JUDGMENT SHEET

PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

Cr.A No. 353-M/2019

(1) Salih Muhammad alias Sawal son of Kashmalay
(2) Mustamir Khan alias Koka son of Salih Muhammad
(Appellants)

Versus

(1) The State through A.A.G.
(2) Noor Zada through Legal heirs.
(Respondents)

Present: *Mr. Jehanzeb Buneri, Advocate.*

Mr. Raza-ud-Din Khan, Addl:A.G

Mr. Shams Buneri, Advocate.

Cr.R. No. 69-M/2019

Ahmad Zada son of Lal Gul
(Petitioner)

Versus

(1) Mustamir Khan alias Koka son of Salih Muhammad
(2) Salih Muhammad alias Sawal son of Kashmalay
(3) The State through A.A.G

(Respondents)

Present: *Mr. Shams Buneri, Advocate.*

Mr. Jehanzeb Buneri, Advocate

Mr. Raza-ud-Din Khan, Addl:A.G.

Date of hearing: **19.05.2021**

JUDGMENT

WIQAR AHMAD, J.- Appellants namely Salih Muhammad alias Sawal and Mushtamir Khan alias Koka have called in question judgment dated 20.07.2019 passed by learned Additional Sessions

Judge-II/Model Criminal Trial Court Buner, vide which they were convicted and sentenced as follows;

- ***U/S 302 (b) PPC to life imprisonment each as Ta'zir along with payment of fine of Rs. 10,00,000/- (one million) each under section 544-A Cr.P.C payable to legal heirs of the deceased. In case of default of payment of compensation, both the accused were ordered to undergo six months simple imprisonment.***
- ***U/S 15 A.A to two years rigorous imprisonment along with fine of Rs. 20,000/- each, or in default thereof to suffer one month simple imprisonment.'***
- ***All the sentences were ordered to run concurrently.***
- ***Appellants were also extended benefit of section 382-B Cr.P.C.***

2. Appellants faced trial in case FIR No. 1293 (Ex.PW-4/1) dated 18.09.2017 registered under sections 302, 34 PPC (read with section 15 A.A) at Police Station Dagger District Buner, on the basis of '*Murasila*' (Ex. PW-6/1). *'Murasila'* had been incorporating report of the deceased then alive namely Noor Zada wherein he has stated that on the day of occurrence he started his tractor as usual, took it out of his house and left for a market namely *Hisar* for the purpose of providing services on rent. When he reached the place of occurrence the appellants namely Salih Muhammad alias Sawal son of Kashmalay and Mustamir Khan alias Koka son of Salih Muhammad residents of Bari Dara had been present there. On seeing the complainant, the accused/appellant namely

Koka (Mustamir Khan) started firing at him as a result of which he received injuries on his face and shoulders. Co-accused/co-appellant Sawal (Salih Muhammad) was alleged to have given axe blows to the complainant, causing him injuries on different parts of his body. The occurrence was stated to have been witnessed by brother of the complainant namely Ahmad Zada and other people present there. Motive for the occurrence was disclosed as a dispute arising out of some loan transaction of Rs. 14,000/-. Both the accused were charged for commission of the offence.

3. During the course of investigation, the Investigating Officer prepared site plan Ex. PW-PB on pointation of the eyewitness. Blood stained earth was also recovered from the spot by Investigating Officer vide recovery memo Ex. PW-3/1 dated 18.09.2017. One cut finger of the deceased was also taken in possession vide recovery memo Ex. PW-3/2 dated 18.09.2017. The Investigating Officer also took in possession the tractor having marks of bullets (belonging to complainant) vide recovery memo Ex. PW-3/3. Two empty shells of 12 bore were also recovered from the spot vide recovery memo Ex. PW-3/4 dated 18.09.2017. Weapon of offence i.e. rifle (12 bore) was

recovered on pointation of accused Mustamir Khan and took in possession by Investigating Officer vide recovery memo Ex. PW-13/2 dated 21.09.2017. The axe used in commission of the offence had also been recovered on pointation of accused Salih Muhammad vide recovery memo Ex. PW-13/3 dated 21.09.2017. The weapons of offence along with other recovered items were sent to Forensic Science Laboratory (hereinafter referred to as ***"FSL***") for the purpose of chemical analysis and comparison, wherefrom reports Ex. PZ/1 and Ex. PZ/2 were received and placed on file.

4. On completion of investigation in the case, complete *challan* was put in Court against appellants. Charge was framed against them on 14.11.2017, to which they pleaded not guilty and claimed trial. Prosecution was invited to produce evidence, who accordingly examined fifteen (15) witnesses and closed its evidence. Statements of the accused were recorded under section 342 Cr.P.C. On conclusion of proceedings in trial, accused/appellants were convicted for commission of the offence vide judgment dated 29.07.2019 of the Court of learned Additional Sessions Judge-II Buner, as stated earlier.

Accused/appellants challenged their conviction and sentences through the instant appeal before this Court. While brother of deceased namely Ahmad Zada has also filed connected Criminal Revision No. 69-M of 2019 for enhancement of the sentences awarded to accused/respondents.

5. We have heard arguments of learned counsel for the parties, learned A.A.G appearing on behalf of State and perused the record.

6. Perusal of record reveals that mainstay of the prosecution case has been eyewitness account of the two eyewitnesses furnished as PW-1 and PW-2. Dying declaration of the complainant who had also expired later on recorded in the shape of *'Murasila'* and exhibited as Ex. PW-6/1 in evidence, as well as the corroboratory pieces of evidence which shall be discussed later.

7. We first discuss evidentiary value of the dying declaration relied upon by the prosecution. In support of the dying declaration prosecution have been relying upon statement of Liaqat Ali, Sub Inspector who had recorded the dying declaration in shape of *'Murasila'* and statement of Dr. Ihsanullah recorded as PW-5, as well as statement of brother of the

complainant recorded as PW-1. Prosecution have also been relying upon the consciousness certificate exhibited as Ex. PW-5/2 as well as report of initial medical examination of injured by same doctor exhibited as Ex. PW-5/1. In support thereof Dr. Ihsanullah, Medical Officer DHQ hospital Dagger has been examined as witness (PW-5). In his cross-examination this witness stated that during examination the patient was serious and in trauma. He also admitted that certificate Ex. PW-5/2 neither bears his signature nor his seal. The certificate Ex. PW-5/2 bears signature of a doctor but same can easily be said to be different from the signature present on report of medical examination of the deceased Ex. PW-5/1. The doctor examined as PW-5 had also disowned said signature. It has become doubtful as who had signed the certificate Ex. PW-5/2 as a doctor. Dr. Khalid Saleem (PW-11) had conducted postmortem examination of the deceased. In his report of postmortem examination he has given a long list of 10 injuries found on different parts of body of the deceased. In internal examination it has been shown that the scalp, skull, membrane and brain were injured. Thoracic wall, ribs, cartilages, pleurae, right and left

lungs and major blood vessels had also been injured. In his cross-examination also he reiterated the same stance vis-à-vis the injuries and stated that major injuries had occurred to brain, lungs and associated blood vessels. He also stated that usually a person receiving injuries to major organs i.e. brain, lungs, major vessels and heart etc gets unconscious. The deceased had received numerous serious injuries on his body as apparent from report of postmortem examination as well as report of the doctor who had conducted such examination. Even the doctor who was claimed to have given consciousness certificate has also stated that during initial examination of the patient he had been serious and in trauma. After receiving major injuries to brain, lungs and main vessels associated therewith, it is hard to believe that he would have retained his consciousness and given the statement in as much detailed as recorded in the *'Murasila'*. Hon'ble Supreme Court of Pakistan in its judgment given in the case of **Farman Ali and 3 others vs The State** reported as ***PLD 1980 Supreme Court 201***, had doubted the making of a dying declaration due to the serious injuries received by its

maker. Relevant part of observation of the Hon'ble Court is reproduced hereunder for ready reference;

"Even the dying declaration of deceased Rashid Khan seems to be doubtful. In view of the said injuries suffered by him; he must indeed have been in a shock if not altogether unconscious. In fact in the cross-examination of Doctor Hasham Daraz Khan, it is said that "the patient was not drowsy but he used to close his eyes after sometime" meaning thereby that he was not in full control of his faculties. In this view, it is impossible to believe that he could have got recorded the details of the occurrence in so precise a manner as not even omit any of the necessary and relevant details–such as the type of arms which each one of the appellants was carrying; the names of the eye-witnesses; and the name of Siddiq son of Qayyum owing to whom the whole unfortunate episode had in the first place been triggered."

Laiqat Ali, Sub Inspector who had recorded the *'Murasila'* was examined as PW-6. In his cross-examination this witness stated that it was correct that he had given the detail of injuries in injury sheet and injury No. 6 had been carrying the detail, "injury with blood on mouth". He also admitted it correct that the consciousness certificate Ex. PW-5/2 had not been signed by him and further added that it had in-fact been signed by his assistant Mr. Jehanzeb head constable. Said Jehanzeb head constable had not been examined as witness in the trial. The consciousness certificate had been bearing two signatures one was that of Jehanzeb head constable who had not been examined while the doctor had disowned signing the certificate ever. Such facts have rendered execution of the consciousness certificate at

the time of first examination of the injured as wholly unreliable. This witness has also stated in earlier part of his cross-examination that the complainant had been accompanied by his brother and other relatives at the time he had been brought to the hospital.

8. "If a dying declaration is found to be genuine and true" as held by the Hon'ble Lahore High Court in its judgment given in the case of ***Taj Muhammad and others v/s The State*** reported as ***PLD 1960 Lahore 723***, " it can by itself form a satisfactory basis for conviction. Some of the main tests for determining the genuineness of a dying declaration are whether intrinsically it rings true, whether there is no chance of mistake on the part of the dying man in identifying or naming his assailants and whether it is free from prompting from any outside quarter and is not inconsistent with the other evidence and circumstances of the case. The value of a dying declaration in each case depends on its own facts and the circumstances in which the dying declaration was made in relation to those facts. If a dying declaration stands the normal tests, for judging its veracity it becomes a wholly reliable piece of evidence, but if it does not, it is far worse than an ordinary statement of a

witness because the maker of the dying declaration was not subjected to cross examination and was not under an oath. If it is found that the dying man in his statement has indulged in telling lies even partially that would put the Courts on guard against accepting the rest of statement without any corroboration, and the result may well be that the whole of the statement is rejected ". Said judgment was also subsequently followed by this Court in its earlier judgment rendered in the case of ***"Zabta Khan v/s The State"*** reported as ***PLD 1963 (W.P.) Peshawar 66***. Similarly in the case of ***"Abdur Rahim v/s The State"*** reported as ***1997 P Cr.LJ 1274***, the criteria for judging a dying declaration was further developed and it was held;

"The site plan prepared at the instance of said Ghulam Saeed (now dead) indicates that the distance between points Nos. l and 3 was five single paces which comes approximately to thirteen feet. The occurrence is stated to have taken place at dark hours of the night and seat of injury sustained by the deceased is on his back and in such a situation a very serious question arises about identity of the assailant when the doctor had too confirmed the fact that the deceased was fired at from the back. It has been laid down by the Superior Courts that dying declaration by itself is sufficient to sustain conviction thereon provided the following conditions are fulfilled:-

(i) Whether there was no chance of mistaken identity;

(ii) Whether deceased was capable of making statement;

(iii) After how long time after sustaining the injury the deceased made the statement?

(iv) Whether the statement rings true?

(v) Whether it was free from promptness of outside?

(vi) Whether deceased was a man of questionable character?

A dying declaration is no doubt admissible under Article 46 of the Qanun-e-Shahadat Order, 1984 but believing or disbelieving a dying declaration has always been a question of application of simple human judgment as held by the Hon'ble Supreme Court of Pakistan in the case of ***"Abdul Razik v/s The State"*** reported as ***PLD 1965 Supreme Court 151***.

9. Nature of injuries on body of the complainant was such as explained above that giving of such a detailed statement by him at the time of lodging first report of the occurrence was not found believable. The dying declaration had not been ringing true intrinsically. The dying declaration in the case in hand has not at all been reliable and worthy of credence. The factum of dying declaration could not be proved by the prosecution. The complainant had also been having a brother and relatives in his company and he was also prone to tutoring and consultation. In this regard, reliance is placed on an earlier judgment of this Court given in the case of ***"Faqir Said Vs. The State and another'*** reported as ***2020 YLR 1169***, wherein it has been held;

"Record showed that dying declaration of the deceased was recorded in in the hospital, but that was in the presence of eyewitness/father-in-law of deceased and it was signed by him. Possibility of prompting and putting the names in the mouth of the deceased then injured could not be rule out. Dying declaring recorded in the presence of relatives was looked into with suspicion by the Court while appraising the same notwithstanding the condition of the deceased then injured at the time of report."

The dying declaration cannot therefore be relied upon in such circumstances, and same has been of no help to the case of prosecution.

10. The prosecution have been relying upon statement of the two eyewitness namely Ahmad Zada i.e. brother of the complainant/deceased who was examined as PW-1 and Haroon-ur-Rashid another witness whose statement has been recorded as PW-2. Ahmad Zada has stated in his statement that on the day of occurrence he had been going to *Sawari Bazar* on foot as he had been serving in a shop there. In the meanwhile, his brother namely Noor Zada (deceased) had passed beside him while driving his tractor, went ahead and took a turn. The witness further stated that as soon as his brother took the turn he heard fire shots and thereby speeded up his pace. PW Haroon-ur-Rashid was also stated to be going there. He then saw the occurrence as narrated in his examination-in-chief. This witness also stated that his brother had been fully in senses and conscious and had reported the matter in the hospital to the police official on duty. Motive was

also stated to be a dispute over fourteen thousand rupees. In his cross-examination the witness stated that he had been residing in a separate house from the deceased. This witness had suddenly happened to have witnessed the occurrence and had been a chance witness. “A chance witness” as held by the Hon’ble Supreme Court of Pakistan in its judgment rendered in the case of ***Mst. Sughra Begum and another v/s Qaiser Pervez and others*** reported as ***2015 SCMR 1142***’ “in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs”. Relevant part of the observations in the judgment is reproduced hereunder for ready reference;

“A chance witness, in legal parlance is the one who claims that he was present on the crime spot at the fateful time, albeit, his presence there was a sheer chance as in the ordinary course of business, place of residence and normal course of events, he was not supposed to be present on the spot but at a place where he resides, carries on business or runs day to day life affairs. It is in this context that the testimony of chance witness, ordinarily, is not accepted unless justifiable reasons are shown to establish his presence at the crime scene at the relevant time. In normal course, the presumption under the law would operate about his absence from the crime spot. True that in rare cases, the testimony of chance witness may be relied upon, provided some convincing explanations appealing to prudent mind for his presence on the crime spot are put forth, when the occurrence took place otherwise, his testimony would fall

within the category of suspect evidence and cannot be accepted without a pinch of salt."

Similarly in the case of ***"Mst. Shazia Parveen v/s The State"*** reported as ***2014 SCMR 1197*** the Hon'ble Supreme Court of Pakistan had not believed testimony of eyewitness who had failed in establishing the reasons for their availability with deceased at the relevant time. Relevant part of the observations of the august Court is also reproduced hereunder;

"***It has straightway been observed by us that the incident in issue had taken place at about 10-30 p.m. inside the house wherein the appellant and her husband were living and no source of light at the spot had been disclosed or shown anywhere on the record. All the eye-witnesses produced by the prosecution were closely related to the deceased and they were admittedly chance witnesses who had failed to bring anything on the record to establish the stated reason for their availability near the deceased at the relevant time. Such related witnesses had failed to receive any independent corroboration inasmuch as there was no independent evidence produced regarding the alleged motive, the alleged recovery of a rope was legally inconsequential and the medical evidence had gone a long way in contradicting the eye-witnesses in many ways. The duration of the injuries and death recorded by the doctor in the Post-mortem Examination Report had rendered the time of death alleged by the eye-witnesses quite doubtful, the stomach contents belied the eye-witnesses regarding the time of occurrence and the negative report of the Chemical Examiner showed that no poison or intoxicant had been detected inside the body of the deceased which squarely contradicted the eye-witnesses. In these circumstances it could not have been held by the learned courts below that the prosecution had succeeded in establishing the appellant's guilt beyond reasonable doubt***."

The witness i.e. PW-1 has though stated that he had been serving in a shop and had been going to *Sawari Bazar* on foot but such an explanation is not sufficient to fully establish presence of the witness at

the scene of crime, right at the time of commission of the offence. It is also unnatural that this witness had been going on foot while his brother had been driving a tractor to same destination, then neither the brother had asked the witness to board the tractor nor had he boarded the same. The explanation given by this witness was not found believable. The witness had also been closely related to the deceased being his brother and had also been an interested witness. In the case of Mst. Shazia Parveen Supra one of the reasons for discarding testimony of the eyewitnesses was that they had been related (as well as chance) witnesses. The other witness namely Haroon-ur-Rashid examined as PW-2 has also given a similar narration stating therein that he had also been going to Bazar for purchasing vegetables when the deceased Noor Zada, while driving the tractor, had passed through him and took a turn. Thereafter he heard the report of fire shots and rushed towards the spot where he witnessed the occurrence. This witness has not stated that the other PW i.e. Ahmad Zada had also been present at the time of occurrence and witnessed the crime. In the start of his cross-examination, the witness has stated that he had been living with the complainant Noor Zada etc for 53 years. This witness had though not been directly related to the complainant or the other PW but he had

been unmarried person and living with them for 53 years. As such this witness had not been having the character of fully independent witness. This witness had not been specifically named in the FIR to have seen the occurrence. He is also a chance witness as he had also reached the place of occurrence per chance. He could not satisfactorily explain the reason of his presence at the spot at the time of commission of the offence.

11. The story narrated by both these two PWs has also been strikingly similar to the extent that both of them have stated that they had been going to Bazar on foot when the deceased then alive crossed them while driving his tractor, took a turn, the fire started, they immediately rushed towards the spot and then witnessed the occurrence. Narration of the story depicts a cyclostyle narration and cannot be termed as a natural narration of the witnesses who had seen the occurrence. Presence of both the witnesses is not believable at the spot. Their testimonies cannot therefore safely be relied upon for convicting the appellants on a capital charge.

12. So far as corroboratory evidence of the recovery of axe on pointation of one appellant namely Salih Muhammad alias Sawal is concerned, it is

important to note that conviction may not solely be based upon corroboratory evidence. Hon'ble Supreme Court of Pakistan while giving its judgment in the case of ***"Muhammad Afzal alias Abdullah and others vs. The State and others"*** reported as ***2009 SCMR 639*** has also expressed almost a similar view in para-12 of its judgment, which is reproduced hereunder for ready reference;

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be."

Hon'ble Supreme Court of Pakistan in its judgment rendered in the case of ***"Imran Ashraf & 7 others v/s The State"*** reported as ***2001 SCMR 424***, has also observed;

"***Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."***

In support of same ratio, further reliance may also be placed on the judgment reported as ***2007 SCMR 1427***. When prosecution has failed to prove case against the appellants beyond reasonable doubt then the corroboratory evidence produced in the case could not be considered in isolation for convicting

an accused. Besides, it is also very strange to note that the axe had been shown recovered from a field where the appellant namely Salih Muhammad alias Sawal had concealed it in bushes. The recovery has been effected after three days of the occurrence, but same had been shown to be containing blood in such quantity that it had been found sufficient for blood grouping as the FSL report Ex. PZ-2 had been showing that it had been containing human blood and of the same group and matching with blood group found on the blood stained earth and blood stained shirt of the deceased. Likewise, the recovery of rifle on pointation of the appellant namely Mustamir Khan alias Koka (from his landed property) had also been found doubtful for the reason that according to marginal witness of the recovery memo Ex. PW-13/2 the place of recovery could be covered within 05/10 minutes from the main road. The recovery has been effected after three days of the occurrence then how was it possible that the rifle had been lying in open field for long three days and same had not been spotted by anyone. Therefore, such recoveries and FSL reports had not been free from doubts as well. "Benefit of even a single doubt is to be extended to the accused wherever reasonably found in case of prosecution", as held by the Hon'ble Apex Court in the case of ***" Mst.***

Asia Bibi v/s The State and others" reported as ***PLD 2019 Supreme Court 64***.

13. In light of what has been discussed above, the instant appeal is allowed as the prosecution have not been able to bring home guilt of the accused/appellants. Judgment dated 20.07.2019 of the Court of learned Additional Sessions Judge-II Buner impugned herein is set aside. Both the appellants are acquitted of the charges by extending them benefit of doubt. They be released forthwith if not required in any other case. Since accused/appellants have been acquitted of the charges while allowing criminal appeal No. 353-M of 2019, therefore connected criminal revision No. 69-M of 2019 has become infructuous and same is accordingly dismissed.

14. These are reasons for our short order of even date.

Announced
Dt.19.05.2021

JUDGE

JUDGE