JUDGMENT SHEET

PESHAWAR HIGH COURT, D.I.KHAN BENCH
(*Judicial Department*)

Cr.A. No.12-D/2019.

Qaizar Khan
Vs.
The State & another.

JUDGMENT

Date of hearing: **15.10.2019.**

For Appellants: **Mr. Ghulam Hur Khan Baloch, Advocate.**

For Respondents: **Ch: Javed Akhtar, Advocate & Muhammad Bilal Kundi, Advocate for the State.**

***

SAHIBZADA ASADULLAH, J.- Impugned herein is the judgment dated 27.02.2019, rendered by learned Additional Sessions Judge-VI, D.I.Khan, whereby the appellant Qaizar Khan, booked in case FIR No.183 dated 09.9.2015, registered under section 302 PPC of Police Station Kulachi, District D.I.Khan, was convicted under Section 302(b) PPC and sentenced to simple imprisonment for life with compensation of Rs.2,00,000/- to be paid to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. recoverable as arrears of land revenue or in default there, to undergo six months simple imprisonment. Benefit of Section 382-B, Cr.P.C. was extended to him.

2. Facts of the case as spelt out from the FIR, in brief, are that on 09.9.2015 at 0030 hours, complainant Badshah Khan, in injured condition, made report to the local police in Emergency Room of Mufti Mehmood Hospital, D.I.Khan, to the effect that at *Isha Wela*, accused Qaizar Khan had attempted to commit unnatural act with his son Ehsanullah and on 08.9.2015, he was going to the house of accused for complaint, at 09:00 p.m, when he reached near the house of one Rab Nawaz Marerra, the accused duly armed with 30 bore pistol was standing there; on complaint, the accused started firing at the complainant with the intention to commit his *qatl-e-amd*, as a result of firing the complainant was hit on his back. The accused decamped from the spot after the occurrence. Besides the complainant, the occurrence was stated to be witnessed by one Masood son of Gul Rehman and other co-villagers. Motive for the offence is stated above. He charged the accused for the commission of offence. On this report murasila Ex. PW 3/1 was drafted and sent to police station where FIR Ex. PA was registered against the accused. On 10.9.2015, the injured complainant succumbed to his injuries in Civil Hospital, D.I.Khan, therefore, section of law was changed from 324 to 302 PPC.

3. After completion of investigation, complete challan was submitted against the accused to the trial Court, where at the commencement of the trial the

prosecution produced and examined as many as thirteen witnesses. On close of the prosecution evidence, accused was examined under section 342, Cr.P.C., wherein he denied the allegations, professed innocence and stated to have falsely been implicated in the present case, however, neither he wished to produce defence, nor opted to examine himself on oath as required under section 340(2), Cr.P.C. The learned trial Court, on conclusion of the trial, convicted the accused vide impugned judgment dated 27.02.2019 and sentenced him as mentioned above, hence this appeal.

4. We have considered submissions of the learned counsel for the parties and have gone through the record of the case with their valuable assistance.

5. It was on 08.9.2015, that Ehsan Ullah (PW-11) narrated to his father, now deceased, that about 1:00 p.m, while lying in his *Baithak*, the appellant/accused entered and tried to unfasten his *shalwar* to commit sodomy with him, who was strongly resisted and eventually left unsatisfied. The deceased took it to his heart and according to the report the deceased went in search to register his complaint to the appellant, who came across near the house of one Rabnawaz Marrera, where on complaint, the accused fired at the deceased with his 30 bore pistol which resulted into the fatal injury. Two witnesses put their appearance i.e. Masood, who was examined as PW-12

and Zahoor PW-13, Masood statedly is closed relative and Zahoor real brother of the deceased. Masood PW put himself at point No.3 of the site plan and to justify his presence at the time and place, he stated that he was searching for his missing goat. This witness stated that he saw the accused and deceased standing and was about to ask for his missing goat that the accused/appellant fired at the deceased, who fell down, whereas the appellant went to his house. He further stated that brother of the deceased Zahoor (PW-13) with other people attracted to the spot and the injured was shifted to his house for onward management.

6. It is of immense importance to mention that while perusing the record, our attention was brought to Naqal Madd No.12 dated 09.9.2015, entered at 2:00 p.m, when the appellant/convict was taken to Mufti Mehmood Civil Hospital, D.I.Khan, in injured condition, the report was entered by the Incharge Reporting Centre, where the appellant charged the deceased alongwith PW Zahoor and Masood for the injuries on his body at 9:00 p.m, on 08.9.2015, while armed with pistol and sticks respectively, but that was not taken to a logical conclusion and was abandoned. The time of report in both the cases increases our curiosity to know that why both the injured were received in the hospital with an abnormal delay? and the report of the deceased then

injured at midnight in the hospital questions the presence of the witnesses at the time of incident.

7. The prosecution witnesses are in happy conflict with each other and with time they fell victim to dishonest improvements. The defence thoroughly cross-examined eyewitnesses. PW-12 was confronted with his 161, Cr.P.C. statement and the stance he took in his Court statement was not taken earlier. The purpose of his presence on the spot was later on introduced with other material improvements. This witness was allegedly standing at a distance of 12 paces, the dark had prevailed, how could he recognize the two i.e. the deceased and the appellant and how could he say with certainty that the accused was armed with a 30 bore pistol. No attempt was made to catch hold the accused despite the fact the accused being of tender age. PW Zahoor is the real brother of the deceased, who was examined as PW-13. He stated that he was informed by Ehsan Ullah and he left after the deceased, this witness further stated that while proceeding towards the house of the appellant, he came across the accused with pistol in his hand and at a little distance, the deceased then injured was lying on the ground. Both these witnesses stated that the injured was shifted to his house, but we are surprised to see that none of these witnesses accompanied the injured to the hospital. It was one Sahib Jan, who accompanied the deceased then injured to the hospital. We are curious to

know that despite the fact the injured was fighting a battle of life and death, why he was not shifted to the hospital there and then to save his life, where was he kept for three and half long hours without providing first aid. Sahib Jan was examined as PW-10 and he was the person who stated to have taken the injured to the hospital. This witness tried his utmost to cover the delay and he tendered abnormal explanation, in this respect, which could not convince us rather tarnished the character of this witness. This witness was not shown present with the deceased then injured in the hospital, neither the police nor the doctor stated a word regarding his presence, so much so the injury sheet, medico legal report and even the report is totally silent regarding his presence. Had he been present with the injured at the time of report, surely he could have verified the report. The delay in reporting the incident and non-presence of witness with the injured in the hospital lead us nowhere but to hold that the witnesses were chance and interested witnesses. In case titled ***Khalid Javed and another vs. The State (2003 SCMR 1419)***, it was observed that evidence of chance witness would be acceptable subject to establishing his presence at the place of incident and in the absence of corroborative evidence to support the version of a chance witness the same had to be excluded from consideration. Reference can also be made to the cases reported as ***Javed Ahmad alias Jaida vs. The State***

(1978 SCMR 114), Muhammad Ahmad & another vs. The State & others (1997 SCMR 89), Imran Ashraf & others vs. The State (2001 SCMR 424) and Zafar Hayat vs. The State (1995 SCMR 896). In the case titled ***Allah Ditta vs. The State (1999 YLR 1478),*** the Hon'ble Lahore High Court held that chance witnesses cannot be safely relied upon on a capital charge in the absence of satisfactory explanation regarding their presence near the place of occurrence where they were ordinarily expected to be present. In the case of ***Muhammad Akram vs. The State (2008 P.Cr.L.J 993),*** it was observed that chance witness cannot be believed safely if he fails to offer cause of his presence at the spot at a given time.

8. We are convinced that the both the sides totally suppressed the real facts from this Court as well as from the trial Court, the convict was minor at the time of incident and that there was no reason for him to fire and kill the deceased. If the stance of the appellant which was taken vide daily diary No.12 dated 09.9.2015 is taken into consideration, it leads to a total uncertainty as to what happened at the time which led to injuries and later on death of the deceased. The witness did not come with the whole truth and they could not established their presence at the relevant time on the spot.

9. There was no previous motive between the parties, but what was conveyed by PW-11 Ehsan Ullah to his father i.e. the deceased, the story forwarded by the

deceased while injured that he had gone to the accused/ appellant to register a complaint with him for what he had done to his son in the afternoon. This stance of the deceased failed to convince us, had he gone after the elders of the accused, then it was easily acceptable that the purpose was no more but to convey his grievances but here, his going after the accused tells nothing but to fix him and this was what the daily diary No.12 suggested where the scribe also noted down that he also prepared injury sheet of the appellant, though onward in that respect the prosecution as well as the appellant maintained silence. In case titled ***"Muhammad Akram Vs. The State"*** **1988 P Cr.LJ 63** it was held that:-

> *"The prosecution has not come with true facts of the case and they have concealed the material facts from disclosure. The prosecution version is wholly different from the one they have placed before the police than the one they have relied upon before the trial Court".*

10. The question is still lurking about in mind that how the deceased received firearm injury, at what time and in what manner; that how the witnesses coincidently reached the spot; that why dishonest improvements were made, the conduct of witnesses is not above board and they all tried to conceal the real facts and hesitated to travel with the truth, their this conduct takes us nowhere, but to hold them interested and inimical.

In case titled ***Akhtar Ali & others Vs. The State (2008 SCMR-6)***, the Honourable Supreme Court of Pakistan has ruled that when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness. In case titled ***Farman Ahmad Vs. Muhammad Inayat and others (2007 SCMR 1825)***, the august Supreme Court has laid down the dictum about validity of statement of a witness improving his version subsequently to strengthen the prosecution case. The same view has been re-enforced by the apex Court in ***Muhammad Saleem's case (2011 SCMR 474)***. Reference may be made to the case law reported as ***Muhammad Rafique and others Vs. The State and others (2010 SCMR 385), Irfan Ali Vs. State (2015 SCMR 840), Ali Sher Vs. State (2015 SCMR 142), Javaid Akbar Vs. Muhammad Amjad and Jameel alias Jeela (2016 SCMR 1241), Azeem Khan Vs. Mujahid Khan (2016 SCMR 274), Sardar Bibi and another Vs. Munir Ahmed and others (2017 SCMR 344), Muhammad Mansha Vs. The State (2018 SCMR 772)***.

11. The Investigating Officer, who was examined as PW-9 stated that on pointation of the witnesses, he prepared the site plan but no blood was recovered where the deceased then injured after receiving firearm injury fell to the ground and was lying for some time and as such, no crime empty was recovered. The Investigating Officer did not take the pains to examine someone in the surrounding regarding the occurrence, in fact there was a joint venture to conceal the material facts with the sole purpose to single out the accused. We found daily diary No.12 on the record, but the Investigating Officer did not investigate the case from that angle, despite the fact that the appellant's presence was admitted in the hospital, but there is persistent silence that who brought him at such odd hours i.e. 2:00 a.m, to the hospital being minor. The malafide of the prosecution is evident from the record that all the times, an attempt was made to accept him major, for this purpose even no hesitation was felt to tamper the discharge slip. The card of arrest (Ex. PW 7/1) was prepared on 09.9.2015, wherein the age of the appellant has been tampered and is written as 20/21 years, in the hospital discharge slip, the age was shown 20 years, whereas in daily diary No.12, the age was put as 17/18 years. The conduct of the prosecution was seriously challenged in this respect and need was felt for ossification and ultimately ossification was done on 22.10.2015, and according to final opinion, the age came

out to be between 15-16 years, form for age computation Radiology Department DHQ Hospital, D.I.Khan is available on file. The tender age of the appellant at the time of the incident belies the prosecution story and we are not ready to believe the mode and manner in which the occurrence is alleged to have taken place occurrence.

12. The prosecution has erected its structure on the dying declaration, as the report was stated to be made by the deceased then injured, in the hospital. The prosecution was under heavy duty to have taken all measures while recording the report, no certificate was requested from the doctor concerned that the patient was oriented in time and space, the murasila has not been attested from the doctor and even the doctor in his statement did not mention that the injured was capable to talk and neither his pulse was recorded and so the blood pressure. The prosecution failed to establish that the report was made by the deceased then injured and that at the time of report, he was free from all influences. The question still remains a question that why the injured witness was brought with an abnormal delay to the hospital with no first aid and when left unattended, could he retain his faculties to talk and understand, our approach is no other but to hold "No" he could not.

No doubt, dying declaration is an important piece of evidence and that sanctity is attached to the dying declaration, because a dying man is not expected

to tell lie, but it is equally true that it is always considered as weak type of evidence being un-tested by cross-examination, therefore, it puts the Courts on guard and great care is demanded to ascertain that:-

1. Whether the maker has the physical capacity to make the dying declaration.
2. Whether the maker had opportunity to identify the assailant/assailants.
3. Whether there was a chance of mis-identification on the part of dying man in identifying and naming the attacker/attackers.
4. Whether it was free from prompting from any outside quarter; and.
5. The witness who heard the deceased making his statement, heard him correctly and whether this evidence can be relied upon.

It is universal principle of criminal justice that dying declaration by itself is not a strong evidence being not tested by way of cross- examination. The only reason for accepting the same is the belief phenomenon of the court of law that a person apprehending death due to injuries, caused to him, is ordinarily not expected to speak a falsehood. To believe or disbelieve a dying declaration thus is left to the ordinary human judgment, however, the Courts always insist upon strong, independent and reliable corroboratory evidence for the sake of safe dispensation of justice. Relying blindly and without proper scrutiny on such statement, would be no less dangerous approach on the part of the Courts of law.

In case titled ***Mst. Ghulam Zohra and another Vs. Malik Muhammad Sadiq and another (1997 SCMR 449)***, it has been held that:-

> *"Police Officer had not obtained certificate from the Doctor before recording the statement of the deceased in an injured condition that he was in a fit condition to give the statement, nor he had given a plausible explanation for such omission and fitness of the deceased to make the statement, thus, remained doubtful".*

13. The appellant was arrested from the hospital and on the next day the Investigating Officer shown recovered a 30 bore pistol on his pointation from a cow dung hill, but this recovery failed to establish on two grounds (1) that no independent witness was associated at the time of recovery of the pistol and section 103, Cr.P.C. was not complied with (2) nothing has been brought on record that the house where-from the recovery was effected, was the house of the appellant. Furthermore, no empty was recovered from the spot, therefore, the pistol so recovered has lost its evidentiary value, particularly in the murder case.

Even otherwise, recovery if proved, is of no help to the prosecution keeping in view peculiar facts and circumstances of the present case, therefore, no conviction could be passed on the basis of such type of recovery and that too on a capital charge.

14. After scrutinizing the evidence available on record, we are of the considered view that the ocular

evidence is insufficient to convict the appellant. We also find that the investigation has not been conducted honestly, false improvements have been made in order to involve the accused and with the particular object the evidence was manipulated so as to strengthen the prosecution case. Therefore, we are not convinced with the evidence of recovery of weapon from the possession of the appellant.

15. In the light of what has been discussed above, the prosecution case is highly doubtful and has not been proved beyond a reasonable doubt. Hence, the appellant is entitled to the benefit of doubt, which was accordingly given to him, while passing the short order of even date that reads as under:-

> *"For reasons to be recorded late in the detailed judgment, we allow this appeal, set aside the impugned conviction and sentence awarded to the appellant Qaizar Khan, vide judgment dated 27.02.2019, passed by learned Additional Sessions Judge-VI, D.I.Khan. Resultantly, appellant is acquitted of the charge levelled against him in the said case. He be released forthwith, if not required to be detained in any other case".*

Announced.
Dt: 15.10.2019.

*Kifayat/**

JUDGE

JUDGE

(D.B)
Hon'ble Mr. Justice S.M. Attique Shah
Hon'ble Mr. Justice Sahibzada Asadullah