a cross-case or in an appeal arising**

out of such a cross-case taken a different view of the evidence in that case. The High Court, clearly erred in adopting such an unwarranted procedure. It was incumbent upon it to make its own independent assessment of the evidence adduced in the case in the other case as well."

Similar view was also expressed in case **Muhammad Gulzar vs Muhammad Ashraf and 3 others (PLJ 1981 Supreme Court 521).**

13. For what has been discussed above and there is no other evidence except the dying declaration which suffers from patent and inherent infirmities, so in our view, the prosecution case is pregnant with inherent defects and material contradictions. The prosecution has been miserably failed to prove its case against the appellants beyond any reasonable doubt and the appellants are entitled to the benefit of doubt. Accordingly, this appeal is allowed, conviction and sentence awarded to the appellants are set aside and they are acquitted of the charges leveled against them.

14. Above are the detailed reasons of our short order dated 13.03.2018 which reads ad under:-

"For the reasons to be recorded later on, this Cr. Appeal No. 256-P of 2013 is allowed, the conviction and sentence of the appellants passed by the learned Additional Sessions Judge-V, Kohat on 29.5.2013 in case F.I.R. No. 459 dated 06.08.2011 under Sections 302/34 PPC Police Station Jungle Khel, Kohat are set aside and the appellants namely Salim Khan and Azam Khan are acquitted of the charges leveled against them. They be set at liberty forthwith if not required in any other case."

JUDGE

Announced:
13.03.2018

JUDGE

(D.B.)
Hon'ble Mr. Justice Qalandar Ali Khan
Hon'ble Mr. Justice Ishtiaq Ibrahim

Muradullah, PS