JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

1) Cr.A No. 144-M/2016

Sadam Ullah son of Karamat Ullah r/o Parrai, Tehsil Barikot, District Swat.

Versus

1) The State through Additional Advocate General, Khyber Pakhtunkhwa at Peshawar High Court Bench Mingora, Swat.
2) Amirzada son of Bazir r/o Parrai, Tehsil Barikot, District Swat.

Present:

Mr. Razaullah, Advocate for the appellant.

Mr. Haq Nawaz Khan, Assistant A.G. for State.

Muhammad Amin Khan, Advocate for Respondent No.2.

2) Cr.R No. 42-M/2016

Mst. Tauheed Begum and 05 others (LRs of deceased Shahid Khan)

Versus

1) Sadam Ullah son of Karamat Ullah r/o Parrai, Tehsil Barikot, District Swat.
2) The State through Additional Advocate General.

Present:

Muhammad Amin Khan, Advocate for the petitioners.

Mr. Haq Nawaz Khan, Assistant A.G. for State.

Mr. Razaullah, Advocate for respondent/convict.

Date of hearing: **07.09.2020**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Appellant Saddam Ullah has challenged the judgment of the learned Additional Sessions Judge-III/Judge Juvenile Court, Swat, dated 28.05.2016 in case F.I.R No. 1048 dated 29.12.2014 u/s 302/34 P.P.C, 13 A.O registered at P.S Ghalegay, District Swat, whereby he was convicted u/s 302 (c) P.P.C and sentenced to

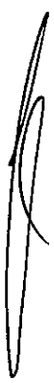
undergo 25 years imprisonment with compensation of Rs.500,000/- to legal heirs of the deceased u/s 544-A, Cr.P.C. He was also convicted u/s 13 A.O and sentenced to undergo one year imprisonment with fine of Rs.2000/- or in case of default thereof to suffer one month S.I in addition.

Legal heirs of the deceased have filed the connected Cr.R No. 42-M/206 seeking enhancement of the appellant's sentence. Both the cases, being interconnected and arising out of the same judgment, are decided through this single judgment.

2. The report was statedly lodged by deceased then injured Shahid Khan son of Wazir in Casualty of Saidu Sharif Hospital on 29.12.2014 at 11:00 hours. He stated in his report that at previous night he came out from his house in response to the knocking of the present appellant Sadam who asked him to accompany him to the river bank as he had lost there his mobile phone. The complainant, being friend of the appellant/convict, went to the place of occurrence with him and started search of the missing mobile phone in dark during which the appellant attacked him with some sharp-edged

object thereby causing him serious injuries on his chest and abdomen due to which he became unconscious. On the next morning someone informed the inmates of his house and relatives for shifting him to hospital for treatment. The complainant neither cited the name of any witness nor disclosed any motive behind the occurrence.

3. Mian Sardar Badshah S.I (PW-2) recorded report of the deceased then injured in Murasila Ex.PA/1 and referred the injured to concerned doctor for medical treatment. Thereafter he was referred to LRH Peshawar where he died on 08.01.2015. Post-mortem on the dead body was conducted by Dr. Naveed Alam (PW-9). The appellant was arrested on 29.12.2014 on the day when the deceased then injured was found by his relatives on the river bank.



4. After completion of investigation, the appellant was challaned to trial Court where he was formally charge-sheeted for the offence to which he did not plead guilty and opted to face the trial. Prosecution produced nine witnesses in support of its case against the appellant and closed its evidence. When examined u/s 342, Cr.P.C, the appellant

denied the allegation of prosecution and claimed to be innocent. On conclusion of trial, the learned trial Court vide judgment dated 28.05.2016 convicted and sentenced him in the manner discussed above, hence, this appeal and the connected revision petition.

5. Arguments heard and record of the case was perused.

6. Admittedly, the case of prosecution mainly rests on the dying declaration of the deceased then injured, however, the record shows that before the report the deceased then injured was taken to Barikot Hospital. Mian Sardar Bahadar SI (PW-2) though was present at the time of examination of the deceased by doctor at Barikot Hospital and he had later recorded the report of the deceased then injured at Saidu Sharif Hospital in shape of *murasila* but he did not record the statement of the deceased then injured at Barikot Hosiptal. Dr. Muhammad Atiq (PW-7) who examined the deceased then injured at Barikot Hospital on 29.12.2014 at 10:15 AM has observed that the deceased then injured was semi-conscious and non-cooperative and has further stated

that the injured was not in a position to record his statement. The said PW stated that:

> "It is correct that a the (time) of examination the patient was semi conscious and cannot talk and was not co-operative..... it is correct that he was unable to talk".

Thereafter the deceased then injured was shifted to Saidu Sharif Hospital where his report was recorded and his thumb impression was obtained by Mian Sardar Bahadar S.I (PW-2) who During his Court statement has referred to a certificate available on record as Ex.PW-2/1 which, according to him, he has obtained from the concerned doctor with regard to consciousness of the deceased then injured. The question arising here is that when he had prepared the injury sheet of the deceased then injured at Barikot hospital then why he did not chalk out his report there and then 45 minutes prior to his shifting to Saidu Sharif Hospital. The afore-referred document i.e Ex.PW-2/1 though depicts that the deceased then injured was conscious but the same certificate has been signed by an unknown person and only his signature is only there on the certificate without his name or designation. Even the prosecution has not examined the concerned doctor who has issued the said certificate.

Thus, the dying declaration of the deceased then injured, which is the only substantive piece of evidence with the prosecution, is belied by medical evidence, hence, in view of the above mentioned attending circumstances of the dying declaration it can safely be held that the deceased was not able to record his statement, as such, the said piece of evidence is not sufficient for sustaining conviction of the appellant. In addition, it is apparent from the record that the occurrence took place on 28.12.2014 whereas the injured complainant died on 08.01.2015 but during this interregnum the investigating agency neither made any effort to obtain any authentic certificate from the doctor who had attended the deceased during his stay in the hospital nor recorded his statement through a magistrate as provided in Rule 21 of Chapter XXV of Police Rules, 1934.

7. Even otherwise, dying declaration is to be looked into with great caution and care in the light of facts and circumstances of each case. It is settled law that dying declaration, being a statement of a person without the test of cross-examination, is a weaker type of evidence which by itself cannot be used as admissible evidence for conviction of an accused unless corroborated by other evidence of

reliable nature. Guidance is sought from *Tahir Khan Vs. The State* **(2011 SCMR 646)**. The august Supreme Court of Pakistan observed in the said judgment that:

> **It is thus absolutely clear from the principles laid down by this Court that a dying declaration is a weaker type of evidence, which needs corroboration and that conviction can be based on the basis of such a declaration when fully corroborated by the other reliable evidence. Thus, the facts and circumstances of each case have to be kept in view and also the credibility, reliability and acceptability of such declaration by the Court.**

8. It is the case of prosecution against the present appellant that he has stabbed the deceased at the bank of river Swat due to which he later on died. The record transpires that the occurrence took place on 28th December 2014 at 09:00 P.M and the report was lodged on the subsequent day at11:00 hours by the deceased then injured which was considered as dying declaration, the last incriminating statement of the deceased. The story of the deceased then injured that he, after sustaining injuries, was lying on the river bank in the month of December till the next morning, which does not appeal to a prudent mind for the reasons that temperature goes to minus in this part of the province. Moreso, only blood-stained shirt of the deceased was taken into possession by

I.O and admittedly the deceased was not wearing any jacket or sweater or any other warm upper apparel. Thus, survival of the deceased then injured till next morning in the mentioned circumstances castes a doubt on the mode and manner of the occurrence and the prosecution version.

9. So far recovery of dagger on pointation of the appellant is concerned, the record shows that prosecution has not associated any independent witness with the said recovery though private persons were present there at some distance as voluntarily stated by constable Jawad Ahmad (PW-8), the attesting witness of the recovery memo. Moreso, the recovery of dagger was effected on 30.12.2014 but sketch Ex.PW- 5/6 prepared by I.O in this regard bears visible overwriting, thus, the date on which the recovery was made is doubtful. In addition, according to the report of Serologist Ex.PF, no opinion has been given regarding the blood on the said dagger being insufficient for analysis. Thus, the observations of the learned trial Court that the blood on the clothes of deceased has matched with the blood on the recovered dagger are against the evidence on record. Even otherwise, recovery of crime weapon, being a corroborative piece of

evidence, by itself is not sufficient for conviction of an accused when no direct evidence of convincing nature is available against him on the record.

10. The learned trial Court has relied upon the alleged extra-judicial confession of the appellant but the record shows that he has not confessed his guilt rather the same is the statement before police which has no evidentiary value under Article 38 of Qanun-e-shahadat Order, 1984.

11. The learned counsel for the complainant during his arguments referred to certain irresponsible questions by defence counsel during cross-examination of PWs but we have no doubt in our mind that weak cross-examination or even admissions by defence counsel will not make any good to the case of the prosecution, when otherwise the same is pregnant with inherent defects and contradictions. In this regard we would refer the judgment of the august Supreme Court in the case of *Abdul Khaliq Vs. The State* **(1996 SCMR 1553)**. It was observed by the Hon'ble Court in the said judgment that:

> **Even if putting of such question in cross-examination by the defence counsel, amounts to an admission, the same r cannot bind the**

appellant. In a criminal case an accused is not bound by the admissions made by his counsel.

12. For what has been discussed above, conviction and sentence of the appellant recorded by learned trial Court cannot be sustained in the circumstances. Resultantly, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge leveled against him in the present case. He be released forthwith from jail if not required in any other case. The connected Cr.R No. 42-M/2016 is dismissed for having become infructuous.

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

Announced.
Dt: 07.09.2020

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