IN THE PESHAWAR HIGH COURT, BANNU BENCH

(Judicial Department)

Cr.A No.11-B of 2022

Muhammad Tufail & another
Vs
The State etc

JUDGMENT

For Appellants: **Muhammad Rashid Khan Dhirma Khel and Abdul Nasir, Advocates**

For respondents: **Mr. Fazal Hayat Khan Khattak, Advocate**

For State: **Sardar Muhammad Asif, Asstt. A.G.**

Date of hearing: **16.11.2022**

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SAHIBZADA ASADULLAH, J.--- The appellants, Muhammad Tufail and Mehmood Hassan, after having been tried by the learned Additional Sessions Judge at Takht-e-Nasrati, District Karak for the charges under section 302/34 PPC in case FIR No.165 dated 24.03.2020 of Police Station Y.K.S Takht-e-Nasrati, District Karak, were convicted under section 302(b)/34 P.P.C and sentenced to life imprisonment as *Tazir* with fine of Rs.5,00,000/- as compensation to the legal heirs of deceased within the meaning of section 544-A Cr.P.C or in default thereof, to undergo six months S.I each. Benefit

under section 382-B Cr.P.C was also extended to the appellants vide judgment dated 12.01.2022.

2. Feeling aggrieved, the appellants have assailed the judgment and the awarded sentence through the instant criminal appeal, whereas, brother of the deceased, Amjad Ali, being aggrieved of the quantum of sentence has moved Criminal Revision Petition No.08-B/2022 for enhancement of the same. Since both these matters have arisen out of the same judgment, therefore, we intend to decide the same through this common judgment.

3. The transient facts, as unfolded in the first information report, are that on 24.03.2020 at 13:20 hours, complainant / deceased then injured Aziz Ullah brought by his co-villagers in injured condition to KDA Hospital, Karak lodged a report to the effect that on the eventful day, he was present in his house, when heard noise of his children; that in response thereof, he came out from the house and saw accused / appellants Mahmood Hassan and Tufail, his co-villagers, duly armed with firearms, who, on seeing him, started firing at him in order to commit his Qatl-i-Amd, due to which, the complainant got hit and injured. The occurrence is stated to have been witnessed by Muhammad Ilyas and motive is alleged to be a dispute over a thoroughfare. The report of the complainant was also

verified by his brother Amjad Ali. The report was reduced into writing in the shape of murasila Ex.PW-1/1, which was sent to the police station for registration of the case, on the basis of which, the case was registered against the accused / appellants under section 324/34 PPC on 24.03.2020. The complainant / injured was referred to Peshawar where he remained under treatment in Lady Reading Hospital, Peshawar and was later on discharged therefrom, however, thereafter his condition deteriorated and ultimately, succumbed to his injuries on 19.04.2020 and autopsy on his dead body was accordingly conducted in DHQ Hospital, Karak. Consequently, the section of law too was altered from one under section 324 PPC to 302 PPC.

4. Initially, accused Mehmood Hassan was arrested on 24.03.2020, whereas, co-accused Muhammad Tufail opted to remain in hiding, but he was subsequently arrested on 16.05.2020 and after completion of investigation, challan was submitted against both the accused, where at the commencement of trial, the prosecution produced and examined as many as 11 witnesses. On close of prosecution evidence, statements of appellants were recorded under section 342 Cr.P.C wherein they professed innocence and false implication, however, neither they opted to be examined on oath as provided under section 340(2) Cr.P.C

nor wished to produce defence evidence. After hearing arguments, the learned trial Court vide the impugned judgment, convicted and sentenced the appellants as mentioned above. Hence, the instant criminal appeal against the judgment of conviction and the criminal revision for enhancement of the sentence.

5. We have heard at extensive length arguments of learned counsel for the parties as well as that of learned Assistant Advocate General for the State and scanned through the record, with their valuable assistance.

6. The deceased then injured after receiving firearm injuries was shifted to KDA Hospital Karak, where he reported the matter to the local police in respect of the incident and charged the accused / appellants for commission of the offence. The police official after examining the injured, prepared the injury sheet and thereafter, drafted the murasila and the deceased then injured was sent to the doctor, for medical examination, under the escort of constable Afaq Ahmad No.535. The injured was examined by the doctor and after giving first aid to the deceased then injured, he was referred to Peshawar for further treatment and as such, the injured was shifted to LRH Peshawar. The murasila was incorporated in the FIR and the investigating officer after receiving copy of

the FIR visited the spot and prepared the site plan. During spot inspection, the investigating officer collected bloodstained earth from place of the deceased then injured and also recovered a spent bullet, two crime empties one each of .30 & 9mm bore. The investigating officer packed and sealed the bloodstained earth into parcel No.1, the spent bullet in parcel No.2, the crime empty of .30 bore in parcel No.3 and the empty of 9mm bore in parcel No.4 vide recovery memo Ex.PC. Accused / appellant Mehmood Hassan was arrested by the local police and the weapon of offence i.e .30 bore pistol bearing No.4108 (Ex.P6) alongwith fixed and spare charger containing 09 rounds of the same bore was also recovered from his possession and in that respect, FIR No.166 dated 24.03.2020 was registered against him under section 15-AA at Police Station YKS, Karak. The crime bullet was sealed in parcel No.2, crime empties were sealed in parcels No.3 & 4 respectively, and the weapon of offence was separately sealed in parcel No.1 and were sent to the Firearms Expert for ascertaining the fact that from which bore the same were fired and as to whether the incriminating articles were fired from the same weapon or otherwise. The laboratory report in respect of the pistol was received that the crime empty marked C1 and the crime bullet marked "B" were fired from the pistol in

question, whereas, the other empty was reported to have been fired from 9mm bore. It is pertinent to mention that the deceased then injured remained under treatment at LRH Peshawar and was discharged from the hospital whose condition suddenly deteriorated thereafter and ultimately, breathed his last on 19.04.2020. Inquest report of the deceased was prepared and his dead body was sent under the escort of constable Afaq Ahmad No.535 to the mortuary for postmortem examination. As the deceased then injured had received firearm injuries on 24.03.2020 and died on 19.04.2020 after he was discharged from LRH Peshawar, so a medical board was constituted in order to ascertain the exact cause of his death. Autopsy on the dead body of the deceased was conducted at DHQ Hospital Karak vide postmortem report ExPM and according to the medical board, so constituted, the cause of death came out to be *"firearm injury to the chest and thoracic spine cardiopulmonary failure and paraplegia"* vide its report Ex.PM/1. Thereafter, the section of law too was altered from one under section 324 PPC to 302 PPC and in that respect, a report ExPF was prepared.

7. The record was scanned through with valuable assistance of learned counsel for the parties and also the worthy Assistant Advocate General in order to see as to

whether the learned trial Court was justified to convict the appellants and that as to whether the learned trial judge appreciated the available record in its true perspective. This Court is to see as to whether the learned trial Court appreciated the evidence on file; as to whether the impugned judgment finds support from record of the case and as to whether the conclusion drawn by the learned trial judge is the outcome of assessment of evidence on file and the recorded statements of witnesses. This being the Court of appeal is under the obligation to reassess the already assessed evidence and to re-appreciate the evidence once appreciated, so that miscarriage of justice could be avoided.

8. The moot questions to be answered by this Court are as to whether the incident occurred in the mode, manner and at the stated time; as to whether the deceased then injured was capable to talk and that it was he who reported the matter; as to whether the eye witness was present at the crime scene at the time of occurrence and as to whether the prosecution succeeded in bringing on record substantial evidence to connect the appellant with the murder of the deceased. The foremost question, which needs to be determined in the first instance is, as to whether at the time of making the report, the complainant was conscious enough and well oriented in time and space or otherwise.

The report was lodged by the deceased then injured himself and the occurrence is stated to have been witnessed by one Muhammad Ilyas. The murasila report ExPA scribed by PW-01 Muhammad Ismail Khan Incharge Casualty KDA Hospital Karak reflects that the deceased then injured was in full senses while reporting the occurrence and that the report was read over to the complainant, who, after admitting the it correct, thumb impressed the same. When the scribe entered into the witness box as PW-01, he, though admitted it correct that he has not obtained any certificate regarding the consciousness or otherwise, of the victim, from Medical Officer, but the witness has explained it well that the victim was conscious and capable to talk. Besides, we have before us an eye witness of the occurrence, who was examined as PW-10. The witness narrated the story, right from the beginning till the end, in a straightforward manner and has consistently supported the prosecution case against the accused / appellants. The witness has confirmed that the injured himself reported the matter to the local police in KDA Hospital Karak and that the report was verified by his brother Amjad Ali. The witness remained adamant to the factum of consciousness of the complainant at the time of making the report. We cannot lose sight of the fact that the occurrence has taken

place on 24.03.2020, whereas, the injured breathed his last on 19.04.2020, after he was discharged from the hospital. It is an admitted position on the record that initially, the deceased then injured was referred to Peshawar and he remained under treatment in LRH Peshawar wherefrom he was discharged. It is evident from the record that it was on 04.04.2020, when the investigating officer took the complainant to the spot where the complainant verified the places assigned to the accused / appellants at the time of occurrence and in this respect, a footnote was added to the site plan (ExPB/3) by the investigating officer with red ink. The snapshots of this episode have also been brought on record by the investigating officer as Ex.PD. The victim at the time of verification has confirmed the places assigned to the accused / appellants to be the same as they stood at the time they were committing the offence. If, for a while, we admit that the victim was unconscious at the time of report, then we cannot lose sight of the fact that the victim has never denied the involvement of either of the accused / appellants in the episode, after he was discharged from the hospital, rather it was he who held them responsible for the injuries they caused to him, before the investigating officer and it was he who verified the site plan. The Medical Officer, who had examined the injured, was produced as

PW-04. There is no denial of the fact that neither the scribe has asked the doctor nor the doctor himself took pain to provide a certificate with regard to the consciousness or otherwise of the victim at the time of making the report, which was crucial as far as condition of the victim was concerned, but this case has its unique facts & circumstances, where on one hand, the victim remained alive for 26 long days and was discharged from the hospital after he had recovered to a good extent, whereas, on the other, he accompanied the investigating officer to the spot for verification, which aspect has duly been corroborated not only by the eye witness, but the investigating officer as well, while recording his statement. It is evident from the record that the doctor was not cross examined by the defence as to whether the victim was conscious at the time of his examination or otherwise and even no suggestion was put to the witness in that respect. This further confirms our belief that the scribe has correctly deposed that the victim was conscious. Keeping in view the highlighted aspects of the case, we are confident to hold that the deceased then injured was well oriented in time and space while making the report and it was none else, but the accused / appellants, who were charged by the victim for the incident.

9. As the only fact that the deceased then injured was oriented in time and space while making the report and that his claim with regard to involvement of accused / appellants in the incident through the dying declaration is not sufficient to maintain the conviction, rather we have to walk an extra mile and to see as to whether the dying declaration has been corroborated by other evidence on record or otherwise. In order to appreciate this particular aspect of the case, we scanned through the available record. We find that the occurrence is claimed to have been witnessed by Muhammad Ilyas, who was examined as PW-10. The witness stated that it was on 24.03.2020 at about 12:30 hours, when he came out of his house and saw the accused / appellants busy in blockage of pathway; that he tried to stop them, but they did not, which led to exchange of hot words between them; that in the meanwhile, deceased then injured came there where the accused / appellants, on seeing him, started firing at him, due to which, he got hit and fell down; that thereafter, the accused / appellants fled away towards Kam Lawaghar side, while he alongwith others shifted the injured to KDA Hospital Karak where the victim himself reported the occurrence to local police and his report was verified by his brother Amjad Ali; that the injured was referred to Peshawar where he remained under treatment

and was discharged after he recovered to a good extent; that thereafter, the investigating officer took the victim to the spot for verification and the victim accordingly verified the site plan to the investigating officer on 04.04.2020; that on 19.04.2020, the condition of the victim suddenly deteriorated and as such, breathed his last. Though, it was submitted that the witness is closely related to the victim, so he being related and interested witness could not have been relied upon, that too, on capital charge, but we are not in agreement with what was submitted. We are mindful of the fact that interested witness is one who has a motive to falsely implicate. There cannot be an inflexible rule that the statement of an interested witness can never be accepted without corroboration. Though, the witness has admitted that the deceased Aziz Ullah was his maternal uncle, but mere relationship of a witness with the deceased is not sufficient to discredit a witness, more particularly, when there is no motive with regard to false implication of the accused, as is the case before us. There is no cavil to the proposition that believing or disbelieving a witness depends upon the intrinsic value of the statement made by the witness and there is no universal principle that in every case, interested witness should be disbelieved or disinterested witnesses be believed, rather it depends upon

the rule of prudence and reasonableness to hold that a particular witness was present on the scene of crime and that he is making a true statement. What is relevant is what statement has been given and it is not the person, but the statement of that person, which is to be seen and adjudged. Reliance is placed on ***"Sajid Mehmood Vs The State" (2022 SCMR 1882)***. It has not been brought on record that what exactly motivated the eye witness to depose against the accused / appellants, that too, in a murder case. The witness was cross examined on material aspects of the case by the learned defence counsel, but nothing detrimental to the prosecution case could be brought from his mouth, rather he remained consistent and firmly disclosed the events in the manner it occurred. The witness disclosed the pre-occurrence circumstances, the mode & manner in which the accused / appellants perpetrated the offence soon on coming of the deceased then injured to the spot and the post-occurrence circumstances. The conduct displayed by the witness is natural and finds complete support from the attending circumstances of the case. So, in the circumstances, the defence has badly failed either to impeach the credit of this witness or to shatter his presence at the crime scene at the crucial time and, therefore, mere relationship between the deceased and the witness remained

no ground to dislodge the deposition of this witness, as has been attempted.

10. The investigating officer after receiving copy of the FIR visited the spot where he recovered a spent bullet Ex.P2 and an empty of 9mm bore ExP4 vide recovery memo ExPC. An empty of .30 bore ExP3 was also taken into possession vide recovery memo ExPC/1. It is pertinent to mention that on 24.03.2020, a .30 bore pistol bearing No.4108 with fixed and spare charger containing 09 rounds of same bore was recovered from accused / appellant Mehmood Hassan and in that respect, a separate FIR No.166 was registered against him under section 15-AA. As the pistol recovered was suspected to be the weapon of offence, so the same alongwith the above incriminating articles, sealed in separate parcels, were sent to the Firearms Expert for opinion where the report was tendered to the effect that the crime empty marked C1 and the crime bullet marked "B" were fired from the pistol in question, whereas, the crime empty marked C2 was opined to be that of 9mm bore vide Ex.PK/1. Thus, it has been established that on one hand, the pistol recovered was the same as used in the commission of offence, whereas, on the other, the offence perpetrated appeared to be the job of two assailants. As far as bloodstained earth is concerned, its report ExPZ

too was tendered in positive. Though, it was contended that when the accused / appellant Mehmood Hassan earned acquittal in the trial under section 15-AA, then the laboratory report confirming the pistol recovered as weapon of offence loses its efficacy in the murder case and, as such, the same could in no way be used as a circumstantial or corroborative piece of evidence against the accused, which, in turn, impairs the very foundation of the prosecution case. This limb of the arguments is of no help to the defence, as on one hand, case of the prosecution has independently been proved through dying declaration, trustworthy ocular account coupled with the collected evidence on record, whereas, on the other, we cannot lose sight of the fact that besides the recovery weapon of offence, the crime empties and spent bullet recovered from the spot have been found to be that of .30 & 9mm bores, which aspect suggests the offence to be the job of two assailants. In the given circumstances, we hold that mere acquittal in the connected case under section 15-AA cannot be taken as a sole ground for acquittal in the murder case, more particularly, when the charges have independently been proved through trustworthy evidence like ocular account, dying declaration, and other evidence which inspires confidence as is the case before us.

11. So far as medical evidence is concerned, it comprises of injury sheet ExPW-1/1, medico legal certificate ExPW-4/1, inquest report ExPW-1/3 and postmortem report ExPM. True that medical evidence is confirmatory in nature and that alone is not sufficient for conviction of an accused charged, but equally true that when the prosecution otherwise succeeds in bringing on record strong evidence in its favour, then medical evidence can be read and considered in aid of the collected evidence. The locale, number, and nature of injuries on person of the deceased then injured coupled with the weapons used in perpetrating the offence are in line with the dying declaration, ocular account as well as the collected evidence and, therefore, the medical evidence lends full support to the prosecution case. The record is indicative of the fact that the deceased died as a result of firearm injuries. The deposition of the victim has been corroborated by the witnesses so produced and record made available. It was vehemently argued that dying declaration is a weak kind of evidence and is hardly sufficient for the conviction of an accused charged, but we are afraid that the defence went wrong while asking our indulgence in its favour. It has never been held that the declaration of a dying man merits no consideration, but instead, much care is advised and for the purpose,

precautionary measures were asked while relying upon such a statement. If we say that it is a weak type of evidence, it does not mean that it has lost sanctity as in that eventuality, we will commit an error, which is hard to be rectified. The legislature was fully conscious of its importance, that's why its glimpses can be seen in the erstwhile Evidence Act, 1872 in the form of section 22, which was implanted in the shape of Article 46 in the Qanun-e-Shahadat Order, 1984. There is no denial of the fact that dying declaration is admissible under Article 46 of the Qanun-e-Shahadat Order, 1984, nevertheless, its evidentiary value and exact place in prosecution case is a different question, which has to be answered in each case according to its attending circumstances keeping in mind the factum of its due corroboration. In one of its landmark judgments, the Apex Court in the case of ***"Abdul Razik Vs The State" (PLD 1965 SC 151)*** has observed that believing or disbelieving a dying declaration is not an exercise in application of law, but an application of simple human judgment. The relevant portion of the judgment reads as under:

> ***"Now, in the concept of a judicial trial according to the mode practiced in the British Jurisprudence, belief or disbelief as***

to the credibility of a witness is a matter which is left entirely to the final judgment of a jury. It is not in any respect a question of law whether a witness appearing at a trial a deposing as to an incident should be believed or should not be believed. The conclusion eventually reached is not an exercise in the application of law, but merely an application of simple human judgment. Therefore, it is plain that the three learned Judges in the High Court were faced with no legal problem, but merely a question of ordinary human judgment. The man who made these statements did not appear before the trial Judge. The usual aids to belief or disbelief, namely, the appearance of the face of the witness as he makes a statement, the manner in which he receives a question, considers his reply and states it, the manner in which he faces cross-examination and meets objections affecting his veracity, and such other factors by which the human judgment is assisted, are all absent. There is only the bare record on paper of what he said to two persons in the brief time which

elapsed between the firing and his death. Neither of the persons who recorded his statement was asked whether he thought the man was saying something which he had been prepared to say, something which was artificial, or, on the contrary, judging by his expression and the way he spoke, that he was telling the simple truth. Yet, this being the only evidence available, it is the duty of the Courts to decide whether or not they can believe it. To accept it without considering the surrounding circumstances would be totally inconsistent with the safe dispensation of justice. To accept it on considerations of expressions of opinion regarding similar declarations in precedent cases, even if those opinions are accompanied by words indicating reliance on some principle of law, is no less dangerous. Only after the most careful scrutiny, applied to all the physical) circumstances as they appear from the evidence, is it possible to decide whether it can be said, with the degree of certainty which is made obligatory for reaching a conclusion of guilt, that the account given by the deceased

of the manner in which he met his death is worthy of belief."

12. While dealing with the matter, one must be aware of the guideline given and parameters provided by the Superior Courts of the land from time to time. As discussed earlier, the deceased then injured was capable to talk, the next test is to see the worth of the collected evidence and the extent of support it provides. The continuous struggle of the investigating officer to collect the most reliable evidence and the ocular account so furnished have added a lot to the worth of the report made by the injured complainant. In the present case, a well knit chain of events has been created by the prosecution which touches both the ends, so we find it hard to discard the same, that too, for no good reason. The continuity of events and the due corroboration that has been established leaves no space for indulgence and we, with no hesitation, hold that the prosecution fully succeeded in labeling the appellants as the actual killers.

13. As regards motive, it was set up as dispute over a thoroughfare, which the accused / appellants were blocking. Though, the investigating officer did not bring on record confidence inspiring evidence in support of the motive alleged, but there is no cavil to the proposition that motive

is a double edged weapon, which could cut either side, as if it could be the reason to kill the deceased, the same could as well be the reason to charge the accused falsely on suspicion by the relatives of deceased. In any case, it is not necessary for the prosecution to set motive, but once it sets the same, then the prosecution would be required to prove. We are cognizant of the fact that failure to prove motive is a factor to be considered against the prosecution, but it is not the rule of thumb that in every case, if prosecution fails to prove motive, it would automatically lead to acquittal of accused charged, rather the failure is not always fatal to prosecution, more particularly, when the charge is otherwise proved through trustworthy evidence as is the case in hand. Such failure may, however, react upon the quantum of sentence on a capital charge as was held by the august Supreme Court in the case of ***"Ali Bux & others Vs The State" (2018 SCMR 354)***. The relevant portion of the judgment reads as under:

> ***"The law is settled by now that if the prosecution asserts a motive, but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on a***

capital charge and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz v. The State and another (2012 SCMR 267), Muhammad Imran @ Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others v. The State (2017 SCMR 148)."

14. The cumulative effect of what has been stated above leads this Court nowhere, but to hold that the prosecution

has successfully brought home charge against the accused / appellants through trustworthy, reliable, and confidence inspiring evidence. It has been proved that the victim was oriented in time and space while making the report and as such, case of the prosecution is supported by the dying declaration. The prosecution has further been successful to corroborate the dying declaration through ocular account, circumstantial and medical evidence. The peculiar facts & circumstances so highlighted supported not only the dying declaration, but the ocular account as well. The ocular account is trustworthy and inspires confidence being in line with the prosecution version. The medical evidence also gives complete support to the prosecution version, as the locale, nature, and number of injuries are in line with record of the case and the deposition made. The learned trial judge has, therefore, rightly convicted the accused / appellants. The impugned judgment does not suffer from misreading or non-reading of any material piece of evidence, rather the same is well reasoned and finds support from record of the case and the recorded statements, which does not call for any interference. The instant criminal appeal being bereft of any merit is hereby dismissed.

15. Now diverting to the quantum of sentence awarded by the learned trial Court and the enhancement as sought

through the Criminal Revision Petition No.08-B/2022. We went through record of the case minutely and in order to ascertain as to what led the learned trial judge to choose a lesser sentence instead of normal penalty of death, we deemed it essential to go through record of the case once again, which we did. As on one hand, the motive alleged by the prosecution has not been proved, whereas, on the other, the recovery of pistol as weapon of offence could not be established against accused / appellant Mehmood Hassan as he has earned acquittal in the case under section 15-AA, though this aspect does not absolve him in entirety since the charge is otherwise established against him. As stated above, it has consistently been held by the Apex Court that failure of prosecution to prove motive may react upon the quantum of sentence against a convict on a charge of murder, so while deriving wisdom from the judgments of the Apex Court reported as ***2018 SCMR 911 "Mst. Nazia Anwar Vs State", 2018 SCMR 149 "Nadeem Ramzan Vs State", 2018 SCMR 21 "Haq Nawaz Vs State", 2017 SCMR 2048 "Ghulam Muhammad Vs State", 2017 SCMR 1662 "Zahoor Ahmad Vs State", and 2017 SCMR 880 "Qurban Hussain Vs State"*** and while taking into consideration the factum of recovery of pistol as weapon of offence having not been established as mitigating

circumstances, we are not persuaded to interfere and honour the request of the petitioner for enhancement of the sentence. We do appreciate the approach of the learned trial Court on this particular aspect of the case and the quantum of awarded sentence is fully justified, which hardly calls for interference. The instant criminal revision being bereft of merit is dismissed as such.

Announced
16.11.2022
(Ghafoor Zaman/Steno)

JUDGE

JUDGE

25 JAN 2023

25/01/2023

(DB)
Hon'ble Mr. Justice Sahibzada Asadullah
Hon'ble Mr. Justice Shahid Khan