IN THE PESHAWAR HIGH COURT, BANNU BENCH

(Judicial Department)

Cr.A No.15-B of 2022

Abdur Rahim etc
Vs
The State etc

JUDGMENT

For Appellants: Mr. Iftikhar Durrani Advocate

For respondent: Mr. Quaid Ullah Khan Khattak Advocate

For State: Mr. Saif-ur-Rehman Khattak, Addl. A.G.

Date of hearing: **21.09.2022**

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SAHIBZADA ASADULLAH, J.--- Through the instant appeal under section 410 Cr.P.C, appellants, namely, Abdur Rahim, Majeed Khan and Abdul Haleem alias Siyal have called in question the judgment dated 15.01.2022 passed by the learned Additional Sessions Judge, Banda Daud Shah, District Karak in case FIR No.211 dated 02.08.2019 under sections 302/324/337-F(iii)/337-A(vi)/34 PPC registered at Police Station Gurguri, District Karak, whereby, they were convicted and sentenced as under:

i. **Under section 302(b)/34 PPC to imprisonment for life alongwith payment of Rs.1,00,000/- each as compensation to the legal heirs of deceased under section 544-A Cr.P.C**

or in default thereof, to undergo six months simple imprisonment.

ii. **Under section 324 PPC to five years R.I.**

iii. **Under section 337-A(i)/34 PPC to payment of Daman of Rs.50,000/- each to injured Muhammad Abdullah or in default thereto, to be dealt with under section 337-Y(ii) PPC;**

2. Benefit under section 382-B Cr.P.C was extended to the appellants and the sentences were ordered to run concurrently. As far as charges under section 337-F(iii) PPC/34 PPC were concerned, the appellants were acquitted of the same.

3. Feeling aggrieved, the appellants have questioned the legality of the impugned judgment and the awarded sentences through the instant appeal, whereas, father of deceased namely Muhammad Jumaraz being aggrieved of the quantum of sentences has moved Criminal Revision Petition No.06-B of 2022 for enhancement of the same. Since both these matters have arisen out of the same judgment, therefore, we intend to decide the same through this common judgment.

4. The transient facts as unfolded in the first information report are that on 01.08.2019 at 00:25 hours i.e. 12:25 AM, deceased then injured Sabir Ullah alongwith injured Syed Rahim lodged a report in emergency ward of Civil Hospital, Teri, District Karak to the effect that on the eventful day at 23:15 hours, he alongwith his friend Syed Rahim, his brother injured Muhammad Abdullah, Attaullah and Masood Rehman were present in their Baitak after taken dinner. Meanwhile, accused Abdul Haleem alias Siyal, Majeed, Ramzan, and Abdur Rahim armed with Kalashnikovs came there and started firing at them in order to commit their Qatl-i-Amd, due to which, he alongwith Syed Rahim and Muhammad Abdullah got hit and injured, while Masood Rehman and Atta Ullah luckily escaped unhurt. Motive is stated to be a dispute over womenfolk. Hence, the *ibid* FIR.

5. Accused Ramzan remained absconder, while on arrest of the appellants after completion of investigation, supplementary challan was submitted against them, where at the commencement of trial, the prosecution produced and examined as many as 14 witnesses. On close of prosecution evidence, statements of appellants were recorded under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they 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 appellants as mentioned above. Hence, the instant appeal against the judgment of conviction and the criminal revision for enhancement of the sentence.

6. Learned counsel for the parties as well as the worthy Additional Advocate General were heard at length and the record was scanned through, with their valuable assistance.

7. The unfortunate incident claimed the life of one, leaving behind two others injured. The matter was reported by the deceased then injured, when he was rushed to the hospital for treatment. The matter was reported to one Samiullah ASI, who was examined as PW-01. The report was noted down in the shape of *murasila* and thereafter, the injury sheets were prepared. The injured were examined by the doctor and after examination their medico legal certificates were prepared. The deceased then injured, after getting first aid, was referred for specialized treatment to Peshawar, where he survived for several days, but at last, succumbed to the injuries and section 302 PPC was added to the first information report. The *murasila* was sent to police station Teri for registration of the case, which

yielded to the present FIR. The investigating officer after receiving copy of the FIR visited the spot and prepared the site plan, on pointation of the eye witnesses. During spot inspection, the investigating officer collected bloodstained earth from respective places of the injured and the deceased. It is pertinent to mention that 77 empties of 7.62 bore alongwith 05 empties of .30 bore were handed over to the investigating officer by PW Masood Rehman. We deem it essential to mention that on the day of incident, no bulb was collected from the spot by the investigating officer, but it was on 02.09.2019, when the same were taken into possession by the investigating officer, as an application was submitted by father of the complainant to the SP (Investigation). The collected empties were sent to the firearms expert for opinion and in that respect, a report was received with an opinion that the same were fired from different weapons. After completion of the investigation, complete *challan* was submitted before the Court. The accused were arrested soon after the incident and they were presented to the Court concerned, where the trial commenced and on its conclusion, the appellants were convicted and sentenced as stated above.

8. The matter was heard and thrashed by the learned trial judge and after application of his judicial mind to the

collected evidence on file and recorded statements of the witnesses before the Court, convicted and sentenced the appellants. This being the Court of appeal is under the bounden duty to scan through the record with the sole purpose to ascertain as to whether the approach of the learned trial Court was correct by holding the convict / appellants responsible for the death of the deceased and injuries to the injured. This Court is to reassess and re-appreciate the already assessed and appreciated evidence, so that miscarriage of justice could be avoided. The courts of law are the custodians of the rights and liberties of the people, so these are to walk with care while determining the rights and liabilities of the parties, to be more specific, a balance must be maintained between the parties, so that miscarriage of justice could be avoided.

9. This Court is to determine as to whether the incident occurred in the mode, manner and at the stated time; as to whether the witnesses were present at the time of incident and thereafter; as to whether the incident occurred inside the *Baitak* belonging to the complainant and as to whether the prosecution succeeded in proving the motive and guilt of the appellants to the hilt. This Court is to determine as to whether the complainant was capable to talk and as to whether the dying declaration is in line with the prosecution

story and statements recorded by the witnesses, before the trial Court. There is no denial of the fact that the incident occurred inside the *Baitak* belonging to the complainant and the record also tells that the house of the convict / appellants is situated just across the street. It is the case of the prosecution that on the night of incident after taking dinner, they were busy in chat, when the convict / appellants attracted to the spot and started firing at them; that soon after noticing the arrival of accused to the *Baitak*, the complainant and the eye witnesses started running in different directions, who, as a result of the fire shots, received firearm injuries on their bodies; that the accused soon after the incident decamped from the spot and that the injured were shifted to the hospital for medical examination. The prosecution examined three eye witnesses in support of its claim. Muhammad Abdullah alias Muhammad Nawaz was examined as PW-12, who stated that after taking dinner, the accused attracted to the spot with Kalashnikovs and pistols, in their possession, and started firing at them. We are to ascertain as to whether in fact the complainant, the injured and the witnesses were present in the *Baitak* right from the evening till the incident occurred. All the three witnesses i.e. PW-12, 13 & 14 were examined and cross examined on material aspects of the

case. PW-12 when appeared before the trial Court, he in his examination in chief, improved his version to the extent that besides Kalashnikovs, the accused were also armed with pistols. This witness could not explain that who, out of the accused, were armed with Kalashnikovs and who, with pistols. When the statement of this witness is taken into juxtaposition with the report of the complainant and his 161 Cr.P.C statement recorded by the investigating officer, he remained silent regarding the pistols, in possession of the accused. This is surprising to note that the introduction of pistols was a conscious attempt on part of the witnesses, as from the spot, alongwith 77 empties of 7.62 bore, 05 empties of .30 bore were also taken into possession. The witnesses went in a constant struggle to accommodate their improvement, in the prosecution story. We were further surprised when PW-13 appeared before the trial Court and explained the situation in a different manner. This witness attributed pistols to accused Majeed, Abdur Rahim and Ramzan. When the witness was cross examined regarding the firing made by the accused, he explained in the following manner:

"*That only two out of the accused i.e. Abdur Rahim and Ramzan were having pistols in their possession.*" He further explained that accused Ramzan made three fire

shots with his pistols, but no one was hit. In respect of Abdur Rahim, he disclosed that he made two fire shots with his pistol, but no one was hit. This witness went a step ahead and answered to a question that accused Abdul Haleem was having no pistol in possession. PW-14 when appeared before the Court, he was asked regarding the weapons, in possession of the accused, who disclosed that out of the accused, Syed Rahim was having pistol in possession, whereas, others were armed with Kalashnikovs, but even when the investigating officer recorded his statement under section 161 Cr.P.C, he did not mention the availability of pistols with the accused, but he improved his statement when appeared before the trial Court. It was in his examination in chief that he introduced pistols with the accused. The conflict among the witnesses on this particular aspect of the case has created a dent in the prosecution case, which, despite efforts, could not be repaired. We are anxious to know that when in the report, made by the complainant, the firearms, in possession of the accused, were mentioned as Kalashnikovs then what led the witnesses to travel in a different direction. If we, for a while, admit that yes 05 empties of .30 bore were collected from the spot, then it is for the prosecution to answer that who fired those shots. As admittedly, the witnesses could

not prove this particular aspect of the case, then an inference can be drawn that the same were fired by the complainant side and when such an inference is drawn, then it creates doubt in a prudent mind regarding the manner in which the incident occurred. We cannot forget that the *Baitak,* where the incident occurred, is smaller in size, bounded by walls with a main gate installed towards the street. If, for a while, we accept that the accused entered the premises and fired all 77 bullets of 7.62 bore, that too, with Kalashnikovs alongwith 05 rounds of .30 bore, then there must have been multiple bullet marks on the surrounding walls, but the investigating officer, during spot inspection, did not observe the same and even, no spent bullets were collected therefrom. Though, one of the marginal witness wanted to persuade this Court in respect of non-availability of bullet marks on the walls by stating that the walls were made up of stones. Even, if we say yes, to what he stated before the Court, then in that eventuality, multiple spent bullets would have been recovered, as the same would have been deflected after striking the walls. This particular aspect of the case can better be understood when the seat of injuries on persons of the deceased and injured are taken into consideration. The respective medico legal certificates of the witnesses disclose that all the three received, single

firearm entry, on their bodies. Another intriguing aspect of the case is that as per statement of the witnesses, soon the accused entered the Baitak, the eye witnesses, the complainant and the injured witnesses started running. The medical evidence, if taken into consideration, belies the stance of the prosecution, as in the given circumstances of the present case, the victims would have received multiple firearm injuries on their bodies. The site plan depicts the respective places of the complainant side before the incident and thereafter. The site plan discloses that when allegedly, the accused fired at the victims, they started running. One of the injured ran from point No.1 and when he reached to point No.1A, he received a firearm injury and similarly, the other when reached to point No.2A, he was hit with a bullet, whereas, the injured Syed Rahim started running towards the main gate, where he received an injury on his body. This is beyond understanding that when accused fired after entering the main gate of the *Baitak*, then what led the injured Syed Rahim to start running towards the gate, as by then, all the accused were duly armed with sophisticated weapons, present in the gate, but the circumstances do not support the eye witness account regarding the manner in which the incident occurred. The witnesses remained inconsistent regarding the time they got

together in the *Baitak* and the time, when they took their meal. Some of the witnesses disclosed before the trial Court that they took dinner at 09:00 PM to 09:30 PM, whereas, the other mentioned the time of taking dinner as 10:30 PM to 11:00 PM. This is for the prosecution to tell that if the meal was taken before the incident, then why the crockery used for the purpose was not taken into possession. Surprising statements are given by the witnesses, as some of them stated before the trial Court that they were sitting on chairs and the cots were lying inside the room, whereas, some disclosed that there were no cots and chairs in the *Baitak*, rather the meal was taken on a mat spread on the floor, but in all circumstances, neither the cots nor the chairs were taken into possession nor shown by the investigating officer in the site plan, prepared on pointation of the eye witnesses. The investigating officer did not ask for the mat used for the purpose and in such eventuality, we lurk no doubt in mind that the prosecution could not succeed in convincing, that they had grouped together to dine. When the very purpose of their presence in the *Baitak* is not established on record then what would persuade the judicial mind of this Court in holding that the incident occurred in the manner as alleged by the prosecution. This is surprising to note that when PW-14 during his cross-

examination, disclosed that at the time of firing, announcement was made in the loudspeaker of the local mosque and on hearing the same, the people of the locality rushed towards the premises. When the incident occurred at spur of the moment, then what opportunity was gained by the locals to make announcement in the loudspeaker. If this part of the statement of the witness is taken to be correct, then it tells another story. The circumstances do suggest that there was cross firing for a considerable long time and the people were left with the only choice to make announcement through the loudspeaker of the mosque. When the witnesses were cross examined in respect of the pistols, in possession of the accused / appellants, it was categorically admitted that one of the convict / appellant Syed Rahim did not fire with the pistol in his possession. When such is the state of affairs, then we are surprised to note that how the said accused could be held responsible, that too, when no effective role of firing was given to him, through the pistol in his possession. The learned counsel for the complainant wanted to convince this Court by submitting that all the accused were in possession of Kalashnikovs as well as pistols. Even, this limb of arguments of the learned counsel failed to convince us, as it has never been the case of the prosecution, that the accused

charged in the FIR, were armed with Kalashnikovs and pistols. The improvements made by the witnesses, on this aspect of the case, has damaged the prosecution case beyond repair. It does not appeal to a prudent mind that the accused, if come, in that fashion, would use both Kalashnikovs and pistols, in their individual possession. In the like circumstances, when the best available weapon is in possession of an accused, then the use of pistol would speak nothing, but *mala fide* on part of the prosecution. It is well settled exposition of law that when the Court finds inconsistencies, contradictions, and improvements in the prosecution evidence and when it reaches to a conclusion that the occurrence has not taken place in the mode and manner as alleged and presented by the prosecution, then the benefit has always been extended to the accused charged. In this regard, wisdom can be derived case laws reported as ***"Jawad Vs The State and another" (2020 YLR 1462)*** and ***"Jalat Khan alias Jalo Vs The State" (2020 PCrLJ 503)***. Similarly, in case titled ***"Rafaat Shah Vs The State" (2022 PCr.LJ Note 39 Balochistan)*** it was held that:

> ***"The mode and manner of the occurrence itself by the prosecution is not appealable to the prudent mined, therefore, it was highly unsafe to rely on the statement of both these***

witnesses to maintain conviction and sentence of the accused on a capital charge."

10. The investigating officer was examined as PW-03, who stated that on receiving copy of the FIR, he alongwith police officials went to the spot; that on arrival to the spot, he found the eye witness Masood Rehman present there alongwith the eye witness Attaullah; that Masood Rehman handed him over 77 empties of 7.62 bore and 05 empties of .30 bore; that the site plan was prepared on pointation of the eye witnesses and their statements under section 161 Cr.P.C were recorded. It is essential to note that another witness namely Gul Samad also accompanied the investigating officer from police station to the spot. He was examined as PW-11, who stated that on the night of incident, he alongwith the investigating officer was present in the police station; that on hearing the fire shots, the investigating officer directed them to go to the spot. The statement of this witness when taken into consideration, gives an inference that the investigating officer alongwith PW-11 and others had reached to the spot earlier than the matter was reported. We cannot ignore that the empties were not recovered from the spot, rather the same were handed over by PW Masood Rehman. This is for the prosecution to tell that when and

why these empties were collected by PW Masood Rehman from the spot. The marginal witness i.e. PW-11 categorically stated that no sooner did they enter the *Baitak*, the empties were handed over. He further explained that in his presence, neither the investigating officer nor PW Masood Rehman collected the same from the spot. When such is the integrity of the witnesses and when such is the recoveries from the spot, then the same cannot be taken into consideration.

11. We are yet to know that what was the exact time of arrival of the injured to the hospital and that as to whether the injured were examined earlier or the report was made. The medico legal certificates of all the injured disclose the time of arrival and examination by the doctor as 11:45 PM, whereas, the time of report is 00:25 i.e. 12:25 AM. When the scribe was examined as PW-01, he explained in the following manner:

"That on arrival to the hospital, first the matter was reported to him, whereafter he prepared the injury sheets and the injured were sent to the doctor for treatment and examination." Now, to ascertain that who was correct i.e. the doctor or the scribe, for this particular purpose, we deem it essential to go through the statement of the scribe, who appeared before the trial Court and was examined as

PW-01. This witness explained before the Court that while on *Gasht* in Gurguri Bazaar, he received information regarding the arrival of the injured to the hospital and he rushed there, where the complainant reported the matter; that after drafting the *murasila*, the same was sent through constable Akhter Ghani to the concerned police station for registration of the case. This is astonishing that how PW Samiullah reached to the hospital and that it was he, who drafted the *murasila*, because he was not posted in the concerned police station, rather he was posted in police station Gurguri. We are yet to know that why it took sufficient long time to incorporate the *murasila* in the FIR despite the fact that hospital and police station are situated in close proximity. This particular aspect of the case can be interpreted in no other manner, but that the report was made after a considerable delay, that too, to provide an opportunity to the complainant side to charge the persons of their choice. The scribe, during his cross examination, disclosed that the injury sheets are not in his writing, rather those were prepared on his dictation. In the same breath, he explained that the *murasila* is in his handwriting. When he was available in the hospital, then why he himself failed to prepare the injury sheets and that why he only opted to draft the *murasila*. The record is silent that who was the police

official, who prepared the injury sheets on dictation of the scribe. Neither the name of the said official is available in the calendar of witnesses nor he was produced before the trial Court. When this explanation is read in juxtaposition with the time of arrival and time of report, no ambiguity is left that before arrival of the police officials, the co-villagers had brought the injured to the hospital and on their arrival, their medical examination was carried out. It further tells that till that time, no report was made. When such is the state of affairs, we are not hesitant in holding that preliminary investigating was conducted in the present case.

12. Another intriguing aspect of the case is the belated recovery of two bulbs, allegedly, installed on the premises at the time of occurrence. Though, the investigating officer visited the spot, prepared the site plan, but he failed to mention the availability of lights, on the walls, at the time of incident. When the same was not taken into possession on the night of incident, we are afraid that the prosecution failed to disclose the source of identification. On realizing the fact, it was disclosed that an application was submitted by father of the complainant to SP (Investigation), requesting for recovery of the bulbs from the premises. The investigating officer, after a month of the incident, went to the spot once again, collected the bulbs installed in the

premises. When the investigating officer was asked as to whether copy of the said application was available on file, to which, he replied in negative. Neither father of the complainant was examined on this particular aspect of the case nor the application was brought on record, which tells that the complainant side, after realizing this fact, tried its level best to bring on record the source of identification. Such belated recovery cannot be read in favour of the prosecution, as in that eventuality, these are the convict appellants who are to suffer at the hands of the prosecution and even, for its negligence, so we are not in a happy mood to accept the same.

13. Another essential aspect of the case is non-production of the injured Syed Rahim. The prosecution abandoned him being won over, but nothing was brought on record that what were the circumstances, which led the prosecution to decide in this fashion. We cannot ignore that injured Syed Rahim was not closely related to the complainant side and his statement was of prime importance, not only that he received injuries in the episode, but also that he would depose against the real culprits. As he was the best available witness and it was he who would explain the circumstances in which the incident occurred, so the choice exercised by the prosecution will

go deep to the roots of it's case. The Legislature was conscious of the like circumstance, that's why Article 129(g) was made an essential component of the Qanun-e-Shahadat Order, 1984. Keeping in view the attitude of the prosecution and the refusal to examine the best available evidence, we can draw an inference that he was not ready to support false claim of the complainant and in such eventuality, a negative inference is drawn. In this regard, wisdom could also be derived from the judgment rendered by the Apex Court in case titled ***"Lal Khan Vs The State" (2006 SCMR 1846)*** in which it was held that:

> ***"The prosecution is certainly not required to produce a number of witnesses as the quality and not the quantity of the evidence is the rule but non-production of most natural and material witnesses of occurrence, would strongly lead to an inference of prosecutorial misconduct which would not only be considered a source of undue advantage for possession but also an act of suppression of material facts causing prejudice to the accused. The act of withholding of most natural and a material witness of the occurrence would create an impression that the witness if would have been brought into witness-box,***

he might not have supported the prosecution and in such eventuality the prosecution must not be in a position to avoid the consequence."

14. The medical evidence does not run in unison with the ocular account, as it is alleged that no sooner did the accused enter the premises, they started firing at the complainant and others. If we admit, for a while, the stance of the witnesses, then the victims would have received firearm injuries from their front, but it is not the case before us. In case of burst firing, all the three would have received multiple firearm injuries, but the seat of injuries and its kind do not tally with the ocular account. The conflict between the two has damaged the prosecution case beyond repair. True that medical evidence is confirmatory in nature and that in case of direct ocular account, the same plays a little role, but we cannot forget that once the ocular account fails to inspire confidence, then it is the medical evidence which would steer the wheel. As in the present case, the witnesses failed to convince this Court regarding the mode and manner in which the incident occurred, so this Court is not ready to interpret the same in favour of the prosecution, rather the benefit of the same must go to the accused charged. The circumstances so narrated have established that the ocular account is not in line with the medical

evidence. Similar situations, where medical evidence was in conflict with the ocular account, have been beautifully dealt with by this Court in a number of cases and the benefit so accrued was extended in favour of accused charged. In this regard, reference could be made to the judgment rendered in the case of ***"Mukhtasir and 05 others Vs the State and another" (2017 PCrLJ 1607 Peshawar).*** Similarly, the Apex Court while dealing with the issue of conflict between medical evidence and ocular account in the case of ***"Bashir Muhammad Khan Vs The State" (2022 SCMR 986)*** was pleased to hold as under:

> ***"The medical evidence is inconsistent with the ocular account as regards injury No. 3 on the right hip of the deceased is concerned, which in-fact was an exit wound but according to the prosecution witnesses of ocular account the same was an entry wound in these circumstances, a dent in the prosecution's case has been created, benefit of which must be given to the appellant. It is a settled law that single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must***

be based on unimpeachable; trustworthy and reliable evidence. Any doubt arising in prosecution's case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable shadow of doubt. However, as discussed above, in the present case the prosecution has failed to prove its case beyond any reasonable shadow of doubt."

15. It was argued by the learned counsel for the complainant that the investigating officer collected 77 empties of 7.62 bore from the spot alongwith 05 empties of .30 bore and that after chemical analysis, the same were opined to have been fired from different weapons and that this piece of evidence can be taken in support of the prosecution, as a corroborative piece of evidence, however, our anxiety is not the positive report, rather we are anxious to know that wherefrom the empties were collected. When the investigating officer categorically stated that on arrival to the spot, the same were handed over by PW Masood Rehman, so we are confident enough that the prosecution has lost this precious piece of evidence. Record tells that 77 empties of 7.62 and 05 empties of .30 bore were allegedly picked and collected from the spot by the PW Masood

Rehman, to appreciate this particular aspect of the case, we once again want to revisit the statement of PW Masood Rehman. This witness when appeared before the trial Court stated that after the injured were picked from the spot for the hospital, he collected a motorbike from his friend and went to the hospital, where in his presence, the complainant reported the matter and he verified the same. This is for the prosecution to tell, that when this witness reached to the spot from the hospital? In order to appreciate this particular aspect, we would like to go through the statement of PW Gul Samad, who stated that on hearing the fire shots, the investigating officer asked them to leave for the spot, this witness further explained that they reached to the spot in a vehicle within 10 to 20 minutes. As by then, the report had not been made, then how PW Masood Rehman was present on the spot, as he was the witness, who verified the report of the complainant and the report was made at 00:25 hours i.e. 12:25 AM. When the statements of these two witnesses are read together, it gives an inference that the empties were neither produced to the investigating officer on the night of incident nor those were collected from the spot by PW Masood Rehman. When such is the state of affairs, the positive laboratory report hardly plays a role to

favour the prosecution. This piece of evidence cannot be taken into consideration as it has lost its evidentiary value.

16. This Court is conscious of the fact that the report was made by the deceased then injured, but it is for the prosecution to convince that at the time of report, the deceased was capable to talk. True that the deceased then injured received a solitary injury on his abdomen, which led to his death after several days of the incident, but that alone cannot be taken into consideration, that too, for confirmation of the fact that the deceased, by then, was oriented in time and space, and that he was capable to talk. In order to dilate upon this particular aspect of the case, we deem it essential to revisit the statements of the scribe, who was examined as PW-01 and the doctor who was examined as PW-08. The scribe appeared before the trial Court, he stated that on reaching to the hospital, the deceased then injured alongwith the injured witnesses was available in the hospital and the doctor was busy in his treatment. When the doctor was available, as disclosed by the scribe, then what precluded the scribe to ask for a report regarding the physical status of the deceased then injured. We are surprised to see that neither the scribe, at the time of report, mentioned as to whether the deceased then injured was capable to talk and as to whether he understood the

proceedings conducted. Even, the scribe, in his cross examination, made his presence doubtful, as he stated before the Court that he, by himself, did not prepare the injury sheets of the deceased then injured as well as the injured witnesses. In the same breath, he explained that the injury sheets were prepared on his dictation, but surprisingly, no witness, in that respect, has been produced. As discussed in earlier part of this judgment that the arrival of the scribe to the hospital at the relevant time does not appeal to mind, as the report was allegedly made to him and it was he who recorded the same, so the injury sheets should have been prepared by him. This particular aspect of the case makes this Court to hold that the report was penned down after providing an opportunity to the witnesses to appear, consult and charge. The doctor was examined as PW-08, but even, he remained silent regarding the capability, of the deceased then injured to talk and even, he failed to confirm that any certificate was asked from him or that he endorsed the report made by the complainant. True that the deceased then injured remained alive for several days and that there was every possibility that thereafter, he remained oriented in time and space, but this Court is to determine as to whether the complainant at the time of report, was fully conscious and as to whether it was he who

reported the matter. We lurk no doubt in mind that the prosecution failed on this particular aspect of the case and even, nothing could be gathered from the record to confirm that at the time of report, the deceased then injured was capable to talk. If, for the sake of arguments, we say yes, to what the prosecution submitted, then in that eventuality, we are to assess the worth, veracity and sanctity of the statement of the complainant, in juxtaposition with the statements recorded by the witnesses. We cannot forget that dying declaration is a weak kind of evidence, which needs corroboration, that too, from independent sources, but in the instant case, when the witnesses failed to establish their presence on the spot and when the witnesses could not succeed to convince this Court regarding the mode, manner and time of occurrence, then we are afraid that the same cannot be read in support of the dying declaration. When both, that too, the most particular aspects of the case went in conflict, then it is hard for this Court to hold that the dying declaration, in isolation is sufficient for awarding conviction. On one hand, the eye witness account has been disbelieved, whereas, on the other, the circumstantial evidence, in the shape of recoveries from the spot, was discarded, so in the prevailing circumstances of the present case, the dying declaration in itself has lost its efficacy, to

be used for conviction of the accused charged. We are not hesitant in holding that the learned trial judge could not comprehend these crucial aspects of the case and as such, fell in error, which resulted in miscarriage of justice. It is settled law that dying declaration by itself is a weaker type of evidence, which needs corroboration through confidence inspiring evidence. In this regard, wisdom could be derived from the judgment rendered by the Apex Court in the case of ***"Tahir Khan v. The State" (2011 SCMR 646)*** in which it was held that:

> ***"Mere dying declaration shrouded by mystery and fraught with so many infirmities is not enough to convict a person. Dying declaration is weaker type of evidence, which needs corroboration when fully corroborated by other reliable evidence. Facts and circumstances of each case have to be kept in view and also credibility, reliability and acceptability of such declaration by Court."***

17. The cumulative effect of what has been stated above leads this Court nowhere, but to hold that the prosecution could not succeed in bringing home guilt against the appellants and that the impugned judgment is suffering from inherent defects, which calls for interference. The

learned trial judge while appreciating the available record misdirected himself both in law and on facts of the case. We, therefore, allow this appeal and set aside the impugned judgment. The appellants Abdur Rahim, Majeed Khan, and Abdul Haleem alias Siyal are acquitted of the charges, they shall be released forthwith, if not required to be detained in connection with any other criminal case.

18. As the prosecution has failed to prove the charges against the appellants beyond reasonable doubts and since the instant criminal appeal ended in acquittal, so the Criminal Revision Petition No.06-B of 2022 for enhancement of sentence fails in the circumstances and is dismissed as such.

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

Announced
21.09.2022
Ghafoor Zaman/Steno

JUDGE

JUDGE

(DB)
Hon'ble Mr. Justice Sahibzada Asadullah
Hon'ble Mr. Justice Shahid Khan

SCANNED
22 OCT 2022
21/10/2022