

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR,**  
[Judicial Department].

**Crl. Appeal No.459-P/2019**

Momin Khan son of Asim Khan,  
r/o village Kandaray Manari Payan,  
District Swabi.

Appellant (s)

**VERSUS**

The State etc

Respondent (s)

For Appellant :-	<u>Mr. Jalal ud Din Akbar-e-Azam Gara,</u> <u>Advocate.</u>
For State :-	<u>Mr. Mujahid Ali Khan, AAG.</u>
For complainant :-	<u>Mr. Sareer Ahmad, Advocate.</u>
Date of hearing:	<b><u>30.10.2019</u></b>

**ORDER**

**ROOH-UL-AMIN KHAN, J:-** This criminal appeal, filed by Momin Khan, the appellant, is directed against the judgment dated 22.07.2017 of learned trial Court/Additional Sessions Judge-I, Swabi, whereby he has been convicted and sentenced, in case FIR No.781 dated 06.07.2013, Police Station Swabi, as under:-

**Under 302(b) PPC:-** To undergo imprisonment for life as Ta'azir and to pay Rs.20,00,000/-, as compensation in terms of section 544-A Cr.P.C. and in default thereof to undergo 06 months S.I.

**Under section 324 PPC:** To undergo 03 years rigorous imprisonment and to pay a fine of Rs.25,000/-.

2. As per contents of FIR (Exh.PA) the prosecution case is that on 06.07.2013 at 1600 hours, deceased then injured Ehtisham aged 19/20 years, in company of injured, Abuzar aged 16/17 years and minor Sana, were brought to casualty of District Headquarter (DHQ) hospital Swabi where Ehtisham reported the matter to Shoaib Khan SI (PW.5), in presence of Casualty Medical Officer (CMO) to the effect that on the fateful day he alongwith his uncles, namely, Muzamil Shah and Mantariq Shah (PW.14), was present on main road near the Hujra of one Jalil situated at *Khandary Maniri Payan* when at 1530 hours, Momin the appellant along with Amir, Talha and Feroz (absconding co-accused), duly armed with firearms came there and opened fire at them with the intention to commit their murder, as a result, he got hit and injured, whereas, his uncles named-above, luckily remained unscathed. Due to firing of the accused, Abuzar and a minor girl Sana also sustained injuries. After the occurrence, the accused decamped from the spot. In addition to the deceased then injured the occurrence is stated to have been witnessed by his uncles named-above. A previous blood feud between the parties has been alleged as motive behind the occurrence. Report of the deceased then injured was reduced into writing in the shape of Murasila Exh.PA/1 by Shoaib Khan SI (PW.5) which was verified by Mustaqeem Shah (PW.9), on the basis of which FIR Exh.PA was

registered against the appellant and absconding co-accused. PW.5 then prepared injury sheets of injured Abuzar and Ehtisham Exh.PW.2/2 and Exh.PW.4/1, respectively and referred them for medical examination. Dr. Mukammil Khan SMO DHQ Swabi (PW.4) examined injured Abuzar and Ehtisham vide medico legal reports Exh.PW.4/1 and Exh.PW.4/2, respectively. He also endorsed the injury sheet of injured Ehtisham and Murasila report Exh.PA/1. After first aid, the then injured Ehtisham was referred to LRH, Peshawar, where he succumbed to the injuries, hence, at 10.55 p.m. Dr. Muhammad Kabir (PW.11) conducted his autopsy and furnished report Exh.PM. Minor Sana was medically examined by lady Dr. Shahida (PW.2).

3. Shehzad Khan SI (PW.13), was entrusted the task of investigation, who proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitnesses. During spot inspection he secured bloodstained earth from the place of injured Abuzar, Sana and deceased then injured vide recovery memos Exh.PW.8/1 to Exh.PW.8/2. Vide recovery memo Exh.PW.8/3 he took into possession three empties of 9 MM Exh.P.7 from the place of absconding co-accused Amir. Likewise, through recovery memos Exh.Pw.8/3, Exh.PW.3/1 and Exh.PW.3/2, he took into possession the bloodstained garments of the injured and the deceased then injured in presence of witnesses,

recorded statements of the PWs u/s 161 Cr.P.C., sent the empties to the FSL for safe custody, and initiated proceedings under section 204 and 87 Cr.P.C. against the accused. After completion of investigation he handed over case file to the SHO for submission of challan under section 512 Cr.P.C. against the accused.

4. On arrest of the appellant and completion of necessary investigation supplementary challan was submitted against him before the learned trial Court, where he was formally charge-sheeted to which he pleaded not guilty and claimed trial. To prove guilt of the appellant, the prosecution examined as many as fourteen witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution allegations and professed his innocence. He, however, refused to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides, convicted and sentenced the appellant as mentioned above, hence, this appeal.

5. We have heard the arguments of learned counsel for the parties and perused the record with their able assistance.

6. It appears from record that during trial, PW Muzamil Shah, one of the purported eyewitnesses, has been abandoned as he was absconding in a murder case.

Similarly, injured Abuzar aged 16/17 years has been abandoned being unnecessary, whereas, injured minor Sana being not competent to answer rational questions, has also been abandoned.

In view of the above, the case of the prosecution hinges upon the testimony of Muntariq Shah (PW.14), the purported eyewitness, Mustaqeem Shah PW.9 (*verifier of the Murasila*), dying declaration of the deceased then injured Ehtisham, medical evidence in the shape of medico legal reports of injured and the autopsy report of the deceased then injured; recovery of blood from the spot, positive Serologist report qua the blood secured from the spot and the bloodstained garments of the injured and the deceased as well as recovery of three crime empties of 9 MM Bore.

7. First of all we are taking the testimony of Muntariq Shah (PW.14). In examination-in-chief he has narrated the same story as set forth by the deceased then injured in his initial report Exh.PA/1. In cross-examination he deposed that he and PW Muzamil Shah (abandoned), accompanied the deceased then injured to the hospital where the police in our presence recorded his statement. He further deposed that Mustaqeem Shah did not accompany them to the hospital, rather, he himself reached the hospital. Contrary to his statement, Mustaqeem Shah while appearing as PW.9 deposed that he accompanied the deceased then

injured Ehtisham to DHQ Swabi from Swabi Adda, who reported to police in injured condition in presence of the doctor and he (PW.9), verified his report. The testimony of Mustaqeem Shah (PW.9), excludes the presence of PW Mantariq Shah at the time of shifting the deceased then injured to the hospital and at the time of report allegedly made by the deceased then injured. Perusal of initial report Exh.PA/1 reveals that it does not bear the signature or thumb impression of alleged eyewitness Mantariq Shah. If at all PWs Mantariq Shah and Muzamil Shah (abandoned) were present with the deceased then injured at the spot and then in the hospital, then instead of verifying report of the deceased then injured by PW Mustaqeem Shah, they would have verified the same. No explanation, much less, plausible has been furnished by PW Mantariq Shah as to why he or abandoned PW Muzamil Shah did not signed/thumb impressed the report of the deceased then injured as verifier. Similarly, the Author of Murasila has also not furnished any explanation to the effect that when he recorded the report of the deceased then injured where PWs Muntariq Shah and Muzamil Shah were shown as eyewitnesses they why the report was not verified through them. Contradicting the report Exh.PA/1, PW Mantariq Shah deposed that he provided cell phone number to the police when report of the deceased then injured was being recorded and he also thumb impressed the report. As stated

above, report of the deceased then injured Exh.PA/1 does not bear the thumb impression of PW Mantariq Shah. He further deposed that after 10/15 minutes the deceased then injured was referred to Peshawar, however, neither he nor abandoned PW Muzamil Shah accompanied the deceased then injured to Peshawar despite the fact that the injured was the nephew of the above named PWs. This part of statement of PW Mantariq Shah is squarely against the natural conduct of an uncle. Though he along with Muzamil Shah, accompanied the deceased then injured to DHQ Swabi but what prompted him immediately to leave his nephew on mercy of other relatives and did not accompany him to hospital in Peshawar. He further deposed that enmity of the accused was not only confined to Ehtisham deceased then injured, rather it was also with them. In the site plan Exh.PB, though the PW Mantariq Shah and Muzamil Shah have been shown present at a distance of 8 to 14 paces from the accused, but no one from them has received a single firearm injury despite that they were under the indiscriminate firing of four accused armed with lethal weapons and were at their mercy. It is not the case of prosecution that the purported eyewitnesses took shelter during the firing. In this view of the matter escape of the PWs or letting them off by the accused so as to stand witnesses against them is beyond the comprehension of a prudent mind. PW Mantariq Shah and

Muzamil Shah have been shown in the site plan Exh.PB near wall of Hujra of Jalil, but no bullet marks or spent bullet have been noticed by the I.O. on the wall of the said Hujra behind them. In the site plan near the spot house of one Matlab and shops of Waqar, Yahya and Muqarab have been shown but none of them has either been examined by the I.O or produced by the purported eyewitness in support of their version or at least to the extent of their presence at the spot after the occurrence. Medical report of deceased then injured Ehtisham bears the name of one Jawad but his statement has neither been recorded by the I.O. nor by the author of the Murasila. PW Mantariq Shah deposed that said Jawad is not known to him and he is not his neighbor. PW Mantariq Shah has not given any explanation, much less, plausible with regard to purpose of their presence at the spot on the day of occurrence. During cross examination he was also confronted with his statement recorded under section 161 Cr.P.C. by the defence by putting certain questions replies of which amounts to dishonest improvements. In view of the contradictions, discrepancies and dishonest improvements in the testimony of PW Mantariq Shah, we are firm in our view that he is not eyewitness of the occurrence. He failed to establish his presence at the spot at the time of occurrence through cogent and reliable evidence, therefore, we disbelieve his testimony.



8. As stated above, PW Muzamil Shah and injured PW Abuzar, have been abandoned by the prosecution on the ground that the former was absconding in a murder case and the latter become unnecessary to produce and examine him. Injured PW Abuzar was an independent witness being not related to either party, therefore, his testimony could play a decisive role in this case, therefore, his non-production in the witness box amounts to withholding the best available evidence, as such an adverse inference within the meaning of Article 129 (g) of the Qanun-e-Shahadat Order, 1984 would be draw against the prosecution that had he been produced he would not have supported the prosecution case.

9. Adverting to the dying declaration of the deceased then injured Eshtisham, suffice it to say that dying declaration is a statement of a deceased person as to cause of his death when he is at the point of death. No doubt, sanctity is attached to a dying declaration because a dying man is not expected to tell lies, but being weak kind of evidence, it requires close scrutiny and corroboration from circumstantial evidence. At different occasions the august Supreme Court of Pakistan has settled some of the well known tests for determining the genuineness of dying declaration which are (i) whether it rings true (ii) whether the dying man was capable of making it (iii) whether it was free from outside prompting and was not inconsistent

with other evidence, facts and circumstances of the case (iv) whether the deceased then injured was capable to identify the assailant (s). To find out truth or falsity of a dying declaration a case is generally considered in all its physical environment and circumstances. It is necessary to find out how far the evidence or its different parts fit in with the circumstances and possibility that can safely be deducted in a particular case. Therefore, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that such statements are made in absence of an accused, which has no opportunity of testing the veracity of the statement by cross examination.

10. In case titled, **Mst. Zahida Bibi Vs The State” (PLD 2006 Supreme Court 255** it has been held by the Hon’ble Supreme Court of Pakistan that 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 a lie. Likewise, rule 25-21 of the Police Rules, 1834, speak about the essential ingredients to be followed during recording of dying declaration, which for the sake of convenience and ready reference is reproduced below:-

**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 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 be 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 of Criminal Procedure, be signed by the person making it.

11. In view of the law and the precedent referred above, the first point for consideration is whether the deceased then injured was capable to talk and able to make a statement. No doubt, Author of Murasila and Mukammil Khan SMO (PW.4) in his medico legal report have mentioned that the deceased then injured was conscious and well oriented in time and space, but the firearms entrance wounds on the person of the deceased then injured reflects otherwise which makes the statements of the Medical Officer and author of Murasila doubtful. As per autopsy report the deceased then injured has sustained firearm entry wound on right side of forehead measuring 1x1 cm above lateral boarder of eyebrow with corresponding exit on right side face below eye 1 cm from nose. Similarly, has also sustained firearm entry wound on right side front of his abdomen with corresponding exit on

back of his abdomen. In view of the aforesaid injuries on most vital parts, capability and ability of the deceased then injured to make statement/talk is beyond the comprehension of a prudent mind. Besides, in the medico legal report firearm entry on right side of forehead of the deceased then injured has not been shown. Similarly, in the medico legal report total seven firearm wounds including entrance, exit and lacerated have been shown on the person of the deceased with 0.5x1 dimension of all entrance wounds, whereas, in the autopsy report total twelve firearm wounds including entrance and exit have been shown on the person of the deceased. Dimension of one entrance wound has been shown as 1x1 cm and the remaining as 0.5x0.5 cm. Firearm entry wound on right side of forehead of the deceased has not been shown in the medico legal report purposely so as to prove capability and ability of making statement of the deceased then injured. Admittedly, the dying declaration of the deceased then injured as not been recorded in accordance with the law and rules mentioned above.

12. We are facing yet another ambiguity qua recording of the alleged dying declaration by Shoaib Khan SI (PW.5). The moment, the injured was brought to casualty, Murasila was drafted at 4.00 p.m. and the injured was referred to casualty Medical Officer through FC Tauseef, who examined the him at 4.00 p.m. The Murasila was

verified by Mustaqeem Shah son of Malik Shah, but the medico legal report shows presence of one Jawad at the time of medical examination of the injured. Mustaqeem Shah (PW.9), the alleged verifier of the dying declaration, in cross-examination deposed that injured was shifted to the hospital by neighbours, however, he could not disclosed their names. The above named Jawad was neither examined nor abandoned for the reason best known to the prosecution; however, it suggests that initially injured Ehtisham was brought to the hospital by neighbours including Jawad, who has rightly noticed by the CMO at the time of medical examination of injured Ehtisham. Had said Jawad been examined, he would have clarified the actual position about dying declaration.

13. From the above it is manifest that initially, the deceased then injured was brought to the hospital by neighbors wherein one Jawad was present at the time of medical examination. The Murasila was delayed till arrival of the PW Mustaqeem Shah, verifier of the Murasila, who as stated earlier is not the eyewitness of the occurrence because at the time of occurrence he has shown himself in Swabi Adda, wherefrom he allegedly accompanied the deceased then injured to the hospital. The above discussed circumstances clearly suggest that the report Exh.PA/1 has not been recorded on the statement of the deceased then injured rather it is a manipulated document which does not

find corroboration from any direct or circumstantial evidence. No crime empty has been shown recovered from the place of the appellant. Similarly, no crime weapon has been shown recovered either from his direct or indirect possession. Total four accused including the appellant have been charged for firing at the deceased whereas as per medico legal report of the deceased then injured all the wounds on his body were found of one and the same dimension, but as per autopsy report of the deceased, the two type of dimensions of entrance wounds have been shown on the deceased, which indicate that the occurrence may be the doing of at the most two persons. The alleged recovered 3 crime empties have not been sent to the FSL so as to ascertain the number of accused. The dying declaration of the deceased then injured is not corroborated by any other circumstantial evidence to prove participation of the appellant in the commission of offence. Similarly, the dying declaration has also not been recorded in accordance with the rules and the settled law. The case has not been registered through direct FIR in Police Station rather in the shape of Murasila.

14. The above discussed facts and circumstances of the case have been ignored by the learned trial Court, therefore, reached to an erroneous conclusion by holding the appellant guilty of the offence. Resultantly, this appeal is allowed, conviction and sentences of the appellant

recorded by the learned trial Court vide impugned judgment dated 22.07.2017 is hereby set-aside and he is acquitted of the charge leveled against him. He be set at liberty forthwith, if not confined in any other case.

15. These are reasons of our short order of even date which is reproduced below:-

“For reasons to be recorded later, we allow this appeal, set-aside the conviction and sentences of appellant, namely, Momin Khan son of Asim Khan, recorded under sections 324 and 302 (b) PPC, by the learned trial Court/Additional Sessions Judge-I, Swabi, vide judgment dated 22.07.2017, in case FIR No.781 dated 06.07.2013, under sections 302/324/ 337-F(iii)/34 PPC, Police Station Sawabi, District Swabi and hereby acquit him of the charges in the cited case. He be set at liberty/released from Jail, if not confined in any other case.”

**Announced:**

**30.10.2019**

*M.Siraj Afridi PS*

**JUDGE**

**JUDGE**

**DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and**  
**Hon'ble Mr. Justice Ishtiaq Ibrahim.**