JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,

PESHAWAR

(Judicial Department)

Cr.A. No.191-P/2012

Date of hearing: _____

Appellant (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- This appeal is directed against the judgment dated 31.03.2012, rendered by learned Additional Sessions Judge-II, Charsadda, whereby she convicted and sentenced appellant ***Muhammad Karim*** under section 302(b) PPC to undergo life imprisonment and to pay Rs.3,00,000/- as compensation to LRs of the deceased in terms of S.544-A Cr.P.C. or in default thereof to undergo 06 months S.I. further. Benefit of S.382-B Cr.P.C. has been extended to him.

2. The prosecution case as unfolded in First Information Report Exh.PA is that on 26.11.2010 at 02.15 hours, Abdul Ghafar deceased then injured reported to local police in Charsadda hospital, that on the fateful night, at 1.20 a.m., the moment he came out from his house, situated in village Kala Dhand Payan, Muhammad Karim (appellant-convict herein), already ambushed there, opened fire at him, as a result he got hit on left side of his abdomen. Motive behind the occurrence as disclosed by him is that the appellant was ejected from a house by landlord, for which he was suspecting him. Report of injured was recorded in the shape of murasila Exh.PA/1 by Munir Khan ASI, on the basis of which FIR No.582 dated 26.11.2010 under section 302 PPC at Police Station Umarzai was registered against the appellant. He prepared injury sheet of the injured Exh.PW.1/1 and referred him for medical examination.

3. Dr. Iraq Shah DHQ hospital Charsadda (PW.6), examined the deceased then injured on 26.11.2010 at 02.15 hours and observed as under:-

Fully conscious well oriented in time and date.

1. Firearm entry wound on the left lower abdomen measuring 1.5 x 1 cm.
2. Exit left side lower posterior abdomen measuring 1.5 x 2.5 cm.

He was referred to LRH, Peshawar for specialized treatment and surgeon opinion.

Injured Abdul Ghafar, later on, succumbed to the injures in LRH Peshawar, wherefrom his dead body was shifted to DHQ hospital Charsadda for post mortem examination. Munir Khan ASI (PW.1), prepared inquest report of the deceased Exh.PW.1/3.

On 26.11.2010 at 04.30 a.m. he also conducted autopsy on the dead body of deceased Abdul Ghaffar and found the same injuries as observed by him at the time of initial examination of the deceased who was then in injured condition.

Opinion: According to his opinion the deceased died due to firearm injuries, internal sever bleeding followed by shock.

4. Hazrat Ullah Khan SI (PW.9) proceeded to the spot and prepared site plan Exh.PB on the pointation of Abdul Sattar. During spot inspection he recovered and took into possession a 30 bore empty shell Exh.P.1, vide recovery memo Exh.PW.5/1. Vide recovery memo Exh.PW.5/2, he took into possession the last worn bloodstained garments of the deceased and sealed the same in parcel, recorded the statements of PWs under section 161 Cr.P.C., sent the bloodstained garments of the deceased to the FSL report whereof is Exh.PZ while report in respect of the empty is Exh.PZ/1. After arrest of the accused/appellant on 27.11.2010, he obtained his physical custody, interrogated him and recorded his statement under section 161 Cr.P.C. On completion of investigation, he handed over the case file to SHO, who submitted challan against the accused/appellant.

5. On receipt of challan by the learned Trial Court, accused/appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, prosecution examined as many as eleven witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed his innocence. He, however, declined to be examined on oath or to produce evidence in defence. On conclusion of trial, learned Trial Court, after hearing both the sides, convicted and sentenced the appellant, as mentioned above, hence, this appeal.

6. The main thrust of arguments of learned counsel for the appellant was that the learned Trial Court while considering the report of the deceased then injured as a dying declaration, blindly relied on the same, squarely over sighting the crucial aspect of identification in the dark hours of the night. He contended that no source of light in

which he identified the appellant has been disclosed by the deceased then injured in his report nor any such source has been observed by the I.O. on the spot nor taken into possession during spot inspection, therefore, the identification of the assailant being highly doubtful, the learned Trial Court erred in law while recording the conviction, on surmises and conjectures, therefore, the impugned judgment is liable to be reversed.

7. Conversely, learned AAG while supporting the impugned judgment sought dismissal of the appeal.

8. We have heard the respective submissions advanced from both the sides and perused the record carefully.

9. It appears from the impugned judgment that the learned Trial Court has recorded the conviction and sentence of the appellant on the sole dying declaration of deceased then injured. We do agree with the learned Trial Court that sanctity is attached to the dying declaration

because a dying man is not expected to tell lies, but being weak kind of evidence it required close scrutiny and corroboration. While dealing with the question of dying declaration the Court has to judge it from certain points. Some of the main tests for determining the genuineness of the dying declaration are:-

*. ***Whether the maker had the physical capacity to make the dying statement.***

*. ***Whether the maker had opportunity to recognize the assailant/ assailants.***

*. ***Whether there were chances for mistake on the part of dying man in identifying and naming the assailant/ assailants.***

*. ***Whether it was free from prompting from any outside quarter ; and***

*. ***Whether the witness who heard the deceased making his statement, heard him correctly and whether their evidence can be relied upon***.

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination.

Admittedly, if once the Court comes to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailant of the victim, there is no question of further corroboration.

10. It appears from the record that incident took place in the month of October 2010 at odd hours of the night at 1.20 a.m. In light of statement of Dr. Iraq Shah, who examined the deceased then injured at first instance and Munir Khan ASI (PW.1) who recorded his report, we entertain no amount of doubt about capability of the deceased then injured to talk and about his consciousness. The only disturbing question is that whether the deceased then injured was in a position to identify the assailant at the time of incident? A look at the report of the deceased then injured reveals that he has not uttered a single word about the any source of light whether electric or natural (moon light), in which he identified the appellant. Similarly, in the site plan Exh.PB nowhere around the

crime venue any source of light has been shown or taken into possession by the I.O. during spot inspection. Had there been any source of light, the I.O. would have definitely mentioned the same in the site plan or the deceased then injured would have specifically disclosed the same in his dying declaration. In the site plan deceased then injured has been shown at Point No.1 and the appellant as Point No.2, at a distance of 15 paces, which is a considerable distance and in absence of any source of light, identification of the assailant from such a distance, is next to impossible. Besides, it does not appeal to our mind that an assailant who selects the odd hours of the night, would commit any stupidity to disclose his identity before his target. The learned trial Court while stating the points of test for determination of a dying declaration at S. No.(d) has specifically mentioned one of the essential points that ***"whether there is any doubt about the identity of the accused"***, but squarely ignored the same in light of the

peculiar facts and circumstances of the case discussed above. The learned Trial Court has not furnished any reason, much less plausible, in support of point of identification, rather has given much stress on the physical condition of the deceased then injured that he was capable to talk, in light of statement of the doctor and author of his report. We do not find any piece of evidence, much less solid and convincing to remove our serious reservations about identification of the appellant by the deceased then injured in the dark hours of the night.

11. For the reasons discussed above, we are firm in our view that though deceased then injured was in a position to talk, but not in a position to identify the assailant. Thus, if identification of the assailant is excluded from consideration, the whole edifice of the prosecution case shall crumble to the ground. No other direct evidence is available with the prosecution. Mere recovery of blood from the spot, bloodstained garments of the deceased

coupled with the report of Serologist and autopsy report, being corroborative pieces of evidence, would not be sufficient to bring home the guilt of the appellant. The identification of the appellant being highly doubtful, cast serious doubts in the prosecution case, benefit of which would be extended to the appellant not as a matter of grace or concession but as a matter of right. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim " it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing

an innocent". Wisdom in this regard can also be derived from the judgments of the apex court in case titled, **"Muhammad Khan and another Vs the State" (1999 SCMR 1220) and case titled, "Muhammad Ikram Vs the State" (2009 SCMR 230)**. The learned trial Court has not evaluated the dying declaration of the deceased then injured in its true perspective and thus reached to an erroneous conclusion by holding the appellant guilty of the offence.

12. Resultantly, this appeal is allowed. Conviction and sentence of the appellant recorded and awarded by the learned Trial Court vide impugned judgment dated 31.03.2012, are set aside and he is acquitted of the charges leveled against him. He be set at liberty forthwith, if not required in any other case.

These are reasons of our short order of even date.

Announced.
02.06.2015.

J U D G E.

J U D G E.

**M.Siraj Afridi P.S. D*