

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

J. Cr. A. No.1341-P/2022
With Murder Reference No.31-P/2022

Shahid Ali s/o Hazir Muhammad,
 Resident of Managi District Swabi.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>Syed Mubashir Shah, Advocate</u>
For State :-	<u>Mr. Jalal ud Din Akbar-e-Azam</u>
	<u>Khan Gara, AAG.</u>
For Complainant :	<u>Mr. Shabbir Hussain Gigyani,</u>
	<u>Advocate</u>
Date of hearing:	<u>10.10.2023</u>

JUDGMENT

ISHTIAQ IBRAHIM, J.- At a trial held by learned Additional Sessions Judge-III, Swabi (“**Trial Court**”), in case FIR No.298 dated 09.04.2019, registered under sections 302 & 324 PPC at Police Station Kalu Khan District Swabi, Shahid Ali, accused having been found guilty of committing *Qatl-e-Amd* of his father Hazir Muhammad deceased and his brother-in-law (brother of his wife), namely, Sabir Khan deceased, has been convicted under section 302 (b) PPC and sentenced to death on two counts as well as to pay Rs.5,00,000/-, as compensation in terms of section 544-A Cr.P.C. to legal heirs of each deceased and in default thereof to

further undergo six months simple imprisonment under each count. Benefit of section 382-B Cr.P.C. has been extended to him.

2. Convict Shahid Ali has filed the instant Jail Criminal Appeal against his conviction and sentences whereas the learned trial Court has sent **Murder Reference No.31-P/2022**, for confirmation of death sentences of the convict. As both the matters are arising out from one and the same judgment of the learned trial Court, therefore, we propose to decide and answer the same through this common judgment.

3. The prosecution's case as unfolded in First Information Report ("FIR") Exh.PA/1 is that on 09.04.2019 at 1505 hours, complainant Mst. Ayesha (PW.11), in company of dead body of her husband, namely, Sabir Khan deceased and injured namely, Hazir Muhammad (unconscious), in casualty of *Kalu Khan* hospital reported to Gul Nabi Khan ASI (PW.7) to the effect that on the fateful day i.e. 09.04.2019 she along with her deceased husband and other inmates of her house had come to *village Managi Swabi* from Peshawar for participation in "*Khatamul Quran*" ceremony; that after attending the said ceremony at 1430 hours when they entered the house of her relative Hazir Muhammad, appellant Shahid duly armed with pistol came out from his room and opened fire at her

husband Sabir Khan and Hazir Muhammad, as a result, both got hit. The former died at the spot whereas the latter was shifted to hospital. Besides her, the incident is stated to have been witnessed by Mst. Gul Taj PW.11 (wife of the appellant). A dispute over women folk was a motive behind the occurrence. Report of the complainant was reduced into writing in the shape of Murasila Exh.PA by Gul Nabi Khan ASI(PW.7), who prepared injury sheet and inquest report of Sabir Khan deceased and shifted his dead body for post mortem examination. He also prepared injury sheet of injured Hazair Muhammad and referred him for medical examination.

4. On 09.04.2019 at 03.15 PM, Dr. Akif Durrani (PW.5), examined injured Hazir Muhammad and found a firearm entry wound on his abdomen anterior (ventral) aspect with corresponding exit wound over back posterior (dorsal aspect). The medico legal report furnished by him is Exh.PM. On the same day he also conducted autopsy on the dead body of Sabir Khan deceased and found the following injuries on his person:-

1. Firearm entry wound of 0.5 x 0.5 cm right arm lateral aspect.
2. Firearm exit wound of 1x1 cm right arm medial aspect.

3. Firearm entry wound of 0.5 x 0.5 cm over lateral side of chest (thorax right side).
4. Firearm exit wound of 1x1' cm over lateral side of chest (thorax) left side.

Opinion: According to his opinion the deceased died due to damage to his heart, lungs and major vessel due to firearm.

5. On 01.05.2019 injured Hazir Muhammad succumbed to injuries. Dr. Muhammad Waqas (PW.9) conducted autopsy on his dead body and observed the following injuries on his body:

1. Entry wound of 1x1 cm in abdomen interior (ventral) aspect.
2. Exit wound of 2x2 cm over back (dorsal).

Opinion: According to his opinion death of the deceased occurred due to firearm injury to his vital organs i.e. liver and intestine.

Probable time between injury and death: **22 days.**

6. The task of investigation was entrusted to Mehmood Khan SI (PW.13), who after registration of FIR, proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitnesses. During spot inspection, he secured blood through cotton from the place of Sabir khan deceased vide recovery memo Exh.PW.2/1. He also recovered one empty of 30 bore

vide recovery memo Exh.PW.2/2 and vide recovery memo Exh.PW.2/3 he took into possession the last worn bloodstained garments of the deceased Sabir Khan. As the accused was absconding, therefore, he applied for proceedings under section 204 and 87 Cr.P.C. against him, sent the bloodstained articles to the FSL, placed on file medical treatment record of Hazir Muhammad deceased then injured Exh.PW.13/6. On 01.05.2019, the injured succumbed to injury, in this regard he placed on file extract of daily diary No.10 dated 01.05.2019 Exh.PW.13/6, placed on file FSL report regarding the bloodstained articles which is Exh.PL. On 19.04.2019, he recorded statement of deceased then injured Hazir Muhammad under section 161 Cr.P.C. and on completion of investigation handed over case file to SHO who submitted challan under section 512 Cr.P.C. against the appellant.

7. On 12.11.2019 the appellant was arrested vide arrest card Exh.PW.8/1. Syed Jamil Khan Inspector (PW.10), obtained his physical remand, interrogated him and recorded his statement under section 161 Cr.P.C. On pointation of the appellant, he recovered a 30 bore pistol having fixed magazine containing 3 live rounds from a cloth box lying in his residential room, who disclosed the same to be the crime weapon. He took into possession the pistol

through recovery memo Exh.PW.4/1 and prepared sketch of the place of recovery Exh.PB/1. He sent the pistol along with crime empty to the FSL, report whereof is Exh.PL. After completion of investigation he handed over case file to SHO, who submitted supplementary challan against the appellant before the learned trial court.

8. On receipt of challan by the learned trial court, the appellant was summoned and formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined fifteen witnesses. After closure of the prosecution's evidence statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath under section 340(2) Cr.P.C. nor opted 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 in the initial paragraph of the judgment, hence, this appeal and murder reference.

9. We have heard the exhaustive submission of learned counsel for the parties advanced at the bar and perused the evidence and record with their valuable assistance.

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10. In this case the ocular account of the incident has furnished by Mst. Gul Taj PW.12 (who is the widow of appellant and sister of Sabir Khan deceased) and Mst. Ayesha PW.11 (who is the complainant and widow of Sabir Khan deceased). Besides Sabir Khan deceased, the appellant is also charged for committing murder of his real father, namely, Hazir Muhammad deceased. Apart from the ocular account, the prosecution has also relied upon the statement of deceased then injured Hazir Muhammad recorded under section 161 Cr.P.C. as a dying declaration.

11. First we are taking for discussion the ocular account of the prosecution's case. Record depicts that occurrence in this case has taken place inside the house of appellant situated in village *Managi Swabi* on 09.04.2019 at 1430 hours, which has been reported with promptitude at 1505 hours i.e. within 35 minutes by Mst. Ayesha widow of Sabir Khan deceased in casualty of *Kalu Khan* Hospital. In her report Exh.PA/1, the complainant has categorically mentioned that besides her the incident is witnessed by Mst. Gul Taj. The complainant while appearing as PW.11 has furnished ocular account of the incident in the following words:-

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“Deceased Sabir Khan was my husband. PW Mst. Gul Taj is wife of accused facing trial Shahid while sister of Sabir Khan deceased. Mst. Sahibzadgai (now dead) was mother of Sabir Khan deceased. Hazir Muhammad was father of accused facing trial Shahid.

On the day of occurrence I along with my deceased husband Sabir Khan and other family members came to village Managi for participating in “Khatmul Quran”. After completion of the said function, we went to the residence of our relative Hazir Muhammad deceased. We reached the residence of the said person at 2.30 PM. When we entered into the house, accused facing trial came out from his room armed with pistol and started firing at my husband Sabir Khan and Hazir Muhammad, as a result, my husband got hit and died on the spot, while father of accused Hazir Muhammad sustained injuries. I charge accused for the offence. Motive behind the occurrence was a dispute over women folk. Besides me, Mst. Gul Taj, wife of the accused facing trial, and Mst. Sahibzadgai (now dead) are the eyewitness of the occurrence. I had lodged the report at Kalu Khan hospital which is signed by me and also verified by one Nasir Iqbal. Today I have seen my signature on the Murasila already exhibited as Exh.PA which is correct. Later on,

the I.O, had also prepared the site plan at my instance.”

12. Another eyewitness, namely, Mst. Gul Taj, wife of the appellant, when appeared in the witness box as PW.12 deposed as under:-


“Accused facing trial Shahid is my husband. Deceased Sabir Khan was my brother and deceased Hazir Muhammad was my father-in-law. PW Mst. Ayesha is widow of deceased Sabir Khan.

My marriage was solemnized with accused facing trial 10 years prior to the occurrence and from this wedlock I have two daughters and one son. After attending the function of Khatamul Quran in the house of one Salim Khan, I proceeded to my house. After some time of my arrival, my brother Sabir Khan deceased along with his wife Mst. Ayesha and mother Sahibzadgai also came to my house. As soon they reached our house in the meantime my husband Shahid came out from his room duly armed with pistol and started firing upon Sabir Khan deceased and Hazir Muhammad, as a result of which both got hit, amongst whom Sabir Khan died on the spot while Hazir Muhammad sustained injuries. Motive behind the occurrence was that Aunt of accused Shahid, namely, Mst. Samina was demanding hands of my sister Mst. Musarrat for her son Aziz. The accused facing trial was also in favour of the

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same, however, my parents were not agree. I am eyewitness of the occurrence. My statement was recorded by the I.O. on the spot. I also pointed out the spot to the I.O. I charge the accused facing trial Shahid my husband for commission of the offence."

13. Both the above named eyewitnesses have been subjected to lengthy and taxing cross-examination by a skillful hand but nothing favourable to defence or adverse to the prosecution could be extracted from their mouths. They have furnished straightforward and truthful account of the occurrence. They have also established their presence at the spot at the time of occurrence. The occurrence has taken place at 1430 hours inside the house of the appellant where he along with her wife Mst. Gul Taj (PW.12) and his father Hazir Muhammad deceased were residing. Mst. Gul Taj (PW.12) is the sister of Sabir Khan deceased. In this view of the matter, visit of deceased Sabir Khan along with his wife Mst. Ayesha (PW.11) on the day of occurrence to the house of the appellant, is appealable to a prudent mind as such close relatives as a routine do visit the house of each other on the occasions of marriage, engagement and Khatamul Quran ceremony etc. Being a broad daylight occurrence and PW Mst.Gul Taj being his wife, question of mistaken identity of the appellant does not



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arise. Eyewitness Mst. Gul Taj (PW.12), in her statement has stated that her marriage with the appellant had taken place some 10 years back and from the wedlock she has a son and two daughters. She was still residing with the appellant in his house, meaning thereby, that relation between appellant and Mst. Gul Taj (PW.12) was cordial, therefore, question of his false implication and substitution of the appellant for the real culprit by her wife seems next to impossible. Even otherwise, it does not appeal to a prudent mind that Mst. Gul Taj will charge her husband falsely so as to destitute her three minor children from the shadow and shelter of their father.



14. The ocular account furnished by Mst. Ayesha (PW.11) and Mst. Gul Taj (PW.12) is corroborated by recovery of blood from the spot, the last worn bloodstained garments of the deceased and positive Serologist report Exh.PK in respect thereof. Similarly, medical evidence furnished by Dr. Akif Durrani (PW.5) and Dr. Muhammad Waqas (PW.9), also supports their testimony. The firearm entrance wounds on the persons of both the deceased being that of one and the same dimension are sufficient to prove the occurrence to be the job of single person.

15. The prosecution has also proved motive behind the occurrence through the testimony of

eyewitnesses Mst. Ayesha (PW.11) and Mst. Gul Taj (PW.12). Both are unanimous in their statement that motive behind the occurrence was that Mst. Samina (Aunt of the appellant) was demanding hand of Mst. Musarrat (sister of Mst. Gul Taj) for her son Aziz and appellant was also in favour of the said Rishta, however, parents of Mst. Musarrat were not willing to accept the said demand. Admittedly, deceased Sabir Khan was the brother of the said Musarrat.



16. Yet there is another strong circumstantial piece of evidence which also corroborates the ocular account of the prosecution's case. Undeniably, Hazir Muhammad deceased was real father of the appellant. The occurrence has taken place on 09.04.2019, whereas the appellant after the occurrence went into hiding and was arrested on 12.11.2019. He has neither bothered to lodge any report about the occurrence nor visited to see his injured father in the hospital nor opted to give shoulder to the casket of his deceased father. No explanation, much less, plausible has been furnished by him so as to justify his absence in the above events. The unexplained abscondence of the appellant indicates towards his guilty mind and corroborates the ocular account.

17. So far as FSL report Exh.PK qua the crime 30 bore empty and pistol shown recovered on the

pointation of the appellant is concerned, no doubt, the same is in the negative, but mere this single piece of corroborative evidence would not be sufficient for discarding the overwhelming ocular account of the prosecution's case which is reliable, truthful and confidence inspiring evidence. In this case, the ocular account furnished by the eyewitnesses being trustworthy and confidence inspiring is believable, therefore, in such eventuality there would be hardly need of any corroboratory pieces of evidence which are always taken into consideration as a matter of caution. In this regard we would rely on the judgment of the Hon'ble apex court in case titled, "Amal Sherin and another Vs the State 22 through A.G. NWFP" PLD 2003 Supreme Court 371), wherein it has been held that:-

"Conviction in a criminal case can be recorded even on the statements of eyewitnesses alone without there being any corroboration provided their evidence inspires confidence".

Similar is the view of the Hon'ble Supreme Court in case titled, "Mst. Sughara Begum and another Vs Qaisar Pervez and others" (2015 SCMR 1142) in the following words:-

"Ocular account in case of 'Qatl-e-Amd' plays a decisive and vital role

and once its intrinsic worth is accepted
and believed then the rest of the
evidence, both circumstantial and
corroboratory in nature, is required as
a matter of caution, but to the contrary,
 once the ocular account is disbelieved,
 then no other evidence, even of a high
 degree and value, would be sufficient
 for recording conviction on a capital
 charge, therefore, probative value of the
 ocular account is to be seen in light of
 the facts and circumstances of each
 case”.

18. Yet there is another aspect of the prosecution's case. Admittedly, Hazir Muhammad deceased, on receipt of injuries became unconscious, therefore, the incident was reported by complainant Mst. Ayesha. He was examined by Dr. Akif Durrani who noticed a firearm entry wound on his abdomen anterior (ventral) aspect with corresponding exit wound over his back. The injured remained hospitalized for 22 days. During the period of said 22 days when he came into senses, on 19.04.2019, his statement was recorded under section 161 Cr.P.C. by Sultan Mehmood Khan (PW.13), whereafter on 01.05.2019, he succumbed to injuries. The said statement of deceased then injured has been brought on record by Sultan Mehmood Khan (PW.13) in his

statement, who is its scribe. The deceased then injured in his statement while reiterating the same story of incident as stated by the eyewitnesses has singularly and directly charged his real son Shahid Ali, the appellant, for commission of the offence and has advanced the same motive behind the occurrence that his sister Mst. Samina (Aunt of the appellant) was demanding the hand of Musarrat, sister of Sabir Khan deceased, for her son Aziz. The appellant was also in favour of the said offer, but Sabir Khan deceased and his parents were not willing, which resulted into the present occurrence. Statement of deceased then injured under section 161 Cr.P.C. has been objected by the defence at the time of its production on the ground that it being a statement under section 161 Cr.P.C. is part of investigation, hence, cannot be transferred or read as evidence against the accused. We are not convinced to subscribe to the objection of the learned defence counsel in light of ratio of judgment of the Hon'ble Supreme Court in case titled, "Mst. Shamim Akhtar vs Fiaz Akhtar and two others" (PLD 1992 Supreme Court 211), wherein while dealing with identical situation, the Hon'ble Supreme Court in paragraphs No.25 and 26 of the judgment has held that:-

"25. The law does not prescribe any special mode of recording the dying declaration. The

statement of an injured recorded by the police under section 161 Cr.P.C. during the course of investigation is not hit by section 162 Cr.P.C. As such the dying declaration is a

good piece of evidence and it can be relied upon by the prosecution. It is not necessary for the admissibility of dying declaration that the deceased at the time of making it should have been under expectancy of death. A statement

under section 161 Cr.P.C. of an injured is an admissible evidence even though the injured had died much later. The dying

declaration is to be adjudged on its own merits. In this case the learned High Court erred in law in discarding the statement of Mst. Nasim Akhtar. Her statement is a substantive piece of evidence and can easily be used against the accused and there is nothing to suggest that the deceased had substituted an innocent person in place of real culprit. Statement by a dying person about the circumstances of his death is admissible under section 32(1) of the Evidence Act. It becomes substantive pieces of evidence if it is trustworthy. In the present case, there is harmony between the dying declaration and other pieces of evidence. There is no room for doubt that it is not false. Due weight has to be attached to the truth of declaration made by the deceased.

26. In Wazir Gul vs the State (1976 SCMR 471) it has been observed that "the dying declaration need not be made under immediate apprehension of death". Law does not insist that for the purpose of being treated a dying declaration the statement should have been made under immediate apprehension of death. We cannot import into statutory provision any such extraneous limitation. In the absence of statutory requirement in this regard the last incriminating statement made by the deceased could be legitimately treated as dying declaration. Similar view was taken in Muhammad Aslam vs the State (PLD 1978 SC 298), Niamat Ali vs the State (1981 SCMR 61) and Noor Muhammad vs the State (1988 SCMR 1640)."

19. In this case, the testimony of Sultan Mehmood Khan (PW.13), scribe of statement under section 161 Cr.P.C. of the deceased then injured, has remained unchallenged and un-shattered to the effect that the deceased then injured was not in a position to make a statement. Keeping in view the ocular account of two eyewitnesses out of whom one is the wife of the appellant coupled with the status of deceased then injured, who was none else but real father of the appellant, in these peculiar circumstances, the learned trial court has rightly taken into account the statement

of deceased then injured under section 161 Cr.P.C. as a dying declaration, in addition to the ocular account for the purpose of conviction of the appellant.

20. On reappraisal of the evidence, we have reached to an irresistible conclusion that the prosecution has proved murder of Sabir Khan deceased and Hazir Muhammad deceased with firearm by the appellant through cogent, reliable and confidence inspiring ocular account and dying declaration of the deceased then injured, corroborated by strong circumstantial pieces of evidence and supported by medical evidence. We see no mitigating circumstance to warrant reduction in the sentences of the appellant.

21. Accordingly, this appeal stands dismissed. Conviction and sentences of the appellant recorded by the learned trial court vide judgment dated 06.12.2022 are upheld and maintained.

22. **Murder Reference No.31-P of 2022**, sent by the learned Trial Court for confirmation of death sentences of the appellant is answered in the **Affirmative.**

Announced:
10.10.2023.
M.Siraj Afridi CS

Senior Puisne Judge

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim and
Hon'ble Mr. Justice Sahibzada Asadullah.