JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

Criminal Appeal No. 31-D of 2016

JUDGMENT

Date of hearing:	20.02.2017
Appellant-petitioner	Haq Nawaz by Muhammad Ismail Khan Alizai Advocate
Respondent	State by Mr. Kamran Hayat Khan Miankhel, AAG and Mr. Muhammad Zahid Khan Advocate for complainant.

MUHAMMAD AYUB KHAN, J.- Through this single judgment, we propose to dispose of instant Criminal Appeal No.31-D/2016 filed by appellant Haqnawaz against his conviction and sentence and Murder Reference No.4-D/2016 forwarded by learned trial Court as both the matters are the outcome of one and the same judgment dated 12.5.2016 rendered by learned Sessions Judge, Tank, whereby the appellant was convicted under section 302(b) PPC and sentenced to death and also to pay compensation of Rs.5000000/- to the legal heirs of deceased under section 544-A Cr.P.C or to undergo six months simple imprisonment in default.

2. The prosecution story, in brief, is that on 17.6.2009 at 1800 hours, complainant Abdur Rahim in

injured condition lodged the report at police station Mulazai, District Tank to the effect that at about 1745 hours, he was standing near the shop of Nasrullah Bhittani when in the meanwhile, appellant came there duly armed with 303 bore rifle and fired at him, he got hit on his left thigh and fell down. After the occurrence, the appellant ran away. The occurrence was stated to have been witnessed by one Hidayatullah. The complainant stated that there was no motive for the occurrence and he did not know why the appellant made firing at him. Initially, the case was registered under section 324 PPC. The injured complainant succumbed to injury on 18.6.2009 and section of law was altered from 324 to 302 PPC.

3. After completion of usual investigation, complete challan against the appellant was submitted before the learned trial Court where he was formally charged. He did not plead guilty to the charge and claimed trial. In order to establish the guilt of appellant, the prosecution examined ten P.Ws. Thereafter, statement of the appellant was recorded under section 342 Cr.P.C, wherein he professed innocence and false implication. However, he neither appeared as his own witness on oath nor produced any evidence in his defence. After hearing

the arguments, the learned trial Court convicted and sentenced the appellant as mentioned above vide impugned judgment dated 12.5.2016.

4. The learned counsel for the appellant contended with vehemence that there were material contradictions in the statements of witnesses, but the learned trial Court failed to appreciate the same in true perspective; that there was no eyewitness to the occurrence; that the learned trial Court wrongly termed the report of complainant as dying declaration and placed reliance on the same. He went on to argue that the prosecution evidence on record created reasonable doubts regarding guilt of the appellant, the benefit of which must have been given to the appellant but the learned trial Court based its findings on surmises and conjectures while convicting the appellant.

5. Conversely, the learned law officer assisted by private counsel representing the complainant party refuted the arguments of learned counsel for the appellant and contended that the prosecution proved its case against the appellant to the hilt by producing confidence inspiring evidence, therefore, the learned trial Court has rightly convicted and sentenced the appellant.

6. We have heard the arguments of learned counsel for the parties and have perused the record thoroughly.

7. The prosecution case mainly hinges on dying declaration of the deceased, ocular account furnished by PW Hidayatullah and medical evidence.

8. First of all, we will determine whether the F.I.R lodged by deceased then injured can be termed as dying declaration and if so, whether it is to be believed or not. On 17.6.2009 at 1800 hours, complainant Abdur Rahim in injured condition lodged the report at police station Mulazai, District Tank that at about 1745 hours, he was standing near the shop of Nasrullah Bhittani when appellant came there duly armed with 303 bore rifle and fired at him. With the firing of appellant, he got hit on his left thigh and fell down. Article 46(1) of Qanun-e-Shahadat Order, 1984 envisages that:-

> *"**46. Cases in which statement of relevant fact by person who is dead or cannot be bound, etc is relevant.** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:*

> *(1)* ***When it relates to cause of death.*** *When the statement is made by a person as to the case of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."*

From the above reproduced Article, it is manifest that the statement made by a person as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. In the instant case, the deceased then injured made the report not under expectation of death, but narrated the circumstances which resulted in his death. It cannot be stated that he was expecting death because the injury was on his left thigh which is normally called non-vital part of the body. However, according to doctor Khalid Iqbal (PW-4), the cause of death is due to injury to main vessels leading to extensive blood loss, shock and death. It is not necessary

for the admissibility of dying declaration that the deceased at the time of making it should have been under expectancy of death. The F.I.R bears the signature of complainant and also the signature of SHO, police station Mulazai and was lodged by the deceased then injured himself immediately after the incident which eliminated the possibility of any influence, therefore, it can safely be termed as dying declaration and conviction can be based on it. In this respect, reliance can be placed on the case of ***Mst. Shamim Akhtar. Vs. Fiaz Akhtar and two others (PLD 1992 SC 211)*** wherein it was held that:-

> *"Mst. Nasim Akhtar died subsequently. The doctor who examined her injuries on the day of incident stated that the condition of the patient was fairly good. It is not mentioned which requirement of law in recording the dying declaration has been ignored. The law does not prescribe any special mode of recording the dying declaration. The statement of an injured recorded by the police under section 161 Cr.P.C during the course of investigation is not hit by section 162 Cr.P.C. As such the dying declaration is a good piece of evidence and it can be relied upon by the prosecution. It is not necessary for the admissibility of dying declaration that the deceased at the time of making it should have been under expectancy of death. A statement under section 161 Cr.P.C of an injured is an admissible evidence even though the injured had died much later. The dying declaration is to be adjudged on its own merits."*

Reliance can also be placed on the cases of ***Majeed. Vs. The State (2010 SCMR 55) and Farmanullah. Vs. Qadeem Khan and another (2001 SCMR 1474).***

9. Next comes the statement of Hidayatullah recorded during proceedings under section 512 Cr.P.C. The learned counsel for the appellant vehemently contended that such statement is not admissible in evidence as the witness was not subjected to cross examination. The record reveals that PW Hidayatullah appeared before the Court on 29.8.2015 but his statement could not be recorded due to absence of counsel for complainant and on 02.9.2015, said PW was abandoned being won over. It was on 09.9.2015 when learned counsel for the complainant submitted an application for transferring the statement of PW Hidayatullah already recorded during trial under section 512 Cr.P.C which was allowed on the same date and statement of the said PW was transferred. The witness was neither dead nor his attendance could not be procured, but he appeared before the Court and on the next date, he was abandoned being won over. However, on the following date, on the application of learned counsel for the complainant, the statement of PW Hidayatullah recorded during trial under section 512 Cr.P.C was transferred which is legally not

correct because the appellant was deprived of cross examining the witness. In such circumstances, the statement of PW Hidayatullah is not worth reliance and is ruled out of consideration. Even if the statement of PW Hidayatullah is ruled out of consideration, the dying declaration of the deceased then injured is there and is sufficient for conviction of the appellant and was rightly relied upon by the learned trial Court while convicting the appellant.

10. The learned counsel for the appellant contended that according to statement of Dr. Khalid Iqbal (PW-4), he examined injured Abdur Rahim on 17.6.2009 at about 07.00 pm and on the same date at about 09.00 am, he conducted autopsy on the dead body of deceased whereas according to PW-9, on the following day of the occurrence, he received information about the death of injured at 06.10 am, which is a material contradiction in the statements of two P.Ws touching very roots of the case, but it has not been taken into consideration by the learned trial Court. The contention of learned counsel for the appellants has no force because according to Dr. Khalid Iqbal (PW-4), on 17.6.2009 at about 07.00 pm, he examined injured Abdur Rahim and on the same date at about 09.00 AM, he conducted autopsy on the dead body

of deceased. It appears to be a slip of tongue because PW-4 examined the injured on 17.6.2009 at 07.00 pm and it is not possible that he may have conducted autopsy on the dead body on 17.6.2009 and that too at 09.00 am, before his death. However, he not only clarified during cross examination that he conducted autopsy on the dead body of deceased on 18.6.2009, but the postmortem report bears the date as 18.6.2009 at its end. This cannot be termed as material contradiction fatal to the prosecution case, but can be termed as mitigating circumstance so far as award of punishment to the appellant is concerned. Moreover, the occurrence is stated to have taken place on 17.6.2009 at 1745 hours and the report was lodged on the same date at 1800 hours. This report has been lodged with promptitude keeping in view the distance between place of occurrence and the police station and after lodging the report, the injured was referred for medical examination. It is a case of single accused where substitution is a rare phenomenon. Reliance in this respect can be placed on the case of ***Falak Sher. Vs. The State (NLR 2000 Criminal 188)***, wherein it was held that:-

> *"In the overall circumstances of the case, where motive has become suspect and where the prosecution version suffers from inconsistencies, other than of a fatal character, it appears proper not to resort*

to the death penalty, touching the guilt of the accused."

11. So far as the quantum of sentence awarded to the appellant is concerned, there are following mitigating circumstances, which entitle the appellant for award of lesser punishment:-

(i) Reportedly, there is no motive for the occurrence. The deceased then injured categorically stated in his report that there is no previous motive and he does not know why the appellant fired at him. In this respect, reliance can be placed on the case of ***Abbas Hussain and another. Vs. The State and another (1992 SCMR 320)*** wherein it was held that:-

"In the peculiar facts and circumstances of the case, it has not been clarified by either party as to what was the actual and immediate cause of occurrence as it is in the evidence that there was no such deep-rooted background of enmity existing between the parties. There appears to be a petty dispute between the parties over the teasing of the girls of the Mohallah. We hold the view that something serious happened immediately before the occurrence for which the appellants while armed with Chhuries opened an attack upon the complainant party and murdered two persons from the complainant side. Even the possibility of an altercation having taken place between the parties cannot be ruled out. Both the parties had been living in the same locality. We are

> *convinced about the insufficiency of the immediate cause of unfortunate occurrence. In this view of the matter, we do not feel inclined to uphold the death sentence. In the circumstances, the sentences of the appellants are altered from death to imprisonment for life."*

(ii) The deceased then injured received a single fire-shot and that too on non-vital part of his body. He was at the mercy of the appellant but the appellant did not repeat the fire. Moreover, the injury was also inflicted on left thigh of the deceased which is a non-vital part of the body but unfortunately, the injury became fatal and resulted in death of the deceased. According to Dr. Khalid Iqbal (PW-4), at the time of examination of the injured, he was bleeding profusely and was not in stable condition. In cross examination, he stated that, *"So far as I remember, no first aid treatment was given to the injured prior to his examination by me. If first aid treatment is given to injured whose vessels are damaged, then there are chances of his survival for about 1½ to two hours. The main blood vessels of the injured were damaged."*

12. In the light of above discussion, we are mindful that the sentence of death awarded to the appellant by the learned trial Court is not justified keeping in view the overall facts and circumstances of

the case. Resultantly, we partially allow Criminal Appeal No.31-D/2016 and while maintaining the conviction of appellant, convert his sentence of death to imprisonment for life. The compensation amount of Rs.500000/- awarded under section 544-A Cr.P.C is also reduced to Rs.200000/-, which shall be recoverable as arrears of land revenue and in default, the appellant shall suffer six months simple imprisonment. The benefit of section 382-B Cr.P.C is also extended to the appellant.

13. Murder Reference No.4-D/2016 is answered in negative.

14. Above are the detailed reasons for our short order of even date.

Announced.
Dt:20.02.2017.
*Habib/**

JUDGE

JUDGE