

JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR JUDICIAL DEPARTMENT

[JUDICIAL DEPARTMENT]

Cr.A No. 354-P/2018.

Sajid Vs The State and another

Date of hearing 02.11.2021

Appellant (by) Mr. Shabbir Hussain Gigyani. Advocate

Complainant (by) Mr. Ali Zaman. Advocate

State (by) Mr. Arshad Ahmad. Addl. A.G

J U D G M E N T

MUSARRATHILALI, J.- This criminal appeal has been directed against the judgment dated 24.03.2018 of the learned Sessions Judge/Judge on Special Task, Peshawar, delivered in case FIR No.734, dated 01.08.2015, registered under Section 302 PPC, at Police Station, Chamkani, District Peshawar, whereby the appellant has been convicted and sentenced u/s 302 (b) PPC to imprisonment for life, besides payment of Rs. 2,00,000/-, as compensation under section 544-A Cr.P.C to the legal heirs of deceased, recoverable as arrears of land revenue or in default thereof shall further undergo six months SI. Benefit under Section 382-B Cr.P.C. was extended to him.

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2. The case of prosecution, as per contents of the FIR, is that on 31.07.2015 Zabita khan in injured condition lodged a report to Tahir Hussain ASI (PW-7) in a casualty room of LRH, Peshawar, to the effect that on the eventful day, he was present in a Cricket playground, situated at Rano Garhi, near motorway bypass, when at 16.15 hours Sajid, the appellant, made firing at him, due to which he was hit and sustained injury on his right side beneath armpit, and, thereafter, he was shifted by a passerby, Shahzada, to the hospital, however, he disclosed no motive for the commission of the offence, accordingly, the above referred case FIR Exh.PW 8/1 was registered against the appellant.

3. Investigation of the case was entrusted to Anwar Khan SI (PW-6), who visited the spot, prepared the site plan, Exh.PB, of his own. He also took into possession blood stained garments of the deceased vide recovery memo Exh.PW 4/1. Later on, the deceased then injured died and, thus, section 302 PPC was added in the case. On arrest of the accused Sajid and completion of investigation, complete challan in terms of section 173 Cr.P.C was submitted. He was sent for trial to the court of learned Sessions Judge/Judge, on Special Task

Peshawar, where at the commencement of trial, the prosecution produced nine (09) witnesses. On closure of the prosecution evidence, the accused-appellant was examined under section 342 Cr.P.C, wherein he denied the charges, professed innocence and stated to have falsely been implicated in the case, however, he was neither ready to be examined on oath nor wished to produce defence. The learned trial Court, on conclusion of the trial, convicted and sentenced the accused-appeal, vide judgment herein impugned.

4. Arguments heard and record perused.

5. The entire case of the prosecution is relied upon the report of the deceased then injured 'dying declaration' made by him in the hospital before Tahir Hussain ASI (PW-7) and medical report as no other person came forward to furnish eyewitness account in the case, therefore, it is to be seen as to whether the dying declaration rings true and is sound in substance to be relied upon, whether the deceased then alive at the time of recording his report before the police could talk coherently and that he was not prompted by other person present with him.

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6. From perusal of contents of the report, it is evident that the occurrence took place on 31.07.2015 at 16.15 hours, while report was lodged on the same day at 17.20 hours (though time of report is tampered with), whereas the FIR was chalked on the following day, i.e., 01.08.2015, at 17.35 hours, after the delay of twenty four (24) hours, with no explanation. The contents of FIR further reveal that after registration of the case, it was handed over to Bukhtiar Khan ASI. Anwar Khan SI, (PW-6), the investigating officer, in cross examination admitted that an inquiry was conducted by Bakhtiar Khan ASI. He further admitted that the said inquiry was not available on record nor he had gone through the said inquiry report. The above discussed evidence is suggestive of the fact that the FIR was lodged after considerable consultations and deliberation and after conducting preliminary investigation in the case.

7. Moreover, the testimony of the Investigating officer is also not in line with the contents of report because he stated in his cross examination that the occurrence took place in the field of one Waroki Haji while as per contents of FIR the occurrence took place in the playground. He further stated that he has investigated

the instant case regarding cricket match and found that there was cricket match at the relevant time. Similarly, the report of injured complainant was recorded on 31.07.2015 at 17.20 hours (05.20 p.m), while according to the medico legal report Exh.PW 9/1, the victim was brought by Tahir Hussain ASI on 31.07.2015 at 05.00 p.m, while, as per report the injured was brought by one Shahzada. Tahir Hussain was examined as PW-7, and he stated in cross examination that the victim was taken by a passerby and the people who brought the injured to the hospital were present at the time of scribing the report. He further stated that the report was not endorsed by the doctor. Therefore, possibility cannot be ruled out that name of the appellant might have been shown by the people present with the deceased then injured at the time of recording report, thus, in the present scenario, the dying declaration is not free from doubt.

8. Apart from the above, as per statement of the Investigating officer, there was a cricket match between two teams in the playground, therefore, people would have been present on the spot but none of them was produced by the prosecution. Similarly, according to the report of deceased then injured, he was brought by one

Shahzada, but neither his statement was recorded by the police under section 161 Cr.P.C nor cited him in the calendar of witnesses nor he was produced before the trial court for recording his statement, as such, withheld its best evidence. It is well settled principle of law that if a best piece of evidence is available with a party and the same is withheld, then it is presumed that the party has some sinister motive behind it in not producing the said evidence, therefore, presumption under illustration (g) to Article 129 of Qanun-e-Shahadat Order can fairly be drawn in the case. Likewise, it is established from the record that neither any empty nor blood was recovered from the spot and even the I.O has not verified the site plan through the injured complainant after his discharge from the hospital, nor the site plan bears the date of its preparation, which aspect of the case also creates doubt in the prosecution story.

9. 'Dying declaration' is the statement which is made by the victim of homicide offences as to cause of his death. The rule relating to dying declaration and its admissibility is provided in Article 46 of the Qanun-e-Shahadat Order, 1984, which says that the statement of dying man is relevant and admissible in evidence,

however, for recording such declaration no particular mode has been provided. sub-Article (1) of Article 46 of the Order, 1984, provides that when the evidence or statement of a person, who is dead, as in the instant case, relates to the cause of his death or as to any of the circumstances of the transaction, which resulted in his death, such statement becomes relevant and gains evidentiary value because of the special circumstances that the person, who made such statement, was no more alive/available. Now, it has been well settled by the Hon'ble Supreme Court that 'dying declaration' is a weak type of evidence and is similar to the statement of an interested witness, therefore, requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell a lie. In the case titled **Abdur Rahim alias Rahima vs. the State and others (PLD 2003 SC 662)** the august Supreme Court has held that 'the law so far developed qua an oral dying declaration is that it is a weak piece of evidence which must be corroborated by independent circumstances'. In another case titled **Mst. Zahida Bibi vs. The State (PLD 2006 SC 255)** Hon'able apex court has held that:-

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“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.”

Same view was also reiterated in the case the cases titled **Farman Ahmed vs. Muhammad Inayat (2007 SCMR 1825) Tahir Khan vs. the State (2011 SCMR 646)**

10. So far as medical evidence is concerned, it is settled law that the medical evidence may confirm the ocular evidence with regards to receipt of injuries, nature of the injuries, kinds of weapon used in the commission of offence but it would not connect the accused with the commission of the offence.

11. On thorough scanning of the record, we are of the affirm view that the prosecution has miserably failed to prove its case against the accused-appellant beyond reasonable doubt. It has been now well settled that 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, resultantly, while extending benefit of doubt, we accept the appeal filed by the accused-appellant by setting aside his conviction and sentences and acquit him of the charges leveled against him. He be set free forthwith, if not required in any other case.


Above are the reasons of short order of even date.

Announced

02.11.2021

M.Zafra P.S


JUDGE


JUDGE

(DB) Hon'ble Mr. Justice Lal Jan Khattak
Hon'ble Justice Musarrat Hilali