

**JUDGMENT SHEET**

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

**Cr.A No. 194-M/2020  
With M.R. No. 4-M/2020**

(1) Sarbiland Khan son of Faida Khan  
(2) Sarzamin Khan son of Khano

(Appellants)

Versus

(1) The State through A.A.G.  
(2) Wali Akbar son of Muhammad Aziz

(Respondents)

**Present:**

M/S Muhammad Hamayoon Khan and  
Nisar Ali, Advocates.

Mr. Raza-ud-Din Khan, A.A.G

M/S Razaullah and Sabir Shah,  
Advocates.

Date of hearing: **09.12.2020**

**JUDGMENT**

**WIQAR AHMAD, J.-** Appellants namely

Sarbiland Khan and Sarzamin Khan are  
aggrieved of their convictions and sentences

recorded vide judgment dated 29.07.2020 of the

Court of learned Additional Sessions Judge Dir

Upper at Wari, whereby they have been

sentenced as follows;

**Appellant Sarbiland Khan;**

***U/S 302 (b) PPC to death as Ta'zir along with  
payment of compensation of Rs. 5,00,000/- (five  
hundred thousand) under section 544-A Cr.P.C***

*payable to legal heirs of the deceased. The amount of compensation shall be recoverable as arrears of land revenue. In default of payment of compensation, the appellant was ordered to undergo six months simple imprisonment.*

**Appellant Sarzamin Khan;**

*U/S 302 (b) PPC to life imprisonment as Ta'zir along with payment of compensation of Rs. 5,00,000/- (five hundred thousand) under section 544-A Cr.P.C payable to legal heirs of the deceased. In default of payment of compensation, the appellant was ordered to undergo six months simple imprisonment. The amount of compensation shall be recoverable as arrears of land revenue if not paid to legal heirs of the deceased.*

*The appellant was also extended the benefit of section 382-B Cr.P.C.*

2. Appellants had faced trial in case FIR No. 504 (Ex. PW-6/1) dated 03.10.2018 registered under sections 302, 34 PPC at police station Wari District Dir Upper on the basis of 'Murasila' (Ex. PW-1/1) sent by Gul Fazil Khan Inspector (PW-9). Complainant namely Wali Akbar Khan lodged report of the occurrence while lying on hospital bed of emergency ward of Wari hospital in injured condition, by stating that he had left his house on 03.10.2018 at 19:55 hours for easing himself in the nearby fields (رفع حاجت) where Sarbiland and Sarzamin (appellants herein) had fired at him with their respective firearms

with the intention to commit his murder. As a result of the firing he had received an injury on left side of his body cavity below ribcage. It was also stated in the report that sound of firing had been heard by his son namely Dil Akbar Khan, wife Mst. Noorina Bibi and nephew namely Muhammad Islam who had immediately come to the spot and had also seen the accused while decamping from the spot, in the light of a solar bulb installed nearby. Motive for the occurrence was stated to have been some land dispute. The accused/appellants were thus charged for commission of the offence. The complainant died on 04.10.2018 whereafter section 302 PPC was also added to the FIR.

3. During the course of investigation, the Investigating Officer prepared site plan Ex. PW-5/1 on pointation of the eyewitnesses. Three crime empties of 7.62 bore were recovered from the spot vide recovery memo Ex. PW-1/4 dated 04.10.2018. A bulb was also taken in possession from the spot vide recovery memo dated 04.10.2018 (Ex. PW-1/5). Investigating Officer also took in possession garments of the deceased

vide recovery memo Ex. PW-1/6. FSL reports Ex. 5/17 and Ex. PW-5/18 in respect of blood stained garments of the deceased and crime empties so recovered from the spot were received from the Forensic Science Laboratory and placed on record.

4. On completion of investigation in the case, complete *challan* was put in Court against the appellants. Charge was framed against appellants on 29.08.2019, to which they pleaded not guilty and claimed trial. Prosecution was invited to produce evidence, who accordingly examined ten (10) witnesses and closed its evidence. Statements of the accused were recorded under section 342 Cr.P.C. On conclusion of proceedings in trial, accused/appellants were convicted for commission of the offence vide judgment dated 29.07.2020 of the Court of learned Additional Sessions Judge Dir Upper at Wari, as stated earlier.

Accused/appellants challenged their conviction and sentences through the instant appeal before this Court.

5. We have heard arguments of learned counsel for the parties, learned Adll: A.G

appearing on behalf of State and perused the record.

6. Perusal of record reveals that prosecution have been relying upon first report of the occurrence Ex. PW-1/1 as a dying declaration as well as ocular account of the incident offered by the witnesses namely Dil Akbar Khan whose statement was recorded as PW-1 and Muhammad Islam who was examined in Court as PW-2. Additionally the prosecutions have also produced corroboratory evidence in the shape of three crime empties of 7.62 bore recovered from the spot and recovery memo of a bulb installed nearby.

7. Before discussing evidence of prosecution a reference to the site plan Ex. PW-5/1 is inescapable in peculiar facts of the instant case. The site plan shows western courtyard of the house of deceased as the place where the deceased had received injuries. Points 2 & 3 assigned to the accused/appellants has been shown above the rooftop of the house of deceased wherefrom they were alleged to have made firing on the deceased. Three empties of 7.62 bore has

been shown recovered from the place of presence of the accused.

8. Description of the occurrence given by the complainant/deceased at the time of lodging report has already been given and need not be repeated. Witness namely Dil Akbar Khan while recording his statement as PW-1 has stated in his examination-in-chief that his father had left his house for the nearby fields so as to ease himself. The appellants were alleged to have opened fire on him and on hearing the fire shots he had come out along with his mother Mst. Noreena Bibi as well as Muhammad Islam (PW-2) and seen that the two accused had been making firing upon his father causing injuries on his person. The appellants were also claimed to have been seen and identified in light of the bulb installed nearby. In the start of his cross-examination he has stated that he had been living in a separate house but added that at the time of occurrence he had been present at the house of his father. He did not deny the suggestion that while recording his statement under section 161 Cr.P.C he had not disclosed to the Investigating

Officer that he had been present in the house of his father at the time of occurrence. He also stated in his cross-examination that the other witness namely Muhammad Islam had been nephew as well as son-in-law of the deceased, who had been living in village *Qonjay* (قونجی) and his house had been situated at a distance of 500 feet from their house. In his cross-examination he also stated that his father had disclosed to the police that the firing had taken place from rooftop of their house. But no such assertion can be found in the FIR. He denied the suggestion that after recovery of empties from rooftop he had come to know that firing had taken place from the rooftop.

9. The other witness namely Muhammad Islam while recording his statement as PW-2 has also given a similar description of the occurrence in his examination-in-chief. In his cross-examination he has stated that the bathroom had been available in house of the deceased. He has also stated further ahead in his cross-examination that height of the rooftop had been 11 feet (approximately). Doctor Roidad Khan

who was produced in Court as PW-4 had examined the complainant (deceased) after receipt of injury, wherein he has stated that his vital organs damaged resulting into cardiothoracic arrest haemodynamically instability. Regarding the certificate of consciousness Ex. PW-4/2 he has stated in his cross-examination, that same had been obtained by the police officer concerned after death of the deceased. In his examination-in-chief he has stated that that the deceased had been referred to Peshawar and had died at Batkhela wherefrom his corpse had been brought back to the hospital at Wari. It would mean that after the corpse was retaken to the hospital, at that time the certificate of consciousness may have been obtained from doctor. Further ahead in his cross-examination he has stated that the deceased had been in a serious condition and had been leading towards shock. He also stated in his cross-examination that the paths of bullet had been from downward to upward.

10. The Investigating Officer namely Amin Khan Sub Inspector has been examined as PW-5. In his cross-examination he had agreed



with the suggestion that after recovery of empties from the rooftop the witness had mentioned in his statement recorded under section 161 Cr.P.C that the firing had been made from the rooftop. He also stated in his cross-examination that from photo of the place wherein bulb had been installed it was clear that it had been fixed below a "Beem" (بيم). He also stated that over a "Beem" there had been a roof ledge (ٲٲ).

11. From the above stated appraisal of evidence the following facts can safely be deduced;

(a) *that it had not been mentioned in the first report of the occurrence/dying declaration that firing had been made upon the deceased, from the rooftop.*

(b) *that the bulb which was claimed to be the only source of light available on the spot had*

*been fixed under a "Beem" over which a roof ledge had also been existing. Over the rooftop no independent source of light had been indicated despite the fact that light of the bulb shown in the site plan could not have lighten the area above the rooftop, which had been shown as the place*

*of presence of the accused and thus there has been substantial doubt regarding identity of the accused/appellants.*

*(c) that the claimed eyewitnesses had been residing separately from the deceased and they had not been accompanying the deceased at the time of occurrence, but had been attracted to the spot after hearing sound of the fire shots.*

The first deduction given in point (a) above is sufficient to discredit the force of dying declaration recorded in the case in the hand. When said fact is also coupled with the conclusion drawn in point (b) above the identification of the appellants by complainant at the time of commission of the offence also becomes doubtful. The question of identification of the accused/appellants at the time of occurrence has been lurking on the face of record all along. The bulb had been shown by the Investigating Officer to have been installed in a place whose light may not have the necessary reflection of enlightening the rooftop. Light of the bulb installed below the rooftop would have definitely got deflected downwards and it may not have an

inward effect as a result of which a person standing on rooftop might have been identified by the complainant or the eyewitnesses at the time of occurrence. The bulb has though been recovered vide recovery memo Ex. PW-1/5 but it could not be produced during the evidence of prosecution and have not been exhibited in their evidence also. The occurrence had taken place during night time, while no independent source of light could be shown to have been existing over the rooftop, therefore identifying the appellants at the place of occurrence would not have been possible, even if the complainant or eyewitnesses had the occasion to locate the directions wherefrom the firing had been made upon the deceased.

Dying declaration is no doubt admissible under Article 46 of the Qanun-e-Shahadat Order, 1984 and same was the case with Indian Evidence Act, 1872 where in section 32 of the said Act dying declaration had been made admissible. Evidentiary value of dying declaration and its exact place in prosecution evidence, is however a different question which has to be answered in each case according to its attending circumstances. It was in the case of dying

declaration that his Lordship Chief Justice A.R. Cornelius (as then he was) recorded observations that believing or disbelieving dying declaration was not an exercise in application of law rather it was an application of simple human judgment. Relevant part of his Lordship observations recorded in the case of "Abdul Razik v/s The State" reported as PLD 1965 Supreme Court 151 are reproduced hereunder for ready reference;

*"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 and 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."*

Further ahead in said judgment the physical circumstance mentioned and interpreted therein, is also very much similar to the facts of instant case, and said part of the judgment is also reproduced hereunder;

*"A physical circumstance which required to be ascertained with accuracy in this case was as to the degree of visibility when the shooting took place. The report of the occurrence was made at the thana in the same village, Katu Khan at 7-15 a.m., by the deceased himself. The distance of the spot from the thana is said to be a mile. According to the evidence, the injured man was taken on a cot to the thana and evidently it must have taken p some time to procure the cot. In his first dying declaration, Yahya said that he had already said his morning prayers when h went to ease himself, and that is possible. The morning pray is said at the first crack of dawn, when there is very little light. But 7-15 a.m., on the 22nd December 1961, which is the day of the winter solstice, that is, when the night is longest, would be barely after sunrise, and calculating how much time was necessary for persons to collect on the spot and to fetch a cot, and probably also to clean the body of the deceased who had been easing himself when he was fired at (for no one says that there was any mark of faces on his person or his clothes) it is necessary to allow an interval of at least an hour between the occurrence and the arrival at the thana. The distance of Yahya's house from the spot is two furlongs, and that had to be covered probably four times after the occurrence before a start for the thana could be made. An allowance of an hour is by no means excessive for all that was necessary, including the walk to the thana, one mile away. This would put back the time of the occurrence to about 6 a.m., at*

which time in the dead of the winter, visibility would be poor indeed. It follows that the shots must have been fired from a fairly close distance, and the accuracy of the shooting confirms this conclusion. It is plain that the shots were fired from behind the deceased. There was a pattern of 14 shots concentrated on the upper right buttock and the portion of the lower back immediately adjacent. That shot may have been fired when the man was on his haunches, but there is also a pattern of 12 pellets on the back of the left thigh as well as two pellets on the adjoining portion of the right thigh, and clearly this pattern is the result of a second shot. One or two of the shots appears to have injured the man's private parts and it could be that these were included in the second pattern. This pattern on the backs of the thighs could not have been produced unless the man rose from his haunches, so as to expose the backs of his legs. On the upper left back there were two pellet wounds and one of these pellets appears to have exited through the front of the chest. These two pellets must be attributed to a third pattern of shot. It is difficult to include them in either of the patterns previously mentioned. It may be believed that three shots were fired, but it is practically impossible that these shots should have been fired, in such low visibility from the distance indicated by the prosecution which is 86 paces equaling some 215 feet or 72 yards. It was at that distance that a single cartridge was found, but that may well have been discarded by the gunman or gunmen as they walked away from the scene. The shots could not have been fired in the half dark at 6 a.m., from a much greater length than say 20 yards and the closeness of the patterns of shots confirms this view."

After analyzing the evidence in the manner reproduced above, benefit of doubt was extended to the appellant and he was acquitted of the charges. In the case of "Taj Muhammad and others v/s The State" reported as PLD 1960 (W.P.) Lahore 723 the benchmarks for determining veracity of a dying declaration were stated as follows;


(i) *Whether intrinsically its rings true,*

- (ii) *Whether there is no chance of mistake on the part of the dying man in identifying or naming his assailants, and*
- (iii) *Whether it is free from prompting from any outside quarter and is not inconsistent with the other evidence and circumstances.*

In the case of "Dr. Munir Ahmad v/s The State" reported as PLD 1986 Quetta 26 criteria for evaluating the genuineness of a dying declaration was narrated in the following words;

- (i) *Whether the maker had the requisite capacity to make the dying statement,*
- (ii) *Whether the maker had an opportunity to recognize the assailants,*
- (iii) *Whether there were chances for mistake on the part of dying man in identifying and naming his assailants,*
- (iv) *Whether it was free from prompting from any outside quarter, and*
- (v) *Whether the witnesses who heard the deceased making his statement heard him correctly and whether their evidence can be relied on.*

Similarly in the case of "Abdur Rahim v/s The State" reported as 1997 P Cr.LJ 1274, we also find the touchstone for discerning a dying declaration in the following manner;

- 
- (i) *there was no chance of mistaken identity,*
  - (ii) *the deceased was capable of making statement,*
  - (iii) *the deceased made the statement without much length of time after sustaining the injury,*
  - (iv) *the statement rings true,*
  - (v) *the statement was free from promptness of outsiders, and*

(vi) *the deceased was not a man of questionable character.*

One of the common feature, in all the criterion given above, relates to the fact whether the person recording dying declaration had been able to identify the accused clearly so as to ward off any chance of mistake on his part. In the case in hand, we have found substantial doubt regarding identification of the appellants by the complainant, because of the fact that the occurrence had taken place in darkness of the night where in the place of appellants no source of light was found available. Another feature relates to the fact whether the dying declaration intrinsically rings true. We have also suspected the dying declaration for the reason that it had not been mentioned therein that firing had been made upon the complainant from the rooftop. The medico-legal report showing path of injuries in the body of complainant from downwards to upwards has also added to our suspicion in this regard. In such a situation, statement of the deceased complainant contained in '*Murasila*', and



presented by the prosecution as dying declaration has not been worth reliance.

Presence of the PWs is also doubtful at the spot of occurrence, as deducted from analysis of evidence and mentioned at point (c) above. Both the eyewitnesses have been living separately from the deceased. It has been mentioned in first report of the occurrence that the witnesses got attracted to the spot on hearing sound of fire shots, but it has nowhere been mentioned there that they had been present in the house of the deceased at the relevant time. It is not believable that the witnesses would have reached the place of occurrence from their respective houses and the accused would still have continued the firing as claimed in their examination-in-chiefs. The only inmate of the house of deceased namely Mst. Noorina Bibi (his widow) could not be produced by the prosecution as a witness and she was abandoned. Presence of the PWs and seeing the accused/appellants decamping from the spot are not believable in circumstances of the case.

12. In light of what has been discussed above, prosecution have not been able to prove their case against the appellants beyond reasonable doubt. They are acquitted of the charges leveled against them by extending them benefit of doubt, and allowing of the instant appeal. Murder Reference No. 4-M of 2020 is answered in "negative". These are reasons for our short order of even date wherein it has been provided;

*"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 29.07.2020 passed by learned Additional Sessions Judge Dir Upper at Wari in case FIR No. 504 dated 03.10.2018 registered under sections 302, 34 PPC at police station Wari District Dir Upper and resultantly acquit the accused/appellants namely Sarbiland Khan and Sarzamin Khan of the charges levelled against them. They be released forthwith if not required in any other case. Murder Reference No. 4-M/2020 is answered in negative.*

Announced

Dt. 09.12.2020

JUDGE

JUDGE

Office  
23/12/2020  
W/R

NAWAB

(D.B) Hon'ble Mr. Justice Ishtiaq Ibrahim  
Hon'ble Mr. Justice Wiqar Ahmad