

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT JUDICIAL DEPARTMENT.

Criminal Appeal No.118-P/2019
with Cr.M.No.227-P/2022

J U D G M E N T

Date of hearing : 28th June, 2022

Appellant : By Mr. Rehan Saeed, Advocate.
(Said Amin)

Respondents : By Syed Sikandar Hayat Shah,
(State) Additional Advocate General.

Complainant : By Mr. Shahid Mehmood,
(Ali Said) Advocate.

QAISER RASHID KHAN, CJ.-The appellant

namely, Said Amin, through the present appeal, has questioned the judgment dated 31.01.2019 of the learned Additional Sessions Judge-V, Nowshera in case FIR No.288 dated 25.06.2015 under sections 302 / 324 / 452 / 148 / 149 PPC of Police Station Akora Khattak, Nowshera whereby he has been convicted and sentenced in the following manner:-

Sl. No	Convictions under sections	Sentences
1	Under Section 302(b) / 149 PPC on four counts for the murder of Khan Said, Siyar Khan, Anwar Said and Ali Said.	Imprisonment for Life on each count with the direction to pay Rs.1,00,000/- to the legal heirs of each of the deceased as compensation in terms of section 544-A, CrPC or in default thereof to undergo six months each.

2	Under Sections 324 / 149 PPC for attempting at the life of Mst. Nazeehat.	Imprisonment of five years with the direction to pay Rs.50,000/- to the victim as compensation in terms of section 544-A, CrPC or in default thereof to undergo three months.
3	Under Sections 452 / 149 PPC for committing house trespass for causing hurt in shape of murder and attempt to murder.	Imprisonment of two years with the direction to pay Rs.5,000/- to the complainant ~ party as compensation in terms of section 544-A, CrPC or in default thereof to undergo one month.
While the sentences have been ordered to run concurrently, benefit of 382-B, CrPC was extended to appellant.		

2. Brief facts of the case are that on 25.06.2015 at about 1905 hours, complainant Ali Said (now dead) in injured condition accompanied by the dead bodies of his father Khan Said and brothers Siyar Khan and Anwar Said reported the matter to Rameen Khan ASI at the DHQ Hospital Nowshera Kalan, that on the eventful date at about 1600 hours, he along with his deceased father and brothers and other inmates were present in the house, when in the meanwhile, Noorul Amin, Gul Amin, Amroz Khan, Suleman, Mudassir, Muhammad Amin and Said Amin (appellant) duly armed arrived and started firing at them and resultantly, his father and brothers

were hit and died on the spot while he and his sister-in-law Mst. Nazeehat Bibi sustained firearms injuries. Motive for the occurrence was stated to be dispute over the cattle. Hence, the complainant / deceased then injured charged the appellant and his co-accused for the commission of the offence and pursuant thereto, the ibid FIR was registered against them.

3. Soon after the occurrence, all the accused decamped from the spot and went into hiding, hence, on completion of investigation, the complete challan Exh.PW-5/1 was put in court on 5.10.2015 against them in their absence and accordingly, they were proceeded under sections 204 and 87 CrPC. After having remained fugitive from law for about two years, the convict-appellant Said Amin and his co-accused Muhammad Amin were arrested on 21.03.2017 and accordingly, supplementary challan Exh-PW-16/1 was put in court against them on 28.04.2017.

Whereas, provision of section 265-C, CrPC was complied with to the extent of the convict-appellant, the proceedings against the co-accused Muhammad Amin stood abated due to his natural death vide order sheet dated 30.05.2017 of the learned trial court. The charge was framed against the convict-appellant on 06.06.2017, to which, he pleaded not guilty and claimed trial.

4. At the trial, the prosecution, in order to prove the charge and substantiate the allegations levelled against the convict-appellant, produced as many as eighteen witnesses.

The gist of their statements is as under:-

PW-1 Dr. Phag Chan MO (Retd) examined the complainant / deceased then injured in the hospital vide medico-legal report Exh.PW-1/1. He also conducted the autopsies of deceased Khan Said, Siyar Khan and Anwar Said vide postmortem reports Exh.PW-1/2, Exh.PW-1/5 & Exh.PW-1/8 and also endorsed their inquest reports and injury sheets vide Exh.PW-1/3&4, Exh.PW-1/6&7 & Exh.PW-1/9&10 respectively.

PW-2 Dr. Aqsa Faheem, WMO, DHQ Hospital Nowshera examined the victim / injured Mst. Nazeerat Bibi vide medico-legal report Exh.PW-2/1 and after giving her immediate resuscitation measures in the casualty, referred her in a serious condition to LRH, Peshawar for further treatment.

PW-3 Shah Saud AMHC No.904 is the marginal witness to the recovery memo Exh.PW-3/1 vide which, in his presence, the investigating officer took into possession bloodstained garments of the deceased Khan Said, Siyar Khan and Anwar Khan.

PW-4 Noor-ul-Islam, ASI partially investigated the case. He issued card of

arrest of convict-appellant Said Amin and dead co-accused Muhammad Amin vide Exh.PW-4/1 and after recalling their BBA, he produced them before the Illaqa Magistrate for obtaining their seven days custody vide application Exh.PW-4/2, which was turned down and accordingly, they were remanded to judicial lockup. He also recorded their statements under section 161 CrPC and after completion of investigation, he handed over the file to the SHO for further proceedings.

PW-5 Irshad Ali submitted complete challan Exh.PW-5/1 against all the accused before the learned trial court.

PW-6 Firdos Khan is the identifier of the dead body of deceased Ali Said (complainant).

PW-7 Khan Nawab is the identifier of the dead body of deceased Siyar Khan.

PW-8 Rameen Khan, ASI recorded the report of complainant Ali Said, the deceased then injured, in the shape of murasila Exh.PW-8/9 and also prepared the inquest reports and injury sheets of deceased Khan Said, Anwar Said and Siyar Khan vide Exh.PW-8/1 to Exh.PW-8/6 respectively. He also prepared the injury sheet of complainant Ali Said (deceased then injured) vide Exh.PW-8/7 and injured Mst. Nazeehat Bibi. Thereafter, he while sending

the murasila Ex.PW-8/9 to the police station for the registration of FIR handed over the dead bodies to the doctor for autopsy and produced both the injured before the doctor for medical treatment and after that they were referred to LRH, Peshawar.

PW-9 Hamid Khan is the identifier of the dead bodies of deceased Khan Said and Anwar Said.

PW-10 Imtiaz is the marginal witness to the recovery memo Exh.PW-10/1 vide which, the investigating officer took into possession bloodstained pebbles (Bajari) from the places of deceased Khan Said, Siyar Khan and Anwar Said as well as injured Mst. Nazeehat Bibi and sealed into parcels No.1 to 4. He is also the marginal witness to the recovery memo Exh.PW-10/2, vide which, the investigating officer took into possession three empties of 7.62 bore, lying in scattered position near the places of the accused and sealed into parcel No.5. He is also the marginal witness of recovery memo Exh.PW-10/3, vide which, the investigating officer took into possession bloodstained shirt of Mst. Nazeehat, produced by her, and sealed into parcel No.9.

PW-11 Dr. Muhammad Aslam, Ex-Demonstrator, KMC, conducted the autopsy of the dead body of deceased Ali Said (complainant) vide postmortem report

Exh.PM and also endorsed his inquest report Exh.PW-11/1.

PW-12 Shah Said is the brother of the deceased complainant and also verifier of the murasila Exh.PW-8/9. In his presence, complainant Ali Said (deceased then injured) lodged the report, which was recorded in the shape of murasila, who after admitting to be correct thumb impressed the same.

PW-13 Mst. Balqees is the widow of deceased Khan Said and mother of deceased Ali Said, Anwar Said and Siyar Khan and simultaneously is the mother-in-law of injured Mst. Nazeehat Bibi. Her relation with the accused party is that absconding co-accused Amroz is her brother while absconding co-accused Suleman and Mudassir are her nephews. Likewise, absconding co-accused Noor-ul-Amin, Muhammad Amin (dead co-accused) and Said Amin (appellant) are her cousins while absconding co-accused Gul Amin is the son of her sister.

She narrated her story as to how on the eventful day, she along with her husband and sons as well as daughter-in-law were present in their house, when in the meanwhile, convict-appellant, dead co-accused as well as absconding co-accused duly armed entered their house and started firing at them resulting in the death of her

husband and two sons Siyar Khan and Anwar Said on the spot and causing injuries to Mst. Nazeehat Bibi and complainant Ali Said while the latter succumbed to the injuries on the following day. However, this PW luckily escaped unhurt. She disclosed the motive to be dispute over grazing the cattle. On her pointation, the investigating officer prepared the site plan.

PW-14 Nazeehat being victim narrated her ordeal as to how on the day of occurrence, she along with her husband Siyar Khan, father-in-law Khan Said, mother-in-law Mst. Balqees and brothers-in-law Anwar Said and Ali Said (complainant) were present in their house, when in the meanwhile, convict-appellant, dead co-accused as well as absconding co-accused duly armed entered their house and started firing at them, due to which, her husband, father-in-law and brother-in-law Anwar Said got hit and died on the spot while she and her another brother-in-law Ali Said (complainant) sustained injuries, who succumbed on the following day whereas her mother-in-law escaped unhurt. The motive for the occurrence was stated to be dispute over grazing the cattle in the field.

PW-15 Shahid Iqbal MHC, on receipt of murasila, incorporated its contents into FIR vide Exh.PA.

PW-16 Bahroz Khan, SHO submitted the supplementary challan Exh.PW-16/1 against convict-appellant Said Amin and dead co-accused Muhammad Amin before the learned trial court.

PW-17 Dilaram Khan, SI conducted the entire investigation of the instant case. He visited the spot, prepared the site plan, Exh.PW-17/1 at the instant of eyewitness Mst. Bilqees. He vide recovery memo Exh.PW-10/1 took into possession bloodstained pebbles from the places of deceased Khan Said, Siyar Khan and Anwar Said as well as injured Mst. Nazeehat Bibi and sealed into parcels No.1 to 4 (Exh.P-1 to P-4). He vide recovery memo Exh.PW-10/2, also took into possession three empties of 7.62 bore, lying in scattered position and sealed into parcel No.5 (Ex.P5). Besides, he conducted the house search of the accused and prepared house search memo Exh.PW-17/2 and prepared the list of the legal heirs of all the four deceased vide Exh.PW-17/3 to Exh.PW-17/6. He also took into possession bloodstained garments of deceased Khan Said, Siyar Khan and Anwar Said vide recovery memo Ex.PW-3/1 and sealed into parcels No.6 to 8 (Exh.P6 to Exh.P8) and also took into possession bloodstained garments of Mst. Nazeehat having bullet cut marks vide recovery memo Exh.PW-10/3 and sealed into parcel No.9 (Ex.P9). He drafted the application Exh.PW-

17/7 for FSL regarding parcels No.1, 2, 3, 4, 6, 7, 8 & 9 and received its report Exh.PW-7/10. He also received the postmortem reports (*Exhs.PW-1/2, Exh.PW-1/8, Exh.PW-1/5 & Exh.PM*), inquest reports (*Exhs.PW-8/1, PW-8/3, PW-8/5 & PW-11/1*) as well as injury sheets (*Exhs.PW-1/3, PW-8/4, PW-8/6 & PW-8/7*) of deceased Khan Said, Anwar Said, Siyar Khan and Ali Said and also received the injury sheet Exh.PW-8/8 of Mst. Nazeehat Bibi and placed on file. He vide applications Exhs.PW-17/8 & PW-17/9) applied to the court of the learned Illaqa Magistrate for the issuance of warrants and proclamation notices under section 204 and 87 CrPC against accused Noor-ul-Amin, Amroz, Suleman, Mudassir, Muhammad Amin and Said Amin. After recording the statements of PWs and completion of investigation, he handed over the case file to the SHO concerned for further proceedings.

PW-18 Qadir Shah Khan, ASI prepared the inquest report Exh.PW-18/1 of deceased then injured Ali Said and sent his dead body to KMC, Peshawar for postmortem.

The prosecution after abandoning the remaining PWs as unnecessary closed the evidence on 26.11.2018.

5. On conclusion of prosecution evidence, the convict-appellant was examined under Section 342, Cr.PC on

17.12.2018. He, in his statement, denied the charges, levelled against him and pleaded innocence. He, however, did not opt to lead any evidence in his defence or to appear as his own witness in terms of Section 340(2), CrPC.

6. The learned Trial Court, after hearing the arguments of both the parties and on appraisal of evidence, convicted and sentenced the convict-appellant as stated above through the impugned judgment. So far as the case of the absconding co-accused is concerned, the learned trial court has observed as under:-

"However, in the light of evidence produced by the prosecution, a prima facie case exists against absconding accused, namely (1) Noor-ul-Amin s/o Kachkol, (2) Gul Amin son of Said Amin (3) Suleman s/o Amroz Khan (4) Mudassir s/o Amroz Khan & (5) Amroz Khan s/o Ashraf all residents of Dargai Tehsil & District Nowshera, therefore, they are declared as proclaimed offenders and perpetual warrants of arrest be issued against them. Their names be entered in Registrar meant for proclaimed officers by quarter concerned."

Being aggrieved, the convict-appellant has filed the instant appeal.

7. The learned counsel for the convict-appellant by referring to the story narrated in the FIR and the statements of the PWs recorded in the court, has tried to project the

inference that the occurrence has not taken place in the mode and manner as described by the prosecution. He next contended that in the absence of any opinion of the doctor qua the consciousness or otherwise, the statement of complainant Ali Shah, deceased then injured, in the shape of the murasila / FIR cannot be termed as a dying declaration. He further argued that the alleged occurrence had taken place at about 1600 hours but as against that, the report was lodged after three hours at about 1905 hours and that too, as per injury sheet of the deceased then injured, he was examined by the doctor at about 6.55 p.m. prior to lodging the alleged report. He also contended that the involvement of seven persons for the alleged indiscriminate firing at the complainant party is not appealable to a prudent mind so far as recovery of mere three empties of 7.62 bore from the spot is concerned. He also contended that a general role of firing has been attributed to all the accused, which clearly suggests that the prosecution story has been exaggerated and if all the alleged crime is committed, then, at the most, it could be the job on one person. His next contended that where more than one accused were charged, then corroboration of each accused is required, which fact is lacking in this case. He also contended that the prosecution has failed to establish the presence of the convict-appellant being of advanced age at the spot at the relevant time and that too, when no empty was recovered from the place where he

was allegedly shown to be present. The learned counsel, by concluding his arguments, contended that awarding punishment of 'life imprisonment' on four counts with huge fine to the convict-appellant, in view of the afore-noted infirmities and loopholes in the prosecution case, is too harsh and not justified, therefore, he be acquitted from the charges levelled against him.

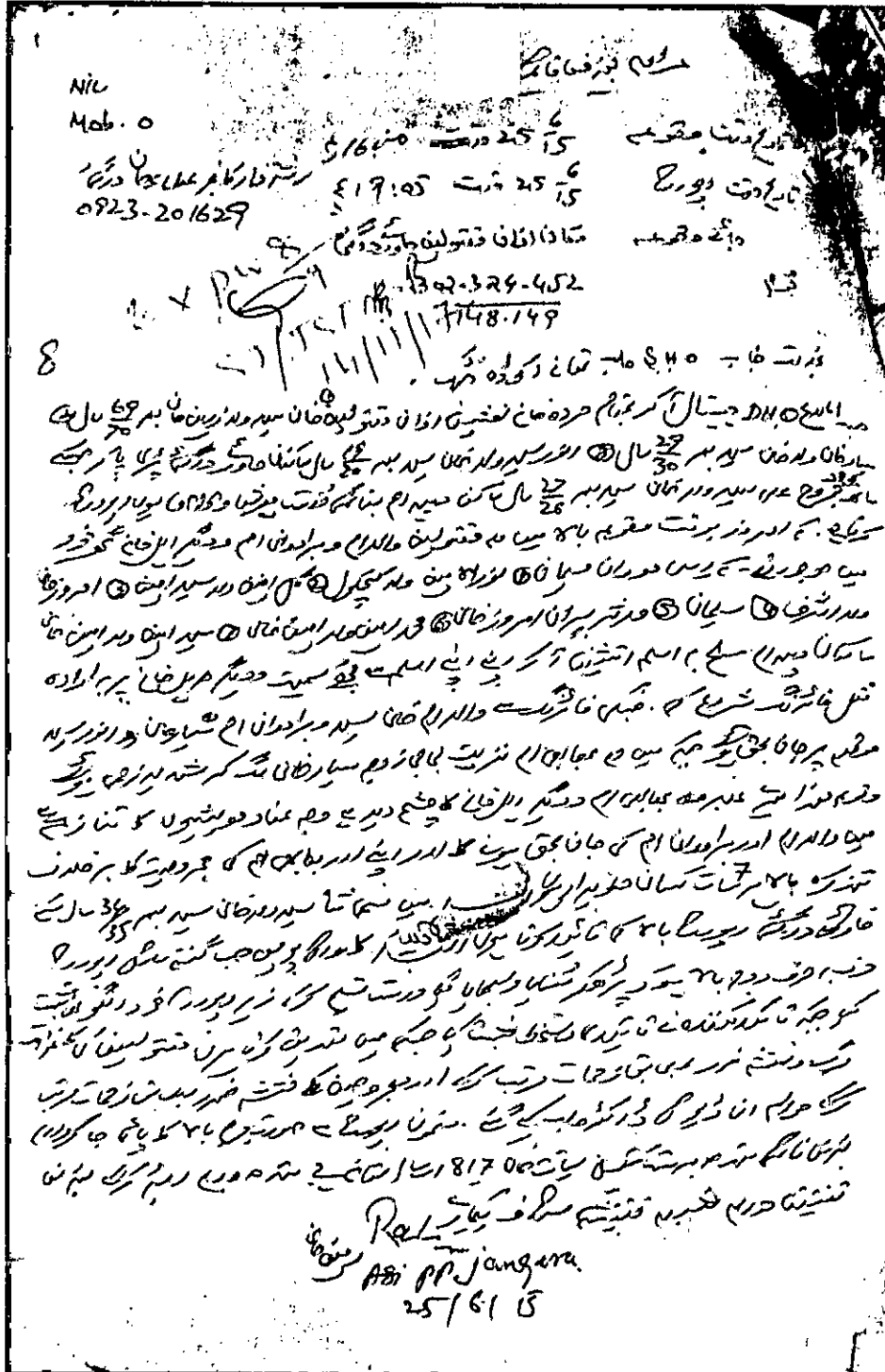
8. As against that the learned Additional Advocate General appearing on behalf of the State duly assisted by the learned counsel for the complainant party vehemently argued that the ocular account being consistent and confidence inspiring, has rightly been relied upon by the learned trial court. They further argued that the convict-appellant along with the absconding accused as well as the dead co-accused Muhammad Amin were directly charged by the complainant / deceased then injured Ali Said for the commission of the offence in his confidence inspiring dying declaration and despite the best efforts of the defence, such dying declaration rings true when judged and adjudged from all the angles and legal parameters. Non-recovery of sufficient number of crime empties, they added, would not pre se demolish the otherwise proved prosecution case against the convict-appellant and his absconding co-accused and that too, when the convict-appellant has also to his credit two years unexplained abscondence. They by concluding their arguments submitted

that the learned trial court has already taken a very lenient view while awarding sentence to the convict-appellant when otherwise he deserves capital punishment for the gruesome and brutal murder of four innocent male members of the same family.

9. Arguments heard and the available record perused.

10. The prosecution case is that the occurrence had taken place on 25.06.2015 at 1600 hours and the report thereof was made at 1905 hours in the hospital by the deceased then injured namely, Ali Said. He narrated his story as to how on the eventful day, he along with his deceased father and brothers along with other inmates were present in the house, when in the meanwhile, Noorul Amin, Gul Amin, Amroz Khan, Suleman, Mudassir, Muhammad Amin and Said Amin (appellant) duly armed arrived there and started firing at them resulting in the death of his father Khan Said and brothers Siyar Khan and Anwar Said on the spot and in the process, he and his sister-in-law Mst. Nazeelat Bibi sustained firearms injuries. He charged the accused party for the commission of the offence. Motive for the occurrence was stated to be dispute over the cattle. The said report was recorded by Rameen Khan, ASI (PW-8) in the shape of murasila Exh.PW-8/9, which was read over to the injured Ali Said and after

admitting it to be correct, he thumb impressed the same in the presence of his brother Shah Said (PW-12), who also signed the same as a verifier. For ready reference, the image of the murasila is depicted as under:-



On receipt of murasila, Shahid Iqbal MHC (PW-15) incorporated its contents into FIR vide Exh.PA. On the following day i.e. 26.06.2015, the complainant succumbed to the injuries, whose autopsy was conducted by Dr. Muhammad

Aslam, Ex-Demonstrator, KMC (PW-11) vide postmortem report Exh.PM.

11. Since the prosecution case primarily revolves around the dying declaration of the complainant Ali Said, therefore, it would be more apt to reproduce the relevant provision of Article 46(1) of the Qanun-e-Shahadat Order, 1984 as under:-

46(1) When it relates to cause of death: When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which cause of his death comes into question.

The Hon'ble Supreme Court has laid down the following principles for recording dying declaration in the case of Farmanullah vs. Qadeem Khan & another (2001 SCMR 1474):-

"No specified forum is available before whom dying declaration is required to be made; there is no bar that it cannot be made before a private person; there is no legal requirement that the declaration must be read over or it must be signed by its maker; it should be influence free; in order to prove such

declaration the person by whom it was recorded should be examined; such declaration becomes substantive evidence when it is proved that it was made by the deceased; corroboration of dying declaration is not a rule of law, but requirement of prudence and such declaration when proved by cogent evidence can be made a base for conviction."

Likewise, in the case of Mst. Shamim Akhtar vs. Fiaz Akhtar & two others (PLD 1992 SC 211), the august apex court has held as under:-

"The law does not prescribe any special mode of recording the dying declaration. The statement of an injured recorded by the police under S.161, Cr.P.C. during the course of investigation is not hit by S.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 S. 161, Cr.P.C. of an injured is an admissible evidence even though the injured had died much later."

In Wazir Gul v. 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 as 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 v. The State (PLD 1978 SC 298); Niamat Ali v. The State (1981 SCMR 61); and Noor Muhammad v. The State (1988 SCMR 1640)."

Similarly, the Hon'ble Federal Shariat Court in the case of **Muhammad Fazil vs. State (2022 YLR 754)** has held as under:-

"In order to treat any statement as "Dying Declaration", it must be proved that declaration was made in extremity, at the point of death, having no hope of this world, compelling the maker to speak truth and nothing but the truth "Niaz-ud-Din and another v. The State and another" (2011 SCMR 725) and "Mushtaq Ahmad and another v. The State" (1973 PCr.LJ 1075). In "Sirajuddin v. The State" (1990 SCMR 588), the deceased himself lodged FIR, which was treated as dying declaration after his death. Similar is the situation in the case of "Niaz Ahmad v. The State" (PLD 2003 SC 635). In addition to these citations, there are certain judgments of the Apex Court in which it is held that dying declaration is a substantive piece of evidence, if court is satisfied about its genuineness, it can be acted upon without any corroboration, however, some of the tests for determining its veracity are that whether it intrinsically rings true; whether there is no

chance of mistake on the part of dying man in identifying or naming his assailant; whether it is free from prompting any outside quarter and whether it is consistent with other evidence and circumstances of the case; Reference: "Mst. Amina and another v. The State" (2013 PCr.LJ 962). This aspect of evaluating dying declaration is also discussed in "Hazoor Bux and 5 others v. S.I.O. Police Station Khanpur Mahar and 3 others" (2011 PCr.L.J. 1454) [Karachi] and "Shahban Bheri v. The State" (2014 MLD 663) [Sindh]".

On this issue, reliance can also be placed on the judgments of the superior courts of the country in the cases of Majeed vs. State (2010 SCMR 55); Niaz-ud-Din & another vs. State & another (2011 SCMR 725); Ali Gohar vs. State & another (2013 PCrLJ Peshawar 578) & Haq Nawaz vs. State (2018 PCrLJ Peshawar 69).

12. In the light of the above guidelines, first of all we would tackle the contention of the learned counsel for the convict-appellant regarding the genuineness and truthfulness of the dying declaration of the complainant Ali Said, the deceased then injured, in the absence of any certificate from the medical officer in whose presence, it was recorded. As the age old saying goes that a dying person is not expected to tell a lie, therefore, presumption of truth is attached to the statement, which is being recorded by a dying person. A perusal of the F.I.R. Exh.PA, which was

subsequently treated as a dying declaration, depicts that the deceased then injured has given a simple and straightforward account of the occurrence by directly charging the convict-appellant along with his absconding and dead co-accused Muhammad Amin for the commission of the offence with specific motive for the occurrence. The dying declaration bears the thumb impression of the deceased then injured as well as signatures of its author Rameen Khan, ASI (PW-8) and verifier Shah Said (PW-12) as is evident from the ibid sketch / image of the murasila.

So far as the question regarding orientation and consciousness of the deceased then injured at the time of making report is concerned, the same is answered by Dr. Phag Chand, MO (Retd) (PW-1) in his statement, who, on 25.06.2015, medically examined the deceased then injured and found the following injuries on his body:-

*A firearm entry wound 1 cm x 1 cm on left
lumber region.*

*A Firearm exit wound size 3 cm x 4 cm on the
right lumber region.*

*Patient was referred to LRH, Peshawar after
doing first aid treatment.*

He, in his cross-examination, has given the following reply to the suggestion regarding consciousness of the deceased then injured:-

"It is incorrect to suggest that due to the huge amount of loss of blood the victim / patient becomes unconscious. It is correct that I have not given in (Ex.PW1/1) the condition of patient / victim conscious or unconscious. Witness volunteered that due to nature of injuries on Lumber regions the patient may be conscious. PW volunteered that my non-mentioning of the word unconscious depicts that the patient was conscious."

13. The above statement clearly suggests that at the relevant time, the deceased then injured was fully conscious and thus capable to record his dying declaration. His dying declaration was recorded on 25.06.2015 at the DHQ Hospital, Nowshera Kalan whereafter he was referred to LRH Peshawar where he remained alive till next day i.e. 26.06.2015. Dr. Muhammad Aslam, Ex. Demonstrator, KMC (PW-11), who conducted autopsy of the dead body has opined that, *"the deceased died due to injuries to the small intestine, large intestine and abdominal blood vessels (mesenteric) due to firearm"*.

14. Being so, it can safely be said that deceased then injured was fully conscious, well oriented in time and space and capable to record his statement / report. Such report-cum-dying declaration of the deceased rings true on all counts and is free from any doubt regarding the identification of the accused party by him. It is consistent with the available

evidence on the record and could safely be relied upon while determining the guilt of the convict-appellant.

15. The dying declaration of the deceased then injured has in turn been corroborated / confirmed by the two star eyewitnesses of the prosecution i.e. Mst. Bilqees (PW-13) and Mst. Nazeehat Bibi / victim (PW-14), who have also given simple and straightforward narrations of the occurrence which inspire confidence and appear to be based on true facts. At this stage, the statements of both these eyewitness require verbatim reproduction, which read as under:-

Mst. Balqees (PW-13)

"Stated that deceased Khan Said was my husband, deceased Ali Said, Anwar Said and Siyar were my sons while injured Mst. Nazehat is my daughter in law. The accused Imroz is my brother while accused Suleman and Mudasir are my nephews whereas accused Noorul Amin, Muhammad Amin, Said Amin are my cousins. Accused Gul Amin is the son of my sister. On the day of occurrence I alongwith my deceased husband Khan Said, deceased sons Siyar, Anwar Said, Ali Said and my daughter in law Mst. Nazeehat were present in our house. In the meanwhile accused Noorul Amin s/o Kachkol, Gul Amin s/o Said Amin, Imroz s/o Ashraf, Suleman and Mudasir sons of Imraoz, Muhammad Amin s/o Amin Khan, Said Amin s/o Amin Khan entered duly armed with firearms and started firing at us with the intention to commit our Qatal-e-Amd as result

of which my husband Khan Said, sons Siyar and Anwar Said got hit and died on the spot whereas my daughter in law Nazeehat and Ali Said complainant also sustained injuries, however, on the following day Ali Said succumbed to his injuries; luckily I escaped unhurt. The motive for the occurrence was dispute over grazing the cattle. On my pointation IO prepared the site plan. I charge the accused for the offence."

Mst. Nazeehat Bibi (PW-14)

"Stated that on the day of occurrence I alongwith my mother in law Mst. Balqees, father in law Khan Said, my husband Siyar Khan, Anwar Said and Ali Said brother in law were present in our house. In the mean while accused Said Amin, Gul Amin, Amroz Khan, Mudasir, Suleman, Muhammad Amin and Noorul Amin came to our house duly armed with firearms and started firing at us with the intention to commit our qatal-e-amd as a result my father in law Khan Said, my brother in law Anwar Said and my husband Siyar Khan got hit and died on the spot. The complainant Ali Said my brother in law and me sustained injuries. Mst. Balqees escaped unhurt and complainant Ali Said succumbed to injuries on the following day. The motive for the occurrence was dispute over grazing the cattle in their field. I charge the accused."

The ocular account as spelt out in such dying declaration and in the statements of PWs-13 & 14 is perfectly in accordance with the medical evidence, site plan and

recoveries from the spot coupled with the two years abscondence of the convict-appellant.

The statement of Mst. Nazeehat (PW-14) being an injured eyewitness deserves to be given much weightage as her presence on the spot at the relevant time is quite natural, unimpeachable and cannot be doubted. She was subjected to a lengthy cross-examination of the choice of the convict-appellant but she held her ground so far as all the material particulars are concerned including her presence at the spot, arrival of the accused party with firearms, firing at the complainant party resulting in the death of the four persons and the injuries sustained by her. Regarding the injured eyewitnesses, the Hon'ble Supreme Court has laid down the following dictum in the case of Muhammad Shabbir & others vs. State (2020 SCMR 1206):-

“the presence of Mazhar Anwaar (PW-20) and Said Rasool injured (PW-21) at the scene of occurrence was quite natural and beyond any doubt and the statements of the prosecution witnesses are consistent, confidence inspiring and in consonance with the probability and circumstances of the case and being worthy of credence, which could not be brushed aside. Injured Said Rasool (PW-21) received firearms injuries in the occurrence while sitting in the jeep and saw the occurrence, hence, his presence at the relevant time cannot be considered as unnatural and

improbable and he has no enmity or malice against the appellants and his testimony is duly supported by medical evidence having been found confidence inspiring, truthful and unimpeachable."

Likewise, the Hon'ble Supreme Court in the case of **Saleem Zada & others vs. State & others (2019 SCMR 1309)** has held:-

"We have gone through the statement of Bahri Zaman, the sole eye-witness and found him most confidence inspiring; he alone can sustain the charge; being injured, his presence cannot be doubted. Driver of the vehicle, though reticent in his deposition, nonetheless, has unambiguously confirmed circumstances whereunder the occurrence took place. Cross-examination on both the witnesses remained inconsequential and as such convictions and sentences consequent thereupon do not call for interference."

On this particular issue, reliance can also be placed on the judgment of the apex court reported in the case of **Rooh Ullah & others vs. State & others (2022 SCMR 888)**.

16. So far as the delay in lodging the report is concerned, suffice it to say that, in the presence of three dead bodies and two injured persons, the first priority of their family members must have been shift them to the hospital and for making such arrangements, sufficient time

must have been consumed. Thus, the delay in lodging the FIR appears to be natural. Wisdom is derived from the judgments of the Hon'ble Supreme Court in the following cases:-

Sikandar vs. State (2006 SCMR 1786)

"The deceased was fired at while he was going on a Kacha path leading to village Pattan at a distance of about two kilometers from his house and it being hilly area, the dead body was brought on foot to the house of deceased consuming about three hours and before the matter could be reported to the police, the S.H.O. of the concerned police station, on coming to know about the occurrence, of his own, reached at the house of deceased and recorded the statement of Gul Khan (complainant), real brother of deceased on the basis of which case was registered, therefore, in these circumstances, delay in the registration of case, would be of no significance."

Sarwar & another vs. State & another (2020 SCMR 1250)

"The occurrence in this case took place at 0.800 a.m. on 03.09.2001 and it was reported to the Police on the same day at 10.15 p.m. The delay is two hours and fifteen minutes in reporting the crime to the Police is not material keeping in view the peculiar circumstances of the case such as the gender of the complainant and 11 miles distance between the place of occurrence and the Police Station. Therefore, we hold that there was no deliberate or conscious delay in

reporting the matter to the Police."

A similar view was also taken by the Hon'ble Supreme Court (AJ&K) in the case of *Iftikhar Khan alias Khari & others vs. State & others [2021 PCrLJ Note 45 (Supreme Court AJ&K)]* by holding that:-

"The learned counsel for the convict submitted that there is an unexplained delay of 1-1/2 hours towards lodging the FIR. We do not agree with this version as in the case in hand, the deceased did not die at the spot rather he died later on in the hospital and in such a situation when he was seriously injured the first priority for the family members of the deceased was to secure his life. It is clear from the record that at first they shifted him to the hospital and thereafter they approached the police for registration of the case; thus, in such state of affairs, the consumption of such time in lodging the FIR appears to be natural."

Thus, it can be safely inferred that the delay in lodging the report as occasioned was quite natural and in the fitness of circumstances.

17. Another striking feature of the case is that at the time of occurrence, injured Mst. Nazeerat Bibi (PW-14), was pregnant having conceived a fetus in her womb, who gave birth to a baby during her stay in the Lady Reading Hospital, Peshawar on the same very day i.e. 25.06.2015 as

is evident from the discharge slip dated 29.06.2015, which reflects as under:-

Disease: Fire Arm Injury (Entry wound→Right Hypochondrium. No Exit wound)

Incision: Middle

Operative

Findings: Peritoneal breach

Procedure/

Operation: Emergency Laparotomy + C-section done. Above incision given, above findings noted, there is gravid uterus, gynae unit was informed where C-Section done, baby delivered, homeostasis secured, wash with N/S Drain placed.

18. The presence of the convict-appellant at the spot at the relevant time has been established from the site plan, Exh.PW-17/1, which was prepared by the Investigation Officer Dilaram Khan, SI (PW-17) at the instant of eyewitness Mst. Bilqees (PW-13), which reflects that the convict-appellant has been shown present at point No.7 and there is no question of misidentification as the said witness in her statement has disclosed the relationship of the accused party with the complainant party as under:-

"States that deceased Khan Said was my husband, deceased Ali Said, Anwar Said and Siyar were my sons while injured Mst. Nazehat is my daughter in law. The accused Imroz is my brother while accused Suleman

and Mudasir are my nephews whereas accused Noorul Amin, Muhammad Amin, Said Amin are my cousins. Accused Gul Amin is the son of my sister."

This witness in her cross-examination has also given the presence and location of the accused party and the complainant party in the following manner:-

"The deceased Ali Said was towards east from me. Deceased Anwar Said was towards eastern side. Again stated that deceased Anwar Said was present towards eastern side from me. My deceased husband was present towards eastern side from me. The distance between me and my deceased husband was about 17 paces. The injured Mst. Nazeehat was also standing from eastern side from me. The distance between me and Mst. Nazeehat would be 7/8 paces. The distance between me and deceased Anwar Said was about 7/8 paces. The accused Amrooz was at distance of 13/14 paces from me. Accused Gul Amin was present towards eastern side from me. The distance between me and accused Gul Amin was 13/14 paces. All the accused were almost at the same distance from me."

19. The other argument vehemently pressed by the learned counsel for the convict-appellant that the number of three crime empties of 7.62 bore recovered from the spot do not correspond with the number of the assailants, who had made indiscriminate firing at the complainant party and that too, in view of the injuries stained by the deceased and the

injured eyewitness. The august apex court while dealing with a similar controversy has held in the case of Qaiser

Khan & others vs. State & others (2009 SCMR 471):-

"Much emphasis has been laid on the fact that despite indiscriminate firing alleged to have been made by the petitioners and absconding co-accused, at the complainant party, no crime-empty has been recovered from the site of occurrence indicative of the fact that the place of incident has not been established. The submission is misconceived. The spot is near the village Abadi and the Investigating Officer reached there after some time of the occurrence. The possibility of the crime-empties, having been taken away by the passerby, cannot be excluded. The non-recovery of crime-empties; in the circumstances of the case, is not fatal to the prosecution case and nothing turns on it. Similar objection has been taken, regarding non-recovery of blood from the spot. This objection is also without force. Blood has been recovered from inside the motorcar in question."

Likewise, the Hon'ble Shariat Appellate Bench (AJ&K) in the case of Muhammad Jahanzaib & others vs. State & others (2019 YLR Note 32 [Shariat Appellate Bench (AJ&K)] also held:-

"On the point of recoveries, it was contended that recoveries of crime empties were not made and only few were made from the place of occurrence which do not match with the crime weapon used by the convict, Jahanzaib.

A careful perusal of the evidence reveals that it is to be determined as to whether on account of no recoveries or there being defective recoveries, the whole prosecution case is to be disbelieved and discarded. The correct legal position with regard to the recoveries even if found defective would be that the main case if otherwise being not based on convincing quality evidence would of course, be a circumstance having important bearing on the ultimate fate of the case. However, if the case otherwise is proved on the basis of convincing evidence mere defective recoveries or no recoveries would not be sufficient to destroy the prosecution case. The conviction could still be recorded if other evidence is found to be of convincing quality and of a nature on which reliance could safely be placed. This view find support from the case reported as 1983 PCr.LJ 898, wherein it was held as under:-

"After careful perusal of the evidence we find ourselves in agreement with the learned counsel for the appellant. These recoveries under law cannot be used in evidence against the appellant. But it is to be determined as to whether on account of no recoveries or there being defective recoveries the whole prosecution case is to be disbelieved and discarded. The correct position with regard to the recoveries found defective would be that the main case if otherwise being not of convincing quality would of course be a circumstance having important bearing on the ultimate fate of the case. If,

however, the case otherwise is proved on the basis of convincing evidence mere defective recoveries would still be recorded if other evidence is found to be convincing quality and of a nature on which reliance could safely be placed."

In the case in hand too, seven persons have been charged for the indiscriminate firing at the complainant party, resulting in the death of three persons on the spot and firearm injuries sustained by the two others, out of whom, one succumbed to the injuries on the following day. Though, only three empties of 7.62 bore were retrieved from the spot but non-recovery of other crime empties is not per se fatal to the prosecution case in view of the number of injuries sustained by the four deceased and one injured and that too, in the light of the ocular evidence, which has been found to be overwhelming and confidence inspiring duly corroborated by the medical evidence. Reliance can also be safely placed on the judgments of the superior courts reported in the cases of Maqsood Ahmad vs. State (2006 SCMR 672) and Muhammad Sarwar & 2 others vs. State (2008 MLD 592 (Lahore).

Even otherwise, as per the site plan Exh.PW-17/1, the place of occurrence is a hilly area, which fact has also been established from the statement of Dilaram Khan SI / IO (PW-17/1), who in his cross-examination has stated that:-

"The place of occurrence is top of hill. It is correct that I have not mentioned the above facts in the site plan. Witness volunteered that I have clearly mentioned that the place of occurrence is hilly area."

Being so, where the place of occurrence is admittedly a hilly terrain, then, the chance of some of the crime empties to have been misplaced cannot be ruled out. In such circumstances, retrieving of all the empties could not be possible.

20. So far as the advanced age of the convict-appellant is concerned, as per the CNIC, available on file, his date / year of birth is 1952. By that count, his age at the time of the commission of the offence in the year, 2015 was sixty-three years. In the absence of any medical record showing the convict-appellant to be suffering from any physical infirmity, which may have caused any handicap to him at the time of the commission of the offence, the sixty-three years age cannot be termed to be an advanced age in this particular case. Wisdom is derived from the landmark judgment of the Lahore High Court reported in the case of **Khairdi Khan & others vs. Crown (PLD 1951 Lahore 322)**, wherein the issue of advanced age has been exhaustively discussed while enhancing the sentence of the convicts therein from life imprisonment to capital punishment of death in the following manner:-

The reasons given by the learned Sessions judge for not awarding the usual sentence of death are that Jahandad is an old man of 60, that Sher Muhammad is a young man of 20 who might have acted under the influence of his elders and that it is not clear which of the appellants inflicted the fatal injuries

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.....

The mere fact that a man who has taken part in a premeditated murder is an old man of 60 is no ground for taking a lenient view and we have been repeatedly telling the Courts of Sessions for many years past that where the murder is premeditated and was committed with the intention to kill, all acting with that intention must be sentenced to death unless there be some other extenuating circumstances.

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The question whether a man who is not expected to live many years should or should not hang, or whether the sentence of death on several men should or should not be executed is a matter for the Government to consider. As a Judge I am quite clear in my mind that no ground for a lenient view exists in this case except in regard to Sher Muhammad. I would, therefore, accept the petition for revision and order Khairdi Khan, Dilawar Khan and Jahandad Khan to be hanged by the neck until each of them be 'dead.'

Wisdom is also derived from the judgments of the Hon'ble Supreme Court in the following cases:-

Amir Gul vs. State (1981 SCMR 182)

"The appreciation of the prosecution case by the Courts below is in full accord with the well-settled principles of law and this being a case of cruel double murder over trivial dispute calls for no mercy under the law even though the convict was aged 70 years at the time of commission of the crime."

Muhammad Sher alias Malang vs. State (PLD 2001 SC 90)

"As regards the age factor, old-age by itself is not a mitigating circumstance for withholding the normal penalty for murder and imposing lesser sentence. The view gets support from Amir Gul v. The State 1981 SCMR 182 wherein the contention that the accused being an old person of 70 years at the time of occurrence was entitled to benefit of lesser penalty of imprisonment for life had not prevailed. In the present case also the plea of lesser sentence having been based on old-age alone cannot prevail particularly when the murder committed by the appellant is gruesome and his diabolic conduct indicates that old-age has done no harm to him."


Reliance can also be placed on the judgments of the Hon'ble Supreme Court reported in the cases of **Aleeq Shah vs. State (2010 SCMR 1590) and Muhammad Sadiq vs. State (2011 SCMR 888).**

Being so, the argument of the learned counsel for the convict-appellant appears to be misconceived, hence, ruled out.


21. Moreover, the prolonged noticeable and unexplained abscondence of the convict-appellant for about two years would go a long way to corroborate and strengthen the truth of the prosecution version. Above apart, all the prosecution witnesses were, no doubt, subjected to lengthy cross-examination but nothing was extracted from any of them, which could dilute the evidentiary worth of their testimony. Minor discrepancies, no doubt, are there in the statements of the PWs but certainly not fatal to the prosecution case. We, therefore, have no hesitation to hold that the charge against the convict-appellant has been proved beyond any shadow of reasonable doubt and he has been rightly convicted by the learned trial Court through a well reasoned judgment.

22. Accordingly, the impugned judgment is upheld, the convictions and sentences of the convict-appellant are maintained and in turn the appeal having no merit is dismissed.

Announced
28. 06. 2022



CHIEF JUSTICE



J U D G E

(Fayaz)

(D.B) Justice Qaiser Rashid Khan, CJ and Justice Syed Arshad Ali, J