

**JUDGMENT SHEET**  
**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR**  
(Judicial Department)

**Cr.A.No.902-P of 2019.**

Date of hearing: 27.08.2019.


Mr.Shabbir Hussain Gigyani, advocate for  
appellant.

Mr.Aqil Muhammad, advocate for  
respondent.

Mr.Kamran Hayat, AAG for State.


**JUDGMENT**

**SAHIBZADA ASADULLAH, J.-** Impugned  
herein is the judgment dated 08.07.2019  
rendered by learned Additional Sessions  
Judge/Judge, Model Criminal Trial Court,  
Swabi delivered in case FIR No.584  
dated 24.07.2012 u/ss 302/34 PPC of  
Police Station Yar Hussain District Swabi,  
whereby upon conviction u/s 302 (b) PPC,  
the appellant has been sentenced to  
imprisonment for life with compensation of  
Rs.3,00,000/- u/s 544-A Cr.P.C. payable to  
the legal heirs of the deceased or in default  
whereof to undergo further six months SI.  
Benefit u/s 382-B Cr.P.C. was extended to  
him.



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2. As per murasila (Ex.PA/1), on 24.07.2012, Said-ul-Abrar Khan, SI upon receipt of information about the occurrence, came to casualty ward of Civil Hospital Yar Hussain, where injured complainant Ayaz Ali (now dead) in conscious condition in presence of CMO reported the matter to him, in terms, that he alongwith his brother Zulfiqar (PW) and uncle Naseer Muhammad (PW5-A) were proceeding to the tobacco kiln of one Sher Aman, their co-villager. The accused-appellant Zahir Shah was present in front of his shop duly armed with pistol and on sight started firing at them with the intention to kill as a result he got hit and sustained injuries whereas his brother Zulfiqar and uncle Naseer Muhammad escaped unhurt. Motive behind the occurrence is stated to be oral altercation took place between him and Zahir Shah appellant upon bathing in the mosque. The occurrence is stated to have been witnessed by Naseer Muhammad and Zulfiqar.



3. Initially, the case was registered u/s 324 PPC but later on the complainant Ayaz Ali succumbed to his injuries,

therefore, Section 302 PPC was inserted in the FIR.

4. After completion of investigation, challan was submitted in court, which indicted the appellant for commission of offence to which he pleaded not guilty and claimed trial. In order to substantiate its case, the prosecution examined 11 witnesses in all, whereafter statement of accused was recorded, wherein, he professed his innocence. On conclusion of trial, the learned trial court convicted and sentenced the appellant, as mentioned above, whereagainst he has filed the instant appeal whereas Zulfiqar Ali, brother of deceased, has moved Cr.R.No.180-P of 2019 seeking enhancement of sentence, therefore, being outcome of same FIR/judgment are decided through this single judgment.

5. Learned counsel for the appellant presented his case before us that the appellant is innocent and has falsely been implicated in the instant case, to him the charge is based on mala fide and the witnesses are inimical and interested. He

submitted that the deceased then injured was in precarious position of health and could not talk, to him the report was not made by him rather his brother reported. He went ahead to convince us that the appellant was charged after consultation by letting the real culprit scot-free, and the witnesses are not trustworthy, hence reliance cannot be placed on them towards capital punishment.

6. Conversely, learned Additional Advocate General appearing for the State assisted by learned counsel for the complainant has vehemently opposed the aforesaid contentions and submitted that the prosecution has proved its case through independent and confidence inspiring witnesses. They further contended that the prosecution has no animosity to charge the appellant and that the defence could not point out any mala fide on part of the prosecution. They proceeded to say that the report is prompt and the maker at the time of report was in full senses.

7. We generously heard the parties and read the record from cover to cover. The prosecution case mainly revolves around the

dying declaration of the deceased then injured and also with the single accused with long abscondence. The record speaks that it was on 24.07.2017 at 7.00 PM when the deceased received firearm injuries while in the company of Naseer Muhammad (PW5-A) and Zulfiqar (PW6) within 30 minutes i.e. at 7.30 PM his report was taken down by Said-ul-Abrar, SI duly attested by the doctor, in the casualty of Rural Health Centre Yar Hussain. The main thrust of the defence arguments was the dying declaration as to the learned counsel the bullets landed on the vital organs of the body and in such eventuality the injured loses his senses what to say of full alertness to the time and space. To him, all was engineered to give an impression that all was well with the injured at the time of report.

8. The defence could not persuade us to believe and accept the picture it painted rather this court is under legal obligation to apply its judicial mind to the evidence available on file. There is no denial to the fact that the report is prompt in all respects

taken down in presence of the doctor duly verified by one of the eyewitness and endorsed by the doctor. The doctor was thoroughly cross-examined, who explained that the deceased then injured was conscious and could talk. The defence was not contented with the report of the doctor, it questioned the eyewitness on this particular aspect of the case where too the reply came that the deceased then injured was conscious and oriented in time and space. The apex court in case of **"Niaz-ud-Din and another Vs. The State and another (2011 SCMR 725)** has held *that "Dying declaration is a weaker type of evidence than the evidence subjected to cross-examination, but conviction can be based on the same, as such declaration is made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth".*

09. It is pertinent to mention that the deceased in injured condition was then referred to Lady Reading Hospital

Peshawar, for further treatment where he died on 01.08.2012, i.e. he survived for long seven days. His survival for seven days alone speaks of his ability to report.

10. The record is silent to tell that what animosity the prosecution had towards the appellant, even the defence could not point out previous ill-will or grudge, which the witnesses and the deceased were nourishing against the appellant. We are not persuaded to hold that the real culprit was let off and the appellant was trapped, as substitution is a rare phenomenon, that too, in the case of single accused. The report was made within 30 minutes as the injured was rushed to the hospital, which excludes every possibility of consultation on the point of charge.

11. Beside the deceased, two other eyewitnesses provided the ocular account and they gave specific reasons for their presence at the place of occurrence as according to them they along with the deceased were proceeding to the tobacco barn of one Sher Aman. Although the deceased and eyewitnesses are inter

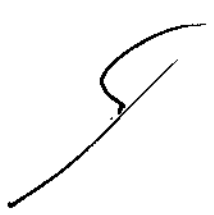
related but they had no previous enmity or ill-will against the accused and they could not be termed as interested witnesses in absence of any previous enmity. Both witnesses remained consistent on each and every material point. Minor discrepancies were not helpful to the defence because the appellant absconded and was arrested after long time and with the passage of time such discrepancies were bound to occur. In the case of **Khizar Hayat Vs. The State (2011 SCMR 429)**, the apex court has held that *"incident was a case of single accused, who had fired upon the deceased, therefore, substitution of the culprit was not possible- such was a rare phenomenon where a witness whose close relative had been murdered would substitute the accused with an innocent person, thereby allowing actual accused to go scot-free....."*

12. The motive was altercation in the mosque a little early, although the eyewitnesses were not present in the mosque and they never said that the accused and deceased exchanged hot words in their presence rather it was the



deceased who while making the report mentioned it.

13. Be that as it may, mere absence of motive or weakness of motive attributed to accused would not in any manner adversely affect the prosecution case, as undoubtedly motive was a thing which in many of the cases remained shrouded in mystery, as it was duly in the mind of the accused, who had committed crime for that reason. Soon after the occurrence, the accused/appellant absconded and it was on 02.02.2016 that he was arrested. Abscondence of accused, although by itself was insufficient for conviction, yet was a strong source of corroboration for other direct and circumstantial evidence in the case. The learned trial court has legally and properly scrutinized and assessed the evidence without misreading and non-reading and the conclusion arrived at by it did not warrant any interference.



14. As far as Cr.R.No.180-P of 2019 filed by the petitioner is concerned, since the motive remained shrouded in mystery, so

the sentence awarded is adequate and warrants no interference.

15. Resultantly, this appeal and the connected criminal revision, mentioned above, being devoid of merit, are hereby dismissed.

  
JUDGE

  
JUDGE

**Announced.**

**27.08.2019.**

Sadiq Shah PS (DB) Hon'ble Mr. Justice Syed Muhammad Attique Shah & Hon'ble Mr. Justice Sahibzada Asadullah.