

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

J U D G M E N T

Cr. Appeal No. 573-P of 2019.
With Murder Reference No.14/2019.

Date of hearing: 24.10.2019
Appellant: (Faqir Said) By Mr. Imtiaz-ur-Rehman Khan, Advocate.
Respondent: (State) By Ms. Abida Safdar, A.A.G.

(Yaqoob Khan deceased through legal heirs) Mr. Astaghfirullah, Advocate.

ISHTIAQ IBRAHIM, J.- Faqir Said son of Sardar-ud-Din, the appellant, through this Criminal Appeal No.573-P/2019 has impugned the judgment and order dated 29.04.2019 passed by the learned Judge Model Criminal Trial Court, Mardan, whereby the appellant was convicted under section-302(b) PPC and sentenced to death penalty as Tazeer. The appellant was also sentenced to pay Rs.5,00,000/- to be paid to the legal heirs of deceased Yaqoob Khan as compensation under section-

544-A Cr.PC recoverable as arrears of land revenue, in case FIR No-396 dated 18.07.2013 under sections-302/34 PPC registered at Police Station, Jabber, District Mardan. The learned trial Court also sent Murder Reference No.14/2019 under Section 374 Cr.P.C for confirmation of death sentence.

2. The brief facts of the prosecution case are that on 18.07.2013 Yaqoob Khan son of Khalil-ur-Rahman deceased then injured was brought by his relatives to Casualty Mardan Hospital; that the injured was conscious, at 18.15 hours reported the matter to Muhammad Arif Khan IHC, posted at Casualty Hospital, Mardan, to the effect that on the day of occurrence he was busy in irrigating his land; that in the meanwhile at 17.30 hours Faqir Said son of Sardar-ud-Din and son Fayaz Khan duly armed with firearms came and suddenly started firing at him, resultantly he got hit and seriously injured. The motive was reported to be dispute over irrigation water, and that the occurrence was witnessed by his brother Latif-ur-Rehman and Hayat Khan son of Ajab Khan. The report of the complainant was reduced into writing in the shape of

murasila, which was thumb impressed by the injured as a token of its correctness and also verified by Hayat Khan.

The author of report, prepared the injury sheet of the injured, and referred him to the doctor for medical treatment under the escort of constable Riaz No.1230. The murasila was sent to police station for registration of case FIR against the accused through constable Sohail No.2545.

The injured was examined by the doctor, and thereafter referred to Lady Reading Hospital, Peshawar. Later on, on 21.07.2013 the injured expired and section-302 PPC was added in the case. The police prepared the injury sheet and inquest report of the deceased and referred the dead body to the doctor for conducting autopsy. On 07.01.2014 accused Faqir Said and Muhammad Fayaz Khan were arrested in the case and thoroughly interrogated by the Investigating Officer.

Standing Medical Board was constituted for examination and age assessment of accused Fayaz Khan son of Faqir Said. Accordingly, accused Fayaz Khan was examined by the standing medical board, and he was declared as juvenile offender and was directed to be tried

under Juvenile Justice System Ordinance, 2000. Therefore, separate challan against him was prepared and submitted before the Judge Juvenile Court.

3. After completion of investigation, supplementary challan was submitted against both the accused before the Court. The accused was formally indicted by the trial Court for the offence, to which he did not plead guilty and claimed trial.

4. The prosecution in supports of its case examined fifteen witnesses. The important prosecution witnesses are, **Muhammad Arif Khan (PW-5)** recorded the report of the deceased then injured in the shape of murasila, prepared the injury sheet of the injured, and referred him to the doctor for medical treatment. **Sher Ali Khan SI (PW-6)** deposed that on 07.01.2014 accused was arrested by SHO and was handed over to him for investigation. Vide application (EX PW 6/1) he produced the accused before the Court and obtained his one day physical custody. He prepared pointation memo (EX PW 6/2) at the pointation of accused. Vide recovery memo (EX PW 6/4) he took into possession repeater bearing No.10202293 with three live

cartridges of the same bore produced to him by the Muharrir of the P.S, and accused Faqir Said disclosed that it was the weapon of offence through which he committed the offence. **Mutabar Khan (PW-07)** is marginal witness to recovery memo (EX PW 7/1) vide which the I.O recovered and took into possession some bloodstained grass from the spot. He is also marginal witness to recovery memo (EX PW 7/2) vide which the I.O recovered and took into possession two empty cartridges of 12 bore SG ExP-2 lying in scattered condition on the spot. He is also marginal witness to recovery memo (EX PW 7/3) vide which the I.O took into possession bloodstained garments of the deceased. **Gul Shahzada, Inspector, (PW-8)** deposed that he prepared the inquest report (EX PW 8/1) of deceased Yaqoob Khan and sent the dead body under the escort of Zahid Khan for postmortem examination. **Hayat Khan, the eyewitness (PW-09)** deposed that on the day of occurrence, he had to take turn of irrigating water of fields from Yaqoob Khan deceased and was present at the spot; that it was 17.30 hours when in the meantime accused Faqir Said armed with repeater rifle

and his son armed with rifle M-16 and started firing at the deceased, due to which Yaqoob Khan was injured; that PW Latif-ur-Rehman was also present at the spot and had seen the occurrence; that deceased in injured condition was shifted in a Suzuki Van, which he boarded himself to DHQ Hospital, Mardan, where he himself lodged the report to the police present there, which was read over to him and after admitting the contents thereof to be correct, he thumb impressed it; that he also endorsed the contents of report (EX PA/1) by putting his signature in Urdu on it; that the injured was examined by the doctor at DHQ Hospital, Mardan, and thereafter referred him to LRH, Peshawar; that after three days of occurrence, the injured Yaqoob Khan expired.

Dr. Muhammad Khalid Khan (PW-10) on 21.07.2013 at 03 P.M conducted autopsy on the dead body of Yaqoob Khan son of Khalil-ur-Rehman and found the following injuries on his body.

EXTERNAL EXAMINATION.

- 1. Multiple Firearm entry wound 1x1cm in size each on left side front of abdomen. 1cm below costal margin total area (5x7)cm.**

2. Firearm wound multiple in number 1x1 each (total area) (10x12cm) on the left and right side abdomen 5cm below costal marginal.

Surgical stitched wound 10x1cm at the middle abdomen and two drain tube on either side.

3. Multiple firearm exit wounds on the left and right side of back abdomen 2x3cm each.
4. On each 7cm below costal margin.

INTERNAL EXAMINATION.

Cranium and spinal cord. **Healthy.**

Thorax.....**Healthy.**

Abdomen. Walls, peritoneum, diaphragm, stomach and its contents, pancreas, small and large intestines and their contents, liver, spleen and bladder were found injured.

Muscles bonds. **As mentioned.**

Opinion. In his opinion, the cause of death due to firearm injuries to liver/spleen/small and large intestines, blood vessels. Probable time that elapsed between injuries and death..Hospitalized while between death and P.M within 02 to 03 hours. The postmortem report (EX PM) consists of six sheets including pictorial and the inquest report is (EX PM/1).

Mohammad Asif, Deputy Medical Superintendent,

DHQ, Hospital, Mardan (PW-11) deposed that he is

conversant with the hand writing and signature of Dr.

Nazeer Ahmad (late) and medicolegal report (EX PW

11/1) is in the hand writing of Dr. Nazeer Ahmad (late)

and bears his signature. **Akbar Khan (PW-13)** conducted

investigation in the case. He visited the spot, prepared the

site plan (EX PB) at the instance of eyewitness, during spot inspection recovered bloodstained grass and two empty cartridges of 12 bore and took into possession vide recovery memo (EX PW 7/1 & EX PW 7/2) respectively. He also took into possession bloodstained garments of the deceased vide recovery memo (EX PW 7/3). Vide application (EX PW 13/2) he sent two empty cartridges of 12 to the Malkhana for safe custody, vide application (EX PW 13/3) sent bloodstained garments and grass to the FSL and received its report (EX PZ).

5. After closure of prosecution evidence, the convict-appellant was examined under section 342 Cr.PC, wherein he neither wished to be examined on Oath nor opted to produce defence and denied the allegations leveled against him. On hearing the learned counsel for the parties, the learned trial Court vide judgment dated 29.04.2019 convicted and sentenced the appellant Faqir Said in the manner already discussed above, hence the appellant has impugned the judgment of the trial Court by filing the instant Criminal Appeal before this Court.

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

7. It is the primary duty of the prosecution to bring home charge against the accused beyond any reasonable shadow of doubt, and most particularly in cases where capital punishment is provided, the prosecution is under statutory obligation to bring on record unimpeachable and cogent evidence, which shall satisfy the judicial mind of the Court with regard to the proof of charge leveled by the prosecution against the accused indicted for the crime.

8. The deceased then injured Yaqoob Khan lodged report (EX PA/1) in casualty of DHQ, Hospital, Mardan, on 18.07.2013 at 18.15 hours, wherein he stated that accused-appellant Faqir Said and co-accused Fayaz Khan both came duly armed with firearms and started firing at him, as a result of which he got hit and received serious injuries. The report of the deceased then injured was endorsed/verified by Hayat Khan (PW-9). The doctor who examined the deceased then injured vide medicolegal report (EX PW 14/1) also endorsed the report (EX PA/1)

by writing that the “*patient fully conscious*” and thereafter the injured was referred to LRH, Peshawar, for further treatment, where he succumbed to the injuries on 21.07.2013.

9. The deceased then injured Yaqoob Khan in his report (EX PA/1) has stated that accused Faqir Said and Fayaz Khan duly armed with “*Aslaha Atasheen*” came and started firing at him without describing their individual role. More so, the description of firearms has also not been specified in the initial report and the general term of “*Aslaha Atasheen*” has been mentioned in the initial report. Perusal of postmortem examination report (EX PM) reveals that the deceased received ten firearm entry wounds on different parts of abdomen measuring 1x1 cm each, the dimension of injuries are of one and the same size and furthermore the seat of injuries shows that it is the doing of one man. However, Hayat Khan (PW-9) the eyewitness, who is father-in-law of the deceased, in his Court statement stated that accused Faqir Said (appellant) was armed with repeater rifle and his son Fayaz Khan (Juvenile co-accused) was armed with rifle M-16 started

firing at the deceased due to which Yaqoob Khan was injured. During spot inspection, the I.O recovered and took into possession two empty shells of 12 bore SG. We are fortified by the judgment of Hon'ble Supreme Court rendered in **Farman's case** (PLD 1980 SC 201), wherein it is held that;

“In his dying declaration, Rashid Khan has involved the three brothers as well as their friend, Farman Ali. But the medical evidence and the evidence of the Ballistic Expert do seem to cast doubt on his veracity. The evidence of Doctor Muhammad Kamal, who had conducted autopsy on the dead body of Rashid Khan' is that the size of inlet of all the wounds suffered by him was the same meaning thereby that he had been shot from one or more than one weapon of the same caliber. it is in the evidence of the Ballistic Expert, however, that the four empties sent to him for examination' were found to have been fired through .32 bore pistol which was also sent to him by the Investigation Officer. It would therefore follow that Rashid Khan had been shot through a pistol and certainly not through a rifle with which Farman Ali is said to have been armed. It is true that according to the prosecution each one of the three appellant brothers was armed with a .32 bore pistol: But the type of injuries suffered by Rashid Khan rather suggests that it was the work of one man. It is common knowledge that .32 bore pistol is an automatic weapon carrying in its charger seven bullets. The fact that the deceased was found to have suffered seven inlet wounds, three of them in his left Knee joint, one on his left elbow, two in his abdomen and one in backward direction to his right superior iliac spine, the inlet size of all of which is said to be the same, would go a long way to show that this could as well be the work of a single person and not of the three appellants. There is no evidence on the record to show, however, as to which one of the three had caused him the said injuries, therefore, no option is left but to hold that the prosecution has failed to bring home its case against any one of the appellants.”

The same view was reiterated by the Hon'ble Supreme Court in **Muhammad Zaman's case** (2014 SCMR 749).

10. The dying declaration of the deceased was recorded in the Hospital, but that was in the presence of Hayat Khan (PW-9) and it was signed by him. Possibility of prompting and putting the names in the mouth of the deceased then injured could not be ruled out as in suchlike circumstances, where the dying declaration is recorded in the presence of relatives is always looked into with suspicion by the Courts while appraising the same notwithstanding the condition of the deceased then injured at the time of report. In this regard, reliance is placed upon the judgment of Hon'ble Supreme Court in **Muhammad Latif's case** (PLD 1970 SC 406).

11. Some of the tests for determining the genuineness of dying declaration has been laid down by the superior Courts from time to time, which are as follows:-

- “1. Whether intrinsically it rings true;*
- 2. Whether there is no chance of mistake on the part of the dying man in identifying or naming his assailant; and*

3. *Whether it is free from prompting from any outside quarter and is not inconsistent with the other evidence and circumstances of the case.”*

In this regard, we are fortified by the judgment of this Court rendered in **Zabta Khan’s case** (PLD 1963 (W.P) Peshawar-66).

12. As discussed in the preceding paragraph, father and son were attributed the role of firing and that too with weapons of different caliber, the same is belied by medical evidence as well as by the other circumstantial evidence. It is practically impossible in the attending circumstances of the case to hold the convict-appellant Faqir Said and his son Fayaz Khan (Juvenile co-accused in connected Criminal Appeal No.572-P/2019) individually or collectively responsible for the crime. In case of **Tawab Khan....vs.....State** (PLD 1970 SC-13), wherein it was held by the Apex Court that dying declaration like statement of any witness is divisible, the same can be taken into consideration against one accused and can be disbelieved against the other accused. On the touchstone of the principle of doctrine of “Sifting of evidence”. In case of **Hizar Hayat** (PLD 2019 SC-527) the law on the subject

i.e “sifting of evidence” was evaluated by the Apex Court by considering the law laid down by the superior Courts right from *Bakhshish Singh alias Bakhshi’s case (AIR 1925 Lahore 549)* till the case of *Munir Ahmad’s case (2019 SCMR-79)* by dilating upon the entire law right from 1925 till date, the Apex Court has held that;

“We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society’s future as a just, fair and civilized society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that the rule falsus in uno, falsus in omnibus shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit.”

(Emphasis provided)

13. While deriving wisdom from the guidelines laid down in the ‘*supra*’ judgment, it is abundantly clear that rule of “*falsus in uno, falsus in omnibus*” has been made integral part of the criminal justice system, which is applicable to the facts and circumstances of the present

case, wherein we are of the firm view that element of throwing net wide, exaggeration and falsehood is apparent on the face of record.

14. At the time of arrest of accused-appellant Faqir Said in case FIR No.12 dated 07.01.2014 u/s-324/353 PPC read with section-13 A.O, the crime weapon i.e 12 bore shotgun bearing No.10202293 with three live cartridges and one 30 bore pistol with rounds were recovered from his possession. Perusal of record further reveals that the two crime cartridges recovered from the spot were sent to the Malkhana for safe custody, but the said crime cartridges after recovery of shotgun were not sent to the FSL as to whether the two crime cartridges recovered from the spot were fired from the recovered shotgun or otherwise. It is well settled principle of law that evidence of one case cannot be read into another case.

15. Sher Ali Khan SI (PW-6) who conducted investigation in the case, interrogated the convict-appellant, took into possession repeater bearing No.10202293 with three live rounds of the same bore vide recovery memo (EX PW 6/4) produced to him by the

Muharrir of the P.S, as weapon of offence, however, in cross examination he stated that the shotgun/peater produced to him by the Muharrir was not sealed. Mutabir Khan (PW-7) the marginal witness to recovery memo (EX PW 7/1) vide which the I.O took into possession bloodstained grass from the spot and recovery memo (EX PW 7/2) vide which the I.O took into possession two empty cartridges of 12 bore SG Wah Industry Limited lying in scattered condition on the spot. This witness in his cross examination stated that Yaqoob Khan deceased was his far relative; that his house is at a distance of about one kilometer from the spot; that he came to know about 18.00 hours and came to the spot at 18.15 hours and by that time the I.O also reached to the spot. He further stated that he had not given any statement to the I.O but signed the recovery memo. His testimony could not be believed to be trustworthy for the reason that the deceased then injured lodged report in DHQ Hospital, Mardan, at 18.15 hours, his injury sheet was prepared and referred to the doctor for treatment, sending of murasila to the Police Station, on receipt of murasila, its contents were incorporated into

FIR, and thereafter the copy of FIR and murasila were handed over to the Investigating Officer, and he proceeded to the spot for conducting investigation, all the above process have consumed sufficient time.

16. Hayat Khan son of Ajab Khan (PW-9) deposed that on the day of occurrence he had to take turn of irrigating fields from Yaqoob Khan deceased and was present at the spot; that it was 17.30 hours when in the meantime accused Faqir Said armed with repeater rifle and his son armed with rifle M-16 started firing at the deceased due to which he was injured. He also pointed out the spot to the I.O. In cross examination, he stated that deceased Yaqoob was his son in law and also his first maternal cousin and their lands are adjacent to each other; that in his land, the crops of maize and sugarcane were there; that he had come for irrigation purpose about 30 minutes before the occurrence; that he had brought spade for irrigation purpose; that he had irrigated his fields for one hour or 1-1/2 hours when the occurrence took place; that after the occurrence, he made a call to a Suzuki driver, which was brought and the deceased in injured condition boarded it

while travelling a distance of 80 paces; that he had wrapped chaddar from his injuries and little blood had oozed while going to Suzuki. This witness has not produced the spade, which he had taken to the fields for irrigation purpose to the I.O. The site plan (EX PB) was prepared at the pointation and instance of Hayat Khan (PW-9), and in cross examination he admitted that he has not shown his fields to the I.O at the spot and had also not shown the irrigated portion of his land as well as the standing crops in his fields. He also admitted that he has not produced the revenue papers of his landed property to the I.O. He has also not produced the chaddar through which he had wrapped the injuries of the deceased then injured.

17. The investigating officer during spot inspection recovered two empty cartridges of 12 bore shotgun lying in scattered condition, but in the site plan no separate point has been given to the empties. Furthermore, (PW-9) in his Court statement stated that convict-appellant Faqir Said was armed with 12 bore shotgun while co-accused Fayaz Khan (Juvenile) was stated to be armed with rifle M-16,

but not a single empty of M-16 rifle was recovered from the place of occurrence despite the fact that the deceased then injured in his initial report and (PW-9) in his Court statement stated that both the above named accused had fired at the deceased. The mode and manner of conducting investigation, preparation of site plan at the instance of eyewitness, recovery of empties from the spot, not showing the fields as well as crops standing therein of eyewitness Hayat Khan in the site plan, and production of spade through which the deceased then injured, PW Latif-ur-Rehman and Hayat Khan were irrigating their fields, non-placing on record revenue papers/warbandi of landed property owned by the eyewitness Hayat Khan (PW-9) and deceased, all the above mentioned lacunas hammers the case of prosecution.

18. Keeping in view the above discussion the prosecution has not been able to bring home charge against the appellant beyond reasonable shadow of doubt. By now it is settled principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. In this regard we are

fortified by the judgment of Hon'ble Supreme Court rendered in *Tariq Pervez's* (1995 SCMR 1345), wherein it was observed that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.

19. As a sequel to what has been discussed above, we accept this Cr. Appeal No.573-P/2019, set aside the impugned judgment dated 29.04.2019 passed by the learned trial Court, and acquit the appellant of the charges leveled against him. He be released forthwith, if not required in any other case.

As the appellant Faqir Said has been acquitted, therefore, Murder Reference No.14-P/2019 sent by the trial Court is answered in negative.

Above are the detailed reasons of our short order of even date.

Announced:

Dated. 24-10-2019.

JUDGE

JUDGE

(D.B.)
Hon'ble Mr. Justice Rooh-ul-Amin Khan
Hon'ble Mr. Justice Ishtiaq Ibrahim
(K. Ali, PS)