JUDGMENT SHEET

PESHAWAR HIGH COURT, D.I.KHAN BENCH

(Judicial Department)

Cr.A. No.03-D of 2023.

Muhammad Yousuf
Vs.
The State etc.

JUDGMENT

For Appellant:	M/S Salimullah Khan Ranazai and Noor Gul Khan Marwat, Advocates.
For State:	Malik Muhammad Asad, Addl: A.G.
For Respondents:	Mr. Qaisar Rahim, Advocate.
Date of hearing:	07.11.2023.

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Dr. Khurshid Iqbal, J.- This judgment shall also dispose of the connected Cr.Rev.No.03-D of 2023, being the outcome of one and the same F.I.R No.563 dated 10.10.2021, registered at Police Station Saddar, District D.I.Khan. Through the instant criminal appeal, Muhammad Yousuf (appellant), has called in question the judgment, dated 31.01.2023, passed by the learned Additional Sessions Judge-II/Judge MCTC, D.I.Khan, whereby he was convicted under section 302(b) P.P.C and sentenced to undergo imprisonment for life as Taazir, with compensation of Rs.8,00,000/- (eight lacs) to be paid to the legal heirs of deceased under section 544 Cr.P.C., or in default thereof, to further undergo six months S.I. He was further convicted under Section 404 PPC, and sentenced to undergo imprisonment for one year

alongwith fine of Rs.50,000/- or in default thereof, to further undergo one month S.I. Both the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.P.C. was extended to the convict/appellant. While father of the deceased has filed the connected criminal revision for enhancement of the sentence awarded to the appellant vide aforesaid judgment.

2. Brief facts of the case, as spelt out from the F.I.R, registered on the strength of a murasila, are that on 10.10.2021, at 20:10 hours, complainant Muhammad Aamir (now deceased), in injured condition, reported the occurrence in the emergency room of civil hospital, D.I.Khan, to the effect that on the eventful night, he was present at Sheikh Yousaf Adda. The appellant, his friend, who use to run a Qingqi rickshaw called him to his village Wandah Balochan Wala. He took a motorbike from his other friend Muhammad Ansar (PW-12) and moved towards the spot. At about 07:20 p.m, when he reached near the official water tank, within limits of Wandah Balochan Wala, the appellant, duly armed with a pistol, was present there. As soon as he got down from the motorcycle, the appellant fired at him with the intention to commit his *qatl-i-amd,* with which he was hit on back and abdomen and fell to the ground. After commission of the occurrence, the appellant took away the motorbike and the cell phone of the then injured complainant. In his report, the complainant further stated that someone might have seen the occurrence. No motive was mentioned in the report. It is

pertinent to mention that initially, case was registered under Section 324 PPC. Subsequently, the injured complainant succumbed to his injuries in the hospital, therefore, Section 302 PPC was inserted in the FIR.

3. On completion of the investigation, complete challan was submitted against the accused before the trial Court. At the commencement of the trial, copies of the relevant documents were provided to him in compliance with Section 265-C, CrP.C. Charge was framed against him, to which he pleaded not guilty and claimed trial. The prosecution produced and examined as many as thirteen witnesses. After closure of prosecution evidence, statement of the appellant under section 342, Cr.P.C., was recorded wherein he professed innocence and false implication. He neither opted to be examined on oath in terms of Section 340(2), Cr.P.C. nor did he produce defence evidence. Learned trial Court, after hearing arguments, vide judgment impugned herein, convicted the appellant and sentenced him as mentioned above. The appellant has assailed his conviction and sentenced through the instant criminal appeal, whereas father of the deceased has filed the connected criminal revision for enhancement of the sentence. Both the matters being inter-connected are taken together for decision through this common judgment.

4. Arguments of learned counsels for the parties heard and the records perused with their valuable assistance.

5. There is no denial of the fact that the incident in the present case occurred at odd hours of night and according to the

prosecution version, none else except the appellant and the deceased were present on the spot at the time of the occurrence. In the present case, besides circumstantial evidence in the shape of recoveries, the prosecution case mainly hinges upon the dying declaration of the deceased then injured. In order to know about the mode and manner of the incident, this Court is under its legal obligation to re-assess the prosecution evidence. Since the occurrence was reported in the hospital by the deceased, then injured, in the shape of dying declaration, therefore, it would be more advantageous to firstly discuss the medical evidence in order to know whether the deceased then injured was capable to talk, and whether the same was made in accordance with the settled principles of justice. In this respect, Dr. Noman Shah was examined before the trial Court as PW-7. He initially examined the deceased, then injured, on 10.10.2021, at 07:55 p.m, and observed an entry wound of 1x1 on abdomen laterally (left side) and another entry wound of 1x1 cm on back (lumbosacral region). During cross-examination, he admitted that no document was produced before him for the purpose of medical examination and report. He further admitted that he had not mentioned in the report (Ex. PW 7/1), that **the then injured was in senses.** To a question regarding condition of the deceased, then injured, he answered that **the injured was in critical condition when he was brought before him.** He also admitted that **no certificate was obtained from him by the police regarding the**

consciousness or unconsciousness of the then injured. Contrary to the above, Dr. Mutahir Jamil (PW-1), who conducted autopsy on the dead body of the deceased on 11.10.201, at 06:30 p.m, and found an entry wound 1x1 cm on abdomen, laterally left side, and an *exit* wound 1x1 cm, on back lumbosacral region. Needless to say, PW-7 noted two entry wounds, whereas PW-1 noted one entry wound with its exit. This conflict between the statements of two Medical Officers has made the injuries dubious for the reason that it cannot be determined that whether the deceased received one or two fire shots. Moreso, no certificate regarding capability to talk was issued by PW-7. Needless to reiterate that the occurrence took place in odd hours of night and no source of light to identify the assailant was disclosed in the report. In this perspective, possibility that the patient was unable to talk, could not be ruled out and that no report was made by the deceased then injured.

In ***Khyber Khan Vs. Shahid Zaman and another (2019 P.Cr.L.J. Peshawar 979)***, it was held that:

> *For believing a dying declaration, inter alia, one of the essential ingredient is that the prosecution shall establish through cogent evidence that the dying man was in full senses, conscious and alert to the surroundings, was fully oriented in space and time and was able to make a coherent statement and the doctor present at the occasion shall give a fitness certificate about the condition of a dying man, but such is not the case herein.*

6. No doubt, a dying declaration has a sanctity as an important piece of evidence for the reason that a dying human-being is not expected tell lie. However, it is always considered as weak type of evidence being un-tested by cross-examination. Courts are required to carefully and cautiously ascertain that the maker had:

- the physical and mental capacity to make the declaration;
- an opportunity to identify the assailant with certainty;
- not been influenced at all; and
- been heard by competent and reliable witness.

Determination of the evidentiary worth of a dying declaration thus is left to the ordinary human prudence. A study of the jurisprudence would show that while considering a dying declaration, the Courts always insist upon strong, independent and reliable corroboratory evidence for the sake of safe dispensation of justice.

In ***Tahir Khan Vs. The State (2011 SCMR 646)***, the Supreme Court held that:-

> *Mere dying declaration shrouded by and fraught with so many infirmities is not enough to convict a person.*

Another relevant case is of ***Mst. Ghulam Zohra and another Vs. Malik Muhammad Sadiq and another (1997 SCMR 449)***. The Supreme Court ruled that:-

> *"Police Officer had not obtained certificate from the Doctor before recording the statement of the deceased in an injured condition that he was in a*

> *fit condition to give the statement, nor he had given a plausible explanation for such omission and fitness of the deceased to make the statement, thus, remained doubtful".*

In this respect, case reported as ***Raza Khan Vs. Razeem (2018 P.Cr.L.J. Peshawar Note 66).*** Let us reproduce its relevant portion because it is a recent case.

> *For believing a dying declaration, inter alia, one of the essential ingredient is that the prosecution shall establish through cogent evidence that the dying man was in full senses, conscious and alert to the surroundings, was fully oriented in space and time and was able to make a coherent statement and the doctor present at the occasion shall give a fitness certificate about the condition of a dying man, but such is not the case herein.*

In light of the above facts of the case law and legal principles, we exclude the dying declaration from consideration.

8. We shall now consider the manner in which the report of the occurrence was lodged. The evidence shows that Mishkat Ullah IHC No. 817, was present in the Police Station, Saddar. As per his statement (PW-9), he was informed by the Muharrir about the occurrence, at which, he alongwith constables Mushataq and Sibtain, on different motorbikes visited the DHQ hospital, D.I.Khan. PW-9 recorded report of the injured's report in the shape of the murasila and injury sheet. He got the murasila thumb impressed from the injured. He also sent the injured to the Doctor through constable Sibtain for medical treatment. While under cross examination, PW9 he made a number of admissions: firstly, the murasila is not in his handwriting. He added that the murasila was written by a constable under his dictation. Secondly, when asked about the constable, he replied that

the name of the constable is not mentioned in the murasila. Thirdly, he also admitted that the injury is also not in his handwriting. Fourthly, he stated that it is not mentioned in the murasila that the injured was brought to the hospital by officials of the Rescue 1122. It is also a matter of the record that in spite of the fact that a police reporting center is available in the DHQ hospital, he lodged the report as an official of the Police Station Saddar. Indeed, no explanation was offered by PWs in this regard. It is thus established that the manner in which the report was lodged is highly doubtful. This aspect is inextricably linked to the report as dying declaration as a result of death of the injured.

9. We now turn to motorbike on which the deceased reached to the place of the occurrence and cellphone on which the deceased talked with the appellant. The record reflects that the deceased borrowed the motorbike from Muhammad Ansar (PW12) when he received a phone call from the appellant. In his deposition as PW12, Muhammad Ansar confirmed the fact that he provided the motorbike to the deceased. He, however, failed to mention its registration number. PWs Habib-ur-Rahman SI (PW4) deposed that the motorbike was owned by one Ali Sajjad Abbas son of Ghulam Abbas, a resident of Eidgah road, DI Khan. He, however, deposed that at the time of occurrence, PW12 was owning the motorbike from the deceased borrowed it on the eventful day. PW3 Zamir Hussain IHC deposed that the appellant disclosed that he along with the IO and other officials recovered the motorbike and the cellphone of the deceased during a raid on the *hujra* of one Rahmatullah, a proclaimed offender in village Jandar which is situated in Kulachi. It is pertinent

to mention that the recovery was effected by the officials of the police station Yarik in Kulachi. In this respect, when asked, PW-4 admitted that no daily diary showing association of the officials of police station Kulachi, was recorded. Even an official from the Kulachi police station was cited a witness to the recovery. PW4 admitted that the cellphone didn't bear the description stated in the FIR. He further admitted that the cellphone was not sealed into a parcel. He obviously admitted that cellphones are easily available in the market.

10. Another significant recovery is that of two empties of a 30 bore pistol from the place of the occurrence. The FSL report of the empties shows that both were fired from two different 30 bore pistols. This squarely negates the prosecution version as to the injury sheet and the medical evidence.

11. The mode and manner of the arrest of the appellant also need assessment. The appellant was arrested by Karam Elahi Sub Inspector (PW-5). He deposed that he received information that the appellant was in the graveyard near Sheik Yousef's shrine. He led a police party and the I.O to the graveyard where the appellant was arrested and a 30 bore pistol without number, having a fixed magazine containing 05 rounds and a bandolier containing 07 rounds of 30 bore pistol were recovered from him. The aforesaid recovered articles were put in a parcels on which were affixed 3/3 seals with a monogram bearing "AS" abbreviation. He stated to have handed over the recovered articles to the I.O. While under cross examination, PW-5 admitted at the time of the arrest the IO was not in possession of the case file and that the card of arrest was not prepared by him under his own handwriting. Two aspects are worth noting in this respect: firstly,

the PWs admitted that the place of the arrest is a thickly populated area but none was associated to the recovery proceedings there. It was admitted that the *Mujawar* at the shrine was present at the moment. Secondly, it was stated that the insignia "AS" stands for Asmatullah Khan, who remained as I.O in the case, but was not present at the time of the recovery. Surprisingly, PW-5 admitted that while leaving the police station, he took the monogram with himself. It follows that the arresting official—PW5—used the monogram of an official who was not accompanying the police party. It needs no mention that the recovery with such a monogram is to be seen as if it was made by the officials whose monogram was used for its sealing. **(Akhtar Iqbal v. The State, 2015 SCMR 291).**

The aforementioned Asmatullah SI, who conducted partial investigation, particularly after the injured succumbed to his injuries in the hospital. While under cross examination, he confirmed that he didn't accompany the police party at the time of the arrest of the appellant and the recoveries from him and further that the file containing the record of the case was with him. His partial investigation included preparation of the inquest report and sending the dead body for post mortem examination, addition of section 404, PPC, and preparation of the list of legal heirs of the deceased. As an investigation officer he admitted that he neither received from the Doctor concerned the document regarding the declaration of death of the injured, nor did he mention the Doctor who handed over to him the dead body. He also admitted that while relatives of the deceased were present in the hospital, he didn't mention their names. He admitted having not placed on the record the daily diaries.

12. Regarding the recoveries, the deposition of Fazal Hussain constable (PW-6), a marginal witness of the recovery memo is also worth examination. PW-6, alongwith Zamir Hussain IHC and Muhammad Zahid constable, accompanied to the place of the occurrence, where he collected blood stained earth (mark 'A'), 02 empties and one live round of 30 bore pistol (marks 'B' and 'C') which were sealed in a parcel. He also witnessed the pointation proceedings conducted on 20.10.2012 and signed the memo as it marginal witness. He deposed that the appellant pointed out the various positions of the mode and manner of the occurrence on the spot. He confirmed the recoveries of incriminating articles from the appellant. While under cross-examination, he badly failed to recall some of the material aspects of the pointation and recovery proceedings. For example, he couldn't recall the time the police party reached to, the time it spent on and the time at which the police returned from the place of the occurrence. Similarly, he couldn't remember for how long he remained with the SHO during the recovery of pistol and rounds. In short, he desperately failed to stand the test of cross-examination.

13. It is settled principle of law that for giving benefit of doubt, it is not necessary that there should be so many circumstances rather if only a single circumstance creating reasonable doubt in the mind of a prudent person is available, then such benefit is to be extended to an accused, not as a matter of concession, but as of right. The august Supreme Court of Pakistan in the case of **"Muhammad Mansha Vs. The State" (2018 SCMR 772)** has enunciated the following principle:

Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted.

In a recent judgment, the Honourable Supreme Court of Pakistan in the case reported as **"Ahmad Ali and another Vs. The State" (2023 SCMR 781)**, has held in paragraph 12, that:

Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right. Reliance in this regard may be placed on the cases reported as Tajamal Hussain v. The State (2022 SCMR 1567), Sajjad Hussain v. The State (2022 SCMR 1540), Abdul Ghafoor v. The State (2022 SCMR 1527 SC), Kashif Ali v. The State (2022 SCMR 1515), Muhammad Ashraf v. The State (2022 SCMR 1328), Khalid Mehmood v. The State (2022 SCMR 1148), Muhammad Sami Ullah v. The State (2022 SCMR 998), Bashir Muhammad Khan v. The State (2022 SCMR 986), The State v. Ahmed Omer Sheikh (2021 SCMR 873), Najaf Ali Shah v. The State (2021 SCMR 736), Muhammad Imran v. The State (2020 SCMR 857), Abdul Jabbar v. The State (2019 SCMR 129), Mst. Asia Bibi v. The State (PLD 2019 SC 64), Hashim Qasim v. The State (2017 SCMR 986), Muhammad Mansha v. The State (2018 SCMR 772), Muhammad Zaman v. The State (2014 SCMR 749 SC), Khalid Mehmood v. The State (2011 SCMR 664), Muhammad Akram v. The State (2009 SCMR 230), Faheem Ahmed Farooqui v. The State

(2008 SCMR 1572), Ghulam Qadir v. The State (2008 SCMR 1221) and Tariq Pervaiz v. The State (1995 SCMR 1345).

14. After thoroughly evaluating the evidence available on file, we feel no hesitation in concluding that the prosecution has miserably failed to prove its case against appellant beyond any reasonable doubt and the learned trial Court has not appreciated the evidence in its true perspective and fell into error by convicting the accused. Resultantly, this appeal is allowed, the conviction and sentence awarded to the appellant vide impugned judgment is set-aside and by extending him the benefit of doubt. The appellant is acquitted of the charge levelled against him. He shall be released forthwith, if not required to be detained in connection with any other criminal case. Consequent upon the acceptance of this appeal against conviction, the connected criminal revision stands infructuous, as such, it is dismissed.

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

Announced.
07.11.2023.
Kifayat/*

JUDGE

JUDGE

(D.B)
Mr. Justice Muhammad Faheem Wali
Mr. Justice Dr. Khurshid Iqbal