JUDGMENT SHEET

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

Cr.A No. 359-M/2019
With M.R. No. 9-M/2019

Khaista Muhammad son of Umar Gul (Appellant)
Versus

(1) The State through A.A.G.
(2) Mst. Shazia (now deceased) through legal heirs.

(Respondents)

Present: *Syed Sultanat Khan, Advocate.*

Mr. Sohail Sultan, Astt: A.G.

Nemo for legal heirs of the deceased.

Date of hearing: **19.11.2020**

JUDGMENT

WIQAR AHMAD, J.- Appellant namely Khaista Muhammad is aggrieved of his conviction and sentence recorded vide judgment dated 30.07.2019 of the Court of learned Judge Model Criminal Trial Court/Additional Sessions Judge-III Swat, whereby he has been sentenced as follows;

U/S 302 (b) PPC to death as Ta'zir along with payment of compensation of Rs. 10,00,000/- (one million) under section 544-A Cr.P.C payable to legal heirs of the deceased. The amount of compensation shall be recoverable as arrears of land revenue under section 544-A (2) Cr.P.C. In default of payment of compensation, the appellant was ordered to undergo six months simple imprisonment.

U/S 15 A.A to six months imprisonment along with fine of Rs. 2000/- or in default thereof, the appellant was ordered to suffer one-month simple imprisonment. The amount of fine was recoverable as arrears of land revenue from person and estate of the convict/appellant.

The appellant was also extended the benefit of section 382-B Cr.P.C.

2. Appellant had faced trial in case FIR No. 47 (Ex. PW-6/1) dated 11.01.2017 registered under sections 302, 109 PPC read with section 15 A.A at police station Mingora District Swat on the basis of *'Murasila'* (Ex. PW-8/2) sent by Kifayatullah Khan, Sub Inspector (PW-8). The FIR had been lodged on report of complainant Mst. Shazia wife of Naeemullah who had succumbed to her injuries later on. She has stated in her report that she had been living along with her husband at Lahore. They had come to the house of one Imran, so as to facilitate construction of their personal house in the locality, and had been staying there as guests. She was present along with her husband and Imran at his house when her father Khaista Muhammad (appellant herein) came along with his son namely Sardar at 01:00 P.M on the day of occurrence. Her brother Sardar stood at the door while her father

entered the house, took out his pistol and made firing at the complainant, as a result of which she received injuries on both of her thighs. It was also stated that her father and brother had been extending life threats to them. The occurrence was stated to have been witnessed by Naeemullah husband of the lady as well as one Imran.

3. During the course of investigation, the Investigating Officer recovered blood soaked earth through cotton, blood stained shoes of the complainant and three spent bullets of 30 bore pistol from the spot vide recovery memo Ex. PW-1/1 dated 11.01.2017. He had also recovered a 30 bore pistol along with three live rounds and two chargers on pointation of the appellant from shop of one Fazal Wahid vide recovery memo Ex. PW-5/1 dated 12.01.2017. Empties so recovered from the spot along with weapon of offence i.e. 30 bore pistol were also sent to Forensic Science Laboratory (hereinafter referred to as ***"FSL"***) for the purpose of comparison, report (Ex.PW-12/21) received therefrom was in affirmative.

4. On completion of investigation in the case, complete *challan* was put in Court against the

present appellant while proceedings under section 512 Cr.P.C were initiated against co-accused namely Sardar Ali. Charge was framed against appellant on 11.05.2017, to which he pleaded not guilty and claimed trial. Prosecution was invited to produce evidence, who accordingly examined twelve (12) witnesses and closed its evidence. Statement of the accused was recorded under section 342 Cr.P.C. On conclusion of proceedings in trial, accused/appellant was convicted for commission of the offence vide judgment dated 30.07.2019 of the Court of learned Additional Sessions Judge-III Swat, as stated earlier.

Accused/appellant challenged his conviction and sentence through the instant appeal before this Court.

5. Learned counsel for appellant submitted during the course of his arguments that the two eyewitnesses named by complainant in her report had not seen the occurrence which was evident from statement of Naeemullah when he appeared in the Court as PW-9, while the other witness namely Imran had been abandoned by the prosecution. He asserted that best evidence

had been withheld by the prosecution, while other witnesses, who had not been shown in the FIR to have seen the occurrence, had been posed as eyewitnesses of the occurrence, whose testimony had not been believable. Regarding confessional statement of the appellant, he stated that it had not been true in its contents as same had not been going in consonance with evidence of the prosecution. He also added that confessional statement recorded after 3 days of the arrest of accused could not be relied upon. Regarding recovery of pistol on pointation of the appellant and its matching FSL report, the learned counsel contended that the person from whose shop such recovery had been effected had disowned the same while appearing in Court as PW-4. In order to bolster his submissions, he placed reliance upon the judgments reported as ***2016 SCMR 274, 2017 SCMR 898, 2019 SCMR 129, 2019 SCMR 274, 1999 P Cr.LJ 1087, 2011 P Cr. LJ 470, PLD 2012 Peshawar 22, 2018 YLR 1629, 2019 YLR 516 and 2019 P Cr.LJ 1014.***

6. The complainant-party (legal heirs of the deceased) did not opt to engage their

private counsel and they stated that they would rely upon arguments of the learned Astt:A.G. Learned Astt: A.G appearing on behalf of State submitted in his arguments that the deceased had named her real father and brother for commission of the offence, in her dying declaration. He added that no *malafide* or any reason for false implication of the appellant could be brought forth by the defence during the course of trial. The learned Astt: A.G laid particular stress on the statement of daughter of the deceased lady namely Mst. Safeera recorded as PW-2, and stated that she had been a natural witness who had stood consistent throughout her statement and no reason existed for disbelieving her testimony. In the end, he stated that prosecution had been able to prove its case against the appellant beyond a shadow of doubt.

7. We have heard arguments of learned counsel for appellant, learned Astt: A.G appearing on behalf of State and perused the record.

8. Perusal of record reveals that prosecution have been relying upon *'Murasila'*

Ex. PW-8/2 registered on the report of complainant as dying declaration along with certificate of the doctor issued regarding consciousness of the lady at the relevant time (Ex. PW-10/1), statements of the eyewitnesses i.e. Mst. Safeera recorded as PW-2 and Mst. Izat Begum recorded as PW-3 as well as confessional statement of the appellant Ex.PW-11/2.

9. In her dying declaration, the lady/complainant has named her real father and brother for causing her the injuries. The certificate showing that the lady had been conscious and capable of giving her statement has also been obtained from the lady doctor namely Saima Rehman which was exhibited in evidence as Ex. PW-10/1. The doctor has been examined in support thereof as PW-10. She has been cross-examined by the defence side but nowhere has they disputed the fact that the lady had been conscious and able to give her statement to the police officer. Learned counsel for appellant was also questioned in this respect, who referred to a sentence in the cross-examination

of the lady doctor PW-10 wherein she has stated as follows;

Agitates سے مطلب restless ہے۔ازخود کہا کہ pain نہیں ہے۔

The learned counsel had been trying to interpret the word *"restless"* as "out of senses", but we are afraid we would not be able to agree with him in this respect. The state of being restless has been explained in the following sentence that she had been suffering from pain. It was obvious that she had received firearm injuries and she would definitely have been in pain, but it is important to note that she had received all the injuries below her navel. Her organs which were significant for enabling her to speak had all been intact and no injury had been received thereupon. The doctor who had examined the complainant has given her certificate that the lady had been conscious and in senses at the time of recording of her statement, and she has stood by such a certificate during the course of her examination before the Court. No reason existed to disbelieve her statement in this respect. Learned counsel for appellant has also

argued at the bar that Mst. Safeera while recording her statement as PW-2 had stated that when the lady had received fire shots she had become unconscious, but such unconsciousness might have been due to the initial shock that she had received. She had been examined in hospital at 02:40 P.M i.e. after 100 minutes of the occurrence. This is not unnatural that initially a person loses consciousness because of the fear and shock of the initial impact of firing, however subsequently regains it. Besides, her injuries were of such nature that it may not have led to immediate unconsciousness and the doctor has expressly stated that she had been conscious at the time of her examination in hospital, therefore the statement of a child witness namely Mst. Safeera may not be taken as a circumstance to disbelieve statement of the doctor in this respect. Article 46 of the Qanun-e-Shahadat Order has made dying declaration as admissible in evidence and same can therefore be safely relied upon. While relying upon a dying declaration and maintaining conviction Hon'ble Supreme Court of Pakistan, in the case of ***"Farmanullah v/s***

Qadeem Khan and another" reported as *2001 SCMR 1474* had observed;

"The dying declaration got recorded by Saida Mir Khan, A.S.I. (P W.7) has been examined in the light of the criterion as mentioned herein above and we are of the opinion that it has been proved beyond shadow of doubt and being a substantive piece of evidence it could have been relied upon. It is an admitted feature of the case that the incident occurred in a broad daylight and only one accused was nominated by assigning specific rule leaving no question of mistaken identity, We don't find any lawful justification whatsoever to disbelieve Saida Mir Khan, A.S.I. (P.W.7) who has no enmity or ill-will against convict/respondent. It may not be out of place to mention here that once the dying declaration is believed there is no legal requirement that it must be supported by independent corroboration specifically in cases where there is no allegation of the substitution of real culprit with that of accused. In this regard we are fortified by the dictum laid down in Niamat Ali v. The State 1981 SCMR 61. A careful analysis of the dying declaration would reveal that the fateful incident has been narrated in a simple and straightforward manner by the injured who was not sure at the moment when it was being recorded that he would remain alive and more so, it finds full corroboration from medical evidence, surrounding circumstances and confidence inspiring eye account furnished by Farmanullah (P.W.5) and Muhammad Nabi (P.W.6). As mentioned hereinabove no corroboration is required and as a matter of caution the eye account, motive -and medical evidence are sufficient to lend corroboration to the dying declaration. In this 1 regard reference can be made to Hazara v. The State 1976 PCr.LJ 106. It is well-entrenched legal position that "sanctity is attached to dying declaration by the statute and it is to be respected unless clear circumstances are brought out showing it not to be reliable.

Further reliance in this respect may be placed on judgment of Hon'ble Apex Court in

the case of ***"Mehtab Khan v/s The State"*** reported as ***"1996 SCMR 1137"***.

10. The eyewitness account produced by prosecution included PW-2 namely Mst. Safeera and Mst. Izat Begum PW-3. Mst.Safeera has been daughter of the deceased lady having an age of 13 years at the time of recording of her statement in Court. At such tender age she was supposed to have been along with her mother inside the house. She had been a natural eyewitness of the occurrence. This fact may also be discerned from the way this witness had stood consistent during the course of her examination in Court. The other eyewitness namely Mst. Izat Begum had also been a natural eyewitness in the sense that the occurrence had taken place inside her house. Being a lady and housewife, her presence inside her house had been very much natural. This witness has also stood firm during the course of her cross-examination and statements of both these witnesses i.e. PW-2 and PW-3 had been consistent inter-se as well, on material particulars of the case. Learned counsel for appellant has mainly been asserting that when

an eyewitness has not been shown to have seen the occurrence, her statement could not be believed. In certain cases, such a fact that a witness had not been shown to have witnessed the occurrence while lodging first report of the occurrence, may be taken as sufficient to disbelieve statement of such an eyewitness, but a rule of thumb cannot be laid down in this respect. Statement of an eyewitness has to be seen and determined in peculiar circumstances of the respective cases. Here it is important that the occurrence had taken place inside the house. One of the eyewitnesses had been a minor daughter of the deceased lady while the other woman had been the lady hosting the deceased. In the given circumstances, their presence at the scene of occurrence had been very much natural and confidence inspiring. The fact that the lady, while recording her dying declaration could not name them as eyewitnesses may not be taken as a reason for excluding their testimonies. In the case of ***"Yousaf v/s The State"*** reported as ***"NLR 1982 Criminal 31"***, a Division Bench of the

Hon'ble Sindh High Court had observed in a somewhat situation;

"Now the question arises whether eye-witness should be believed. It is true that except P.W. Mohabbat all other witnesses are related to each other. It may also be noted that accused Rasool Bux who was acquitted was also related to Mohd. Laiq as his son-in-law and the appellant is the step son of Mohd. Laiq. It sounds strange that such close relations will be implicated falsely without any genuine cause or grievance. The learned counsel for the appellant has disputed that as the name of Laiq and Mst. Sughar does not appear in the F.I.R. the entire story should be disbelieved. It is true that there is an omission in incorporating these two names in the F.I.R. but this fact by itself is not sufficient to discredit the evidence of the other persons particularly in the circumstances of the case when the entire incident has happened at the house of Mohd. Laiq where all of them were present. It will be rather unusual that all these persons would come and stay and some of them may have lunch at the house of Laiq if he himself or his daughter were not present there. The presence of Laiq ad Mst. Sughar in the light of the evidence brought on record cannot be challenged."

Further reliance in this respect may also be placed on judgment of Hon'ble Sindh High Court in the case of ***"Waheed alias Siraj v/s The State"*** reported as ***PLJ 1990 Cr.C. (Karachi) 379***.

11. Confessional statement of the accused/appellant had been recorded on 4th day of his arrest. The learned counsel for appellant has though stated that such a confession could not be believed once it had been recorded after three

days of his arrest, and in this respect he has placed reliance upon judgments reported ***2018 YLR 1629 and 2019 P Cr.LJ 1014***, but we find confession in the case in hand to have been voluntarily recorded. It is not a rule of law that delayed confession, must be discarded in all circumstances. Hon'ble Supreme Court of Pakistan had believed confessional statement recorded after 12 days of custody of an accused, in the case of ***"Majeed v/s The State"*** reported as ***2010 SCMR 55***, wherein the Hon'ble Court had observed;

"No doubt there was delay of 12 days in recording the confession but this by itself its not sufficient to discard the same. This Court in the case of Nabi Bakhsh v. State 1999 SCMR 1972 held that delay in recording the confessional statement by itself is not sufficient to affect its validity. However, no hard and fast rule can certainly be laid down about the period within which the confessional statement of the accused ought to be recorded during investigation. Reference is also invited to Muhammad Yaqoob v. State 1992 SCMR 1983."

This Court in a recent judgment in the case of ***"Jumaraz v/s The State"*** (***J.Cr. A. No. 96-M of 2018***) had also believed a confessional statement recorded after four days of arrest of the accused by observing as follows;

"Although the confession was recorded with delay because the appellant was arrested on 21.06.2017

and his confession was recorded on 25.06.2017, however, the mentioned delay would not damage the reliability of the confession in view of its confidence inspiring nature and its full corroboration by circumstantial evidence on the record. Confession of an accused and its different aspects in each case is to be looked into in light of its attending facts and circumstances, therefore, it is not a rule of universal application that in each and every case the delay will essentially damage the evidentiary value of confession."

The confessional statement has not only been true and voluntary in nature but has also been supported by sufficient corroboratory evidence in the shape of statements of the eyewitnesses as discussed above, as well as recovery of weapon of offence i.e. 30 bore pistol on pointation of the accused/appellant.

12. The evidence of recovery of pistol on pointation of the appellant cannot be disbelieved for the mere reason that the witness namely Fazal Wahid while recording his statement as PW-4 had given certain concessional statement in favour of the accused/appellant. There had been other evidence in support thereof, in the shape of statements of Qadar Khan Constable recorded as PW-5 and the Investigating Officer namely Muhammad Anwar Sub Inspector recorded as PW-12, who have

stood consistent in respect of recovery of weapon of offence on pointation of the appellant.

13. Learned counsel for appellant has also agitated that co-accused namely Sardar had not been named by the eyewitnesses, in their statements recorded as PW-2 and PW-3, this fact may be more relevant in the trial of the co-accused but it is important that said co-accused had not been attributed any effective role in the occurrence by the lady deceased while recording her first statement of the occurrence. He had only been assigned the role of standing in the door of the house. Not naming the said co-accused by the two eyewitnesses cannot be taken to disbelieve the evidence of prosecution against the appellant in respect of whom evidence of the prosecution have remained consistent otherwise.

14. As a result of cumulative effect of evidence of the prosecution, we have come to the conclusion that the appellant had rightly been found guilty of commission of the offence. His sentence however requires a rethinking. Deceased had been real daughter of the appellant and the motive stated by him in his confessional

statement was of such a nature that the appellant may have felt himself compelled due to existing norms in the society, to commit the offence. Besides, minor weaknesses in the evidence of prosecution as discussed above may not be taken as a justification for the outright acquittal of the appellant, but such weaknesses may be considered for reduction of the sentence as held by Hon'ble Apex Court in the case of ***"Mst. Bevi v/s Ghulam Shabbir and another"*** reported as ***"1980 SCMR 859"***, wherein the Hon'ble Court had observed;

"It has been held in some cases that the principle underlying the concept of benefit of doubt can in addition to the consideration of question of guilt or otherwise, be pressed also in matter of sentence. As a definite motive was asserted against the respondent and the same has failed, keeping in view all the circumstances of this case, it would not be necessary to impose the capita' punishment. Therefore while finding him guilty; under section 302, P. P. C. he is sentenced to transportation for life should be awarded as compensation."

A similar view has also been recorded by Hon'ble Apex Court in the case of ***"Mir Muhammad alias Miro v/s The State"*** reported as ***2009 SCMR 1188***. Further reliance may also be placed on judgments in the case of ***"Muhammad Ayaz Khan v/s***

Murtaza and other" reported as ***2008 SCMR 984*** and the case of ***"Kamran Ullah v/s The State and another"*** reported as ***2020 SCMR 1214.*** The appellant was also a person of 68 years of age at the time of commission of the offence. All such circumstances are taken as sufficient justification for reduction of the sentence from normal penalty of death to life imprisonment. Resultantly, the instant appeal is partially allowed to the extent that the sentence of death awarded to the appellant under section 302 (b) PPC is reduced to life imprisonment. Benefit of section 382-B Cr.P.C is extended to the appellant as well. Rest of the sentences awarded by learned trial Court through the impugned judgment shall remain intact. Murder Reference No. 9-M of 2019 is answered in ***"negative"***.

Announced
Dt. 19.11.2020

JUDGE

JUDGE

Office 30/11/2020 W/R

NAWAB

(D.B) Hon'ble Mr. Justice Ishtiaq Ibrahim
Hon'ble Mr. Justice Waqar Ahmad