IN THE PESHAWAR HIGH COURT, BANNU BENCH

(Judicial Department)

Cr.A No.26-B of 2022

Issa Khan
Vs
The State etc

JUDGMENT

For Appellant: Muhammad Shoaib Khan Sadozai, Advocate

For respondent: Nemo

For State: Mr. Qudrat Ullah Khan, A.A.G

Date of hearing: **22.06.2022**

SAHIBZADA ASADULLAH, J.--- Through this appeal under section 410 Cr.P.C, appellant has called in question the judgment dated 31.01.2022 passed by the learned Additional Sessions Judge-VI / Judge Juvenile Court, Bannu in case FIR No.310 dated 13.06.2019 under section 302 PPC registered at Police Station Ghoriwala, Bannu, whereby, he was convicted under section 302(b) PPC and sentenced to imprisonment for life alongwith fine of Rs.1,00,000/- or in default thereof, to undergo three months simple imprisonment. Benefit under section 382-B Cr.P.C was extended to the appellant.

2. Feeling aggrieved, the appellant has questioned the legality of the impugned judgment and the awarded sentence through instant appeal.

3. Brief facts of the case as divulged in the first information report are that on 13.06.2019 at 18:00 hours, complainant Usman in injured condition at emergency ward of Civil Hospital, Bannu lodged a report to the effect that on that day, he was present in the fields of Farid Khan within the area of Abid Khel, when at 12:00 hours, accused Issa Khan armed with 12 bore rifle came there and the moment started firing at him, due to which, he got hit and injured; the accused decamped from the spot after the commission of offence, whereas, he was brought to the hospital by people of the locality. Motive is alleged to be dispute over money. Hence, the *ibid* FIR.

4. After completion of investigation and arrest of the accused, prosecution submitted complete challan, where at the commencement of trial, the prosecution produced and examined as many as 17 witnesses. On close of prosecution evidence, statement of appellant / accused was recorded under section 342 Cr.P.C, wherein he professed innocence and false implication, however, neither he opted to be examined on oath as provided under section 340(2) Cr.P.C, nor wished to produce

defence evidence. After hearing arguments, the learned trial Court vide the impugned judgment, convicted and sentenced the appellant as mentioned above. Hence, the instant appeal against the judgment of conviction.

5. It is pertinent to mention that Nadir Khan, son of the deceased, had put appearance before the office stating that being poor, he could not engage private counsel, hence, opted to rely upon the arguments to be made by the learned A.A.G vide office note dated 19.04.2022. The same was his stance even today. So, learned counsel for the appellant and learned Assistant Advocate General were heard at length and with their valuable assistance, the record was gone through.

6. The unfortunate incident occurred on 13.06.2019 at about 12:00 hours, when the deceased then injured namely Usman present in the fields of one Farid Khan, within the area of Abid Khel was fired at by the appellant Issa Khan through 12 bore rifle. Soon after receiving firearm injury, the deceased then injured was shifted to the THQ Hospital, Naurang, wherefrom he was referred to DHQ Hospital, Bannu for further treatment, where he reported the occurrence. The deceased then injured while reporting the matter, charged the convict / appellant for the effective fire shot. The injured was referred for

specialized treatment, but unfortunately, he could not survive and lost his battle between life and death. The investigating officer after collecting copy of the FIR, visited the spot and prepared the site plan on his personal observations and also collected bloodstained earth from the place of the deceased. Though, the learned trial Court was pleased to convict the appellant, yet this being the court of appeal, is under the bounden duty to reassess the available record and to scan through the collected material to know as to whether it was the convict / appellant who killed the deceased and as to whether the deceased then injured was capable to talk.

7. The duty of a judge is to find out the truth in respect of a particular disposition process as part of justice delivery mechanism. So, the facts have to be scrutinized and evidence has to be adduced in order to substantiate the story so narrated. Dying declaration being statement of a person, who is no more to assist the judge in order to ascertain the facts which constituted the crime of which he has been the victim. The law recognizes the statement made by a dying person. Article 46 of the Qanun-e-Shahadat Order, 1984 explores the concept of dying declaration, which deals with cases related to that person who is dead or who cannot be

found. A dying declaration is admissible in evidence even though it has not been made on oath and the person making it cannot be cross examined. Admissibility of a dying declaration as a relevant piece of evidence is guided by the principle of necessity and religious belief of the olden days. The necessity being, that in cases, where victim is the only eyewitness to crime, the exclusion of his statement might defeat the ends of justice. A person who makes a dying declaration must, however, be competent to make the statement at the time he makes it, otherwise it would be inadmissible. Recording of dying declaration being an important task, so utmost care is required to be taken while recording such declaration. If a dying declaration is recorded carefully, keeping in mind its essential ingredients, such declaration retains its full value. Though, in the earlier days, the statement of a dying man was looked into with honour and there was a concept behind the statement so recorded that a dying man will not tell a lie. This was because of the fact that '*a dying man seldom lies*' or '*truth sits upon the lips of a dying man*'. By the time, no need was felt for its corroboration, but with passage of time, the values changed and morality degraded to a greater extent, so need was felt to look for independent

corroboration and this was so, that the Apex Court of the country went with repeated change in respect of the statement recorded by a dying man, though at times, the Apex Court was of the opinion that it needs no corroboration, but with the passage of time, when the amplitude changed with drastic change in moral and social values, so ultimately, the same was declared as a weak kind of evidence. Therefore, it is not safe to convict an accused person merely on the evidence of a dying declaration without corroboration, because such a statement is not made on oath and is not subject to cross examination and because the maker of it might be mentally or physically in a state of compassion and might be drawing upon his imagination while he was making the declaration. Hence, as a safeguard, a stress has been laid on corroboration of the dying declaration before it is being acted upon.

8. The Court is to see that dying declaration inspires confidence or otherwise, as the maker of the dying declaration is not available for cross examination. The court should be satisfied that there was no possibility of tutoring or prompting and evidence to the effect that the dying declarant was in a fit state of mind must be brought. As dying declaration requires close scrutiny and

corroboration and the court must satisfy itself about its genuineness and truthfulness, so it has to be seen that whether at the time of its making, the declarant was in full senses, conscious, alert to the surroundings and fully oriented in time and space, beside being able to make a coherent statement. The dying declaration must ring true and the doctor present shall give a fitness certificate about the condition of the dying person. It is noteworthy that the declarant is in a fit condition of mind to give the statement when recording was started and remained in fit condition of mind, until the recording of dying declaration is completed. The fact of fit condition of mind of declarant can be best certified by the doctor, yet in case where it was not possible to take fitness certificate from the doctor, dying declaration still retains its sanctity, if there are other witnesses to testify that the declarant was in fit condition of the mind. However, the dying statement should not be under the influence of anybody or prepared by prompting, tutoring or imagination. When interested witness has attended the deceased when he was making a dying declaration and because of the injuries, the deceased is neither physically or mentally fit, no reliance can be placed on such dying declaration, in the absence of evidence to show that the deceased was

physically and mentally capable of making the dying declaration and was not the victim of any tutoring. The matter to believe or disbelieve a dying declaration is, however, left to the ordinary human judgment, but the courts always insist upon strong, independent and reliable corroboration for safe administration of justice, as relying blindly without scrutiny of such statement would be a dangerous approach. So, we are to see as to whether at the time of making the dying declaration, the deceased then injured was fully oriented in time and space, conscious, alert to the surroundings and in full senses; as to whether the doctor has furnished fitness certificate to that effect; as to whether the deceased was attended by his relatives, if so, whether he was tutored or prompted to implicate the accused charged in view of the attending facts & circumstances of the present case and as to whether the dying declaration has been corroborated by other independent evidence or otherwise.

9. Diverting to the facts of the case, the prime question which is to be determined at first instance is whether at the time of making the dying declaration, the complainant was conscious and capable to talk or otherwise. In order to determine this question, we are to examine the statements made by the scribe and the doctor

who examined the deceased then injured. It may be noted that the occurrence has taken place at 12:00 hours, whereas, the report has been lodged at 16:50 hours. The deceased then injured had received nine firearm entry wounds on lower back in the middle with two exit wounds in pelvic area in the middle and it has been claimed after receiving the injuries, that he remained on the spot for sufficient time and when people of the locality came there, he was shifted to the hospital. It is an admitted position that the deceased then injured was initially shifted to THQ Hospital, Naurang and therefrom he was referred to DHQ Hospital, Bannu where he reported the occurrence. The scribe was examined as PW-04 whose statement is completely silent as regards making of application for obtaining opinion of the doctor regarding consciousness, alertness and capability of the deceased then injured as to talk. The doctor who examined the complainant in DHQ Hospital, Bannu was produced as PW-05, but neither he has furnished a certificate nor endorsed the injury sheet to the effect that the deceased was conscious, well oriented in time and space and fully capable to make the statement. Similarly, the medico legal certificate furnished by the doctor is also silent regarding capability of the complainant to talk.

There is no denial to the fact that in order to believe a dying declaration, it is, *inter alia*, one of the essential ingredients that the prosecution must establish through reliable evidence that the dying person was in full senses, conscious and alert to the surroundings, beside being fully oriented in time and space and was able to make a coherent statement and to this effect, the doctor present at the occasion, must furnish a fitness certificate about the condition of a dying person, but that is not the case before us. When the doctor was examined as PW-05, he admitted that no application regarding the capability of the injured was moved by the police. He admitted that the timing i.e. 04:50 hours is the time of arrival of injured to emergency and his examination by him. When such is the position, then the claim of the scribe that he scribed the murasila report at 04:50 hours, prepared the injury sheet of the injured and sent him to the doctor for medical examination becomes falsified. It has not been claimed by the scribe that he used to pen down report of the complainant while he was being under examination of the doctor due to his serious condition. The doctor further admitted it correct that due to severe pain, the injured was unable to talk. Though, due to this admission, an attempt was made by the prosecution to declare the said witness

hostile, but it could not be, however, the learned trial court in exercise of its jurisdiction under section 540 Cr.P.C, summoned the doctor reexamined him on this particular aspect of the case, where he claimed that by the sentence "*due to severe pain, the injured was unable to talk*", he meant that as the injured was suffering from severe pain, so he was avoiding to talk. In cross examination, the witness admitted that soon after the injured was brought to the hospital, he was medically administered and after passing through required surgery, he was returning into normal state of health. It was further admitted that when the injured was brought to the hospital, he, due to severe pain, was making hue & cry and was avoiding to talk. If the admissions made by the doctor are juxtaposed with the surrounding facts of the present case, where neither the scribe moved an application for obtaining opinion from the doctor regarding capability of the complainant as to talk nor the doctor of his own opined in unequivocal terms that the deceased was conscious, oriented in time and space and fully capable to talk nor the medico legal report confirms such aspect, so it can be concluded that the deceased then injured was not capable to talk at the time of making the report. We are surprised that when the doctor in

unequivocal terms admitted that the injured was unable to talk, then what ambiguity was left for the trial Court to re-examine him for explanation. If the medico legal report is seen, it has nowhere been mentioned that the deceased was in full senses and that he was capable to talk. Similarly, no certificate regarding consciousness and capability of the deceased as to talk was tendered. As the cross examination is the greatest engine ever invented for the discovery of truth, so when it was categorically admitted by the doctor that the deceased was unable to speak, then such admission can be taken into consideration against the prosecution, particularly when the surrounding circumstances of the case speaks against the prosecution version. The explanation tendered by the doctor during his re-examination seems to be an afterthought.

10. It is surprising to note that prior to his shifting to DHQ Hospital, Bannu, the deceased was given first aid at THQ Hospital, Naurang, but neither his medical documents were brought on record to confirm his capability regarding making a statement nor his statement was penned down in the said hospital. Even, the prosecution has not been able to advance explanation, much less plausible, for this omission. It is also a mystery

as to who took and brought the complainant from the spot to the THQ Hospital, Naurang. Interestingly, Nadir Khan, son of the deceased, was produced as PW-17 who deposed that his father was murdered by the appellant and that he relies upon the statement of his father who has charged the appellant for the offence. When this witness was cross examined, he admitted that he is not eye witness of the occurrence and that he was present with his father at DHQ Hospital, Bannu at the time of making the report by his father. He also claimed that he had accompanied his father to THQ Hospital, Naurang, but it is strange to note that neither report was made in the said hospital nor medical documents pertaining to examination of the deceased were brought on record. The physical circumstances of the present case in particular reference to the lapses on part of the scribe and the doctor coupled with the conduct of the prosecution in not bringing medical documents of the deceased pertaining to his first examination at THQ Hospital, Naurang do suggest that the deceased then injured was unconscious and so uncomfortable, that he could neither be able to make a statement nor was in senses, that's why no report was made in THQ Hospital, Naurang and it was only after the procurement of his son namely Nadir Khan

(PW-17), that the accused was charged on his instance at DHQ Hospital, Bannu. It has been alleged that the dying declaration was made by the complainant in presence of his son (PW-17) and it was recorded by a police official. When dying declaration is recorded by a police official, that too, in presence of a person having blood relation with the declarant is considered suspect and less worthy of credence. Though, mere presence of relative who brought the deceased in injured condition to the hospital would not, by itself, impair the evidentiary value of statement made by the deceased while in critical condition, but as the instant case has its own peculiar facts & circumstances, where the consciousness, alertness and capability of the deceased as to talk has not been proved and that the deceased was given first aid at THQ Hospital, Naurang where neither his report was penned down nor his medical documents were brought on record to substantiate the capability of the deceased as to talk, so the presence of complainant with the deceased at the time of making the report at DHQ Hospital, Bannu has reacted against the prosecution version. In this regard, wisdom can also be derived from the judgment rendered by the Apex Court in case titled ***"Nazim Khan and 02 others Vs The State" (1984 SCMR 1092)*** wherein it was held that:

"As this Court has held in Ghulam Farid v. The State a dying declaration recorded at a police station, when the relatives who have brought the injured there are present is always suspect and certainly less worthy of credence than one recorded by a Magistrate after excluding the relatives."

11. As the deceased then injured was lying in the fields after he was being fired at, that too, for a considerable time, wherefrom he was shifted to the hospital, so the persons who attended him at first hand and shifted him to the hospital were most relevant, as there is every likelihood that had he been in a position to make statement, he would have narrated before them the actual story, but none of them was produced to support the prosecution case. It was also noticed that while recording the dying declaration, provisions of Rule 25-21 of the Police Rules, 1934 pertaining to recording of dying declaration were negated, which further created flaws in the present case. The said rule reads as under:

25-21. Dying declaration: (1) A dying declaration shall, whenever possible, be recorded by a Magistrate.

(2) The person making the declaration shall, if possible be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.

(3) If no magistrate can obtained, the obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.

(4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.

(5) A dying declaration made to a police officer should, under section 162, Code Criminal Procedure, be signed by the person making it.

12. The story narrated in the FIR is yet another factor which pricks our mind. It depicted that on one hand, there

was a dispute over money between the appellant and the deceased, whereas, on the other, it has been claimed by the deceased that the weapon used in the commission of offence was owned by him and that the same was given to the appellant at his request made earlier on the day of incident. If there was serious dispute between the appellant and the deceased, then the deceased was not supposed to have given his weapon to the appellant. Contrarily, if the dispute was not so serious that the deceased gave his weapon to the appellant, then the appellant was not supposed to have committed his murder. Besides, the rule of prudence does not accept that a person will give his own weapon to his opponent, that too, when there existed a dispute of such a degree which later results in his death through the said weapon. The conduct of the deceased on this particular aspect of the case is not above board and the behaviour he adopted goes against the human psychology.

13. As stated above, the deceased then injured was firstly brought to the THQ Hospital, Naurang, but none of the persons who brought him there was examined regarding the episode and his capability as to talk nor his medical documents confirming his capability as to talk were produced. It has not been plausibly explained as to

why statement of the declarant was not penned down in the said hospital. As regards the dying statement made in the DHQ Hospital, Bannu, neither the doctor has furnished fitness certificate regarding capability of the deceased then injured as to talk nor has this aspect been specifically mentioned in the medico legal report. The admissions made by the doctor in his court statement regarding the condition of the deceased has further damaged the claim of the prosecution regarding consciousness, alertness and capability of the deceased then injured as to talk. Presence Nadir Khan (PW-17) with his deceased father at the time of making the statement has further clouded the episode with doubts and in view of the aforesaid circumstances of the present case, possibility of tutoring or prompting of the deceased by his son to name the appellant for the crime, if it is presumed that the injured was able to make the report, cannot be ruled out. At the same time, as the very consciousness, alertness and capability as to talk of the deceased is doubtful, so possibility that the story would have been narrated by his son to the scribe can also not be ruled out in entirety.

14. The investigating officer while appearing as PW-11 claimed that he visited the hospital, where he recorded statement of the deceased then injured at 23:00 hours, but

it is strange that when the deceased was stable and remained alive for six days, then why such statement was not recorded in presence of Magistrate. The record is silent regarding permission having been obtained by the investigating officer from the Medical Officer for recording statement of the deceased as to his fitness to make statement. Question that when the deceased was stable then why he was referred to Peshawar is still unanswered. It has been claimed by PW-15 that after his arrest, the appellant confessed his guilt before him, but the law is well settled that such statement can neither be termed as confession in its legal parlance nor any credence could be extended to the same. In this regard, reliance can be placed on the judgment rendered by the Apex Court in case titled ***"Gul Muhammad and another Vs The State through Prosecutor General Punjab" (2021 SCMR 381)*** in which it was held that:

> ***"It is strange enough that the extra judicial confession recorded in the presence of police personnel when they were under arrest and at the time of making statement they ware also in handcuffs. This practice of recording extra judicial confession***

by the police officials in presence of police officers is nullity in the eye of law and no credence can be extended to this piece of evidence."

15. The cumulative effect of what has been stated above is that the prosecution has failed to establish consciousness, alertness and capability of the deceased then injured as to talk. It has also not been proved that the complainant was in full senses while making the report. The story set-forth in the FIR is dubious and does not appeal to a prudent mind. The essential ingredients required for acting upon dying declaration have neither been fulfilled nor established on record. The dying declaration has, therefore, become not worthy of credence.

16. The next important piece of evidence collected during investigation is the recovery of weapon of offence at the instance and pointation of the appellant. The weapon of offence was neither sent to forensic science laboratory to confirm that the same was in working condition nor any independent evidence regarding its recovery at the instance of the appellant has been brought on record. It has not been proved that it was the same weapon which was used in the commission of offence.

The dying declaration has not been corroborated by any independent sort of evidence inspiring confidence. As crime empties were not recovered in the instant case and forensic science laboratory's report has also not been brought on record, so the mere recovery of alleged weapon of offence becomes useless.

17. The motive for the occurrence is not convincing either and even, the prosecution has failed to prove the same. Though, absence or weakness of motive, by itself, is not sufficient to dislodge the prosecution case, but when the same is set up, it has to be proved by the prosecution and the same is to be scrutinized and adjudged by the court in order to arrive to a just conclusion. It is trite law that failing to prove motive will react against the prosecution and not the defence. As the prosecution could not produce an iota of evidence in support of the motive, so it will be the prosecution to suffer the consequence.

18. In corollary to the above discussion, we have reached to an inescapable conclusion to hold the prosecution has miserably failed to prove the charges against the appellant beyond clouds of doubt. The prosecution case is suffering from legal defects and inherent flaws which have cut its roots. The learned trial judge has failed to appreciate the evidence brought before

and the worth of the dying declaration in its legal parlance. The instant case is left with no legs to stand upon. The impugned judgment passed by the learned trial court cannot, therefore, be maintained. We, therefore, accept the instant criminal appeal and set the impugned judgment aside. Consequently, the appellant is acquitted of the charges; he shall be released forthwith, provided his detention is not required in connection with any other criminal case.

19. The above are the detailed reasons for our short order of even date.

Announced
22.06.2022
Ghafoor Zaman/Steno

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice Ishtiaq Ibrahim
Hon'ble Mr. Justice Sahibzada Asadullah