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

Cr. A No. 171-M/2021

Muqadar Khan
Versus
The State and 01 other

Present:

Mr. Shams-ul-Hadi, Advocate for appellant.

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

M/S Umar Zaman Khan and Amjad Ali Zewar, Advocates for Respondent No.1.

Date of hearing: **31.01.2023**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Appellant/convict Muqaddar Khan has preferred instant appeal u/s 410, Cr.P.C against the judgment of the learned Additional Sessions Judge/Model Criminal Trial Court, Malakand at Batkhela, rendered in case FIR No. 53 dated 03.09.2017 u/s 302, 324, 337-F(ii)/34 PPC of Levies Post *Khaar*, District Malakand, whereby he was convicted and sentenced as under:

1. **302 (b) PPC**

   Life imprisonment, with the directions to pay Rs.500,000/- as compensation to the legal heirs of the deceased within the meanings of section 544-A Cr.P.C or in default to undergo further 06 months S.I;

2. **324 PPC**

   07 years rigorous imprisonment, with a fine of Rs.100,000/- or in default to undergo further 04 months S.I; and

3. **337-F(ii) PPC**

02 years rigorous imprisonment, with directions to pay Rs.50,000/- as *daman* to injured Noor Hayat or in default to undergo further 03 months S.I.

All the sentences were ordered to run concurrently with benefit of section 382-B Cr.P.C.

Injured Noor Hyat alongwith LRs of the deceased have also filed the connected Cr.R No. 44-M/2021 against the judgment of the learned trial Court qua the quantum of sentences awarded to the appellant. Both the cases, being off-shoots of one and the same judgment, are decided through this single judgment.

2. Brief but relevant facts of the case, as per contents of *Murasila* drafted on 03.9.2017, are that deceased then injured Khaista Rehman reported to IHC Ziaullah (PW-2) at DHQ Hospital *Batkhela* to the effect that he was posted as lineman in village *Dheri* situated within the limits of Sub-Division *Khar;* that on the same day when he came home after repairing of a Transformer, the gate of his house was knocked in response of which he came out and saw that the present appellant, duly armed with pistol, was present there alongwith an unknown person who was unarmed. The appellant questioned him for interrupting supply of electricity to his house and brawled with him. During the fight, Noor Hayat (PW-8), who is nephew of the deceased, also came to the spot and was trying to separate them but the appellant started firing at them, as a result whereof Khaista

Rahman as well as Noor Hayat got hit and sustained injuries on their bodies. The occurrence was stated to have been witnessed by Mudasir (PW-9) and Waqar Ali (abandoned).

3. Report of the deceased then injured recorded in shape of *murasila*, was converted into formal F.I.R wherein the appellant and his co-accused were initially charged u/s 324/34 PPC. Later on, complainant succumbed to the injuries on 07.09.2017, therefore, section 302 was added in the FIR with further addition of section 337-F(ii) PPC qua the injuries sustained by Noor Hayat. Both the injured were initially attended by Dr. Atta Ullah Shah (PW-4) in DHQ hospital *Batkhela* who gave his opinion Ex.PW-4/1 wherein he observed that:

> Injured pt. Khaista Rahman and Noor Hayat are well oriented with time, place and person and the injured are able to give statement to police and he given statement to police in my presence.

Dr. Attaullah also examined injured Noor Hayat and found four firearm injuries on his body, the detail whereof as per report Ex.PW-4/2 is as under:

> 0.5 x 0.5 cm in anterolateral aspect of right leg. Entry wound.
>
> 0.5 x 0.5 cm in anterolateral aspect of right leg. Exit wound.
>
> Another wound 0.5 x 0.5 cm anterolateral aspect of right leg. Entry wound.
>
> Another wound 0.5 x 0.5 cm anterolateral aspect of right leg. Exit wound.
>
> The injured was referred to Peshawar for further management.

Complainant Khaista Rahman in injured condition was examined by Dr. Gul Rahman (PW-3) on 03.0.2017 at 10:55 P.M and gave his report Ex.PW-3/1, which reads as follows:

> Patient Khaista Rahman brought to the Emergency department at the mentioned time and date by the attendants, stable and oriented with history of gunshot (FAI) wearing blue color cloths.
>
> On examination there was a lesion of about 0.5 x 0.5 cm on the lateral lower side of left thigh with another wound of about 1x1 cm on the medial upper side of left thigh near scrotum crossing scrotum with the same characteristics of wound with another wound on the medial upper side of the right thigh measuring about 1x1 cm and a wound of about 1x1 cm on the upper lateral side of right thigh. There was no other mark on the borders of wound.
>
> Stitches were taken from the right lateral side wound of the right thigh. Tight compressive bandages were applied to the Edematoused scrotum and other wounds, initial treatment was given and patient immediately referred to the tertiary health care unit for investigation and management.

The injured complainant was also referred to LRH Peshawar but later on he died on 07.09.2017. Post-mortem on the dead body was conducted by Dr. Atta Ullah (PW-4). No wound was reported in Column Nos. II to IV except at Serial No. 13 of Column No. IV, the detail of which alongwith other relevant portion of the post-mortem report Ex.PW-4/3 is as under:

(I) **EXTERNAL APPEARANCE**:

Mark of ligature etc: Nil.

Condition of subject: Stout.

WOUNDS, BRUISES, POSITION, SIZE, NATURE.

Patient when received at emergency was already dead.

There were wounds (stitched) on the both lateral and medial sides of both thighs and scrotum. The clothes were embedded with blood.

Cause of death: Excessive bleeding from wounds due to FAI.

(13) **Organs of generation external and internal:** stitched wounds on the scrotum.

(V) MUSCLES, BONES, JOINTS:

Injury:

Wounds on both the thighs both aspects (lateral and medial) and scrotum.

(VI) REMARKS BY MEDICAL OFFICER.

FAI.

Blood vessels of thighs and scrotum damaged

Dangerous injuries.

Probable time that elapsed.

(a) Between injury and death:

03-09-2017 10:55 pm to 07-09-2017 07:15 am.

(b) Between death and Post-mortem: Approx: 20 Minutes.

PW-4 also endorsed death certificate of deceased Khaista Rahman which is available on record as Ex: PW4/4.

4. Appellant was arrested on the following day of the occurrence i.e., 04.09.2017 who lodged a cross report vide Daily Diary dated 04.09.2017 alleging therein that on 03.09.2017 at about 21:30 hours he came to village *Dherai* for receiving generator sent by his brother from Saudi Arabia through Cargo; mistakenly, he knocked the door of the house of Khaista Rahman instead of Sherin Zaman, in response whereof Khaista Rahman came out from his house and likewise on his call about six other persons armed with sticks, iron rods and pistol came there, as such, Khaista Rahman with the help of his other unknown companions started

beating him as result of which he sustained injuries on his head, forehead and also suffered on his body internally.

5. Name of the absconding co-accused became later on known as Sahib Zada alias Commando. After completion of investigation, challan was put in Court and formal charge was framed against the appellant but he did not plead guilty and opted to face the trial while co-accused Sahibzada was formally proceeded u/s 512 Cr.P.C with directions to prosecution to produce evidence in his absence. Prosecution produced and examined 10 PWs in support of its case and closed its evidence. After examination of the appellant u/s 342, Cr.P.C, the learned trial Court vide judgment dated 24.06.2019 convicted and sentenced him in the same manner as discussed earlier. Appellant challenged the judgment of learned trial Court before this Court through his earlier appeal Cr.A No. 305-M/2019 which was allowed vide judgment dated 10.02.2021 and the case was remanded to learned trial Court with directions to examine or re-examine all essential witnesses of the alleged cross version dated 04.09.2017 as Court witnesses who authored the report, medico-legal report of injured/appellant and bring any other relevant documents on the file of the present case through the authors of those documents deemed necessary by trial Court for just decision of the case.

6. On remand of the case, the learned trial Court recorded statements of 03 witnesses as CW-1 to CW-3 qua the DD dated 04.09.2017 and injuries sustained by accused by affording opportunity to both sides of cross-examination of the said witnesses. After recording additional statement of the appellant u/s 342, Cr.P.C. the learned trial Court found him guilty of the charge, hence, sentenced him through the impugned judgment in the same manner as in the first round, the detail of which has already been given in the earlier portion of this judgment. Hence, instant appeal and connected revision petition.

7. We have heard the arguments of learned counsel for the parties including the learned Assistant Advocate General on behalf of State and perused the record with their able assistance.

8. The case of prosecution against the present appellant is that he came to the house of deceased Khaista Rahman on 03.09.2017 at 22:30 hours and questioned him for disconnecting supply of electricity to the area where his house is situated, on which a fight took place between them during which nephew of the complainant namely Noor Hayat also came out of his house and tried to separate them but in the meanwhile the appellant fired at both of them with his pistol resulting into injuries on their bodies. The injuries

sustained by complaint Khaista Rahman proved fatal because of which he subsequently died on 07.03.2017. In order to prove the above allegations against the appellant, prosecution has relied upon dying declaration of the deceased then injured available on record in shape of *Murasila* Ex.PA, ocular account furnished by injured Noor Hayat (PW-8) and Mudassir Khan (PW-9); and circumstantial evidence comprising of medical evidence, site plan, incriminating recoveries including the crime weapon pistol and matching FSL report thereof with the two empties recovered from the spot.

9. First of all, we would resort to dying declaration of the deceased then injured incorporated in *Murasila*. Dying declaration was previously governed under Section 32 of the Evidence Act, 1972. In Qanun-e-Shahadat Order, 1984 the relevant provision thereof is Article 46, which provides that statement of a person who is dead is relevant if it relates to the circumstance which resulted in his death and is admissible in proceedings wherein cause of his death is a matter in issue. A dying declaration, being the last words of a dying person, is an exception to the hearsay rule, may be admitted as evidence in criminal law . The rationale is that someone, who is dying or believes death to be imminent, would have less incentive to fabricate testimony. No doubt

superior Courts have held that dying declaration is a weak type of evidence which requires deep scrutiny with great care and caution but on the other hand it is also a settled principle that a dying declaration can be considered as substantive piece of evidence if the Court is satisfied about its genuineness. Thus, dying declaration is required to be considered on case-to-case basis in view of the attending circumstances of each case and, if found genuine, may be relied upon against accused. The question that when can conviction of an accused be based on dying declaration of a dead person, the guiding principles in this regard have been laid down by Hon'ble Supreme Court from time to time in a number of cases, however, we would refer the case of "***Farman Ullah Vs. Qadeem Khan and another***" **(2001 SCMR 1474)**. The law enunciated in respect of dying declaration in the said judgement can be enumerated as under:

(i) **No specified forum is available before whom dying declaration is required to be made;**

(ii) **There is no bar that it cannot be made before a private person;**

(iii) **There is no legal requirement that the declaration must be read over or it must be signed by its maker;**

(iv) **It should be influence free;**

(vi) **In order to prove such declaration, the person by whom it was recorded should be examined;**

(vii) **Such declaration becomes substantive evidence when it is proved that it was made by the deceased;**

(viii) **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.

In the present case, the occurrence took place on 03.09.2017 at 22:30 hours which was reported on the same date at 22:50 hours, as such, the report was lodged with exciting promptitude and there was no occasion for the deceased then injured either for consultation and deliberation or to record his report under the influence of someone else for implicating the appellant in a false case, especially, when there was no previous blood feud or even a grudge between them. Since, the law neither requires a specified forum before which a dying declaration is to be made nor it is required that a dying declaration is to be recorded in a particular form, therefore, the dying declaration in the present case cannot be discarded for having been recorded by an official of the Levies in shape of *Murasila*. The question whether *Murasila*/dying declaration had been drafted on the report of deceased then injured Khaista Rahman, not only said report was seconded by injured eye-witness Noor Hayat but he also verified the contents of *Murasila* when appeared during the trial proceedings as PW-8. The injured complainant and injured Noor Hayat were well oriented in time place and person as spelt out from certificate Ex.PW-4/1 endorsed by Dr.

Attaullah (PW-4) who, in order to ascertain as to whether they were able to record statements, had examined both of them on their arrival to casualty of DHQ hospital *Batkhela*. Learned counsel for the appellant has objected the genuineness of the certificate Ex.PW-4/1 by contending that it was later on endorsed by doctor (PW-4) at the instance of I.O for strengthening the case against the appellant, however, this objection of the learned counsel has no force in it because the defence counsel has brought nothing on record from the mouth of PWs to create even a slightest doubt qua the genuineness of said certificate. Zia Ullah IHC (PW-2), who recorded dying declaration of deceased then injured in shape of *Murasila*, has verified the contents of said report by stating that he had read over the report to deceased then injured whereafter he signed the same in his presence. During cross-examination, the defence counsel confronted the author of *Murasila* with overwriting on the figure '9' in the date of occurrence i.e., 03.09.2017 and father's name of the present appellant which was missing in the report. Overwriting on the figure '9', representing the month, appears to have been made for correction of clerical mistake as other documents prepared by the same author on the same date bear no overwriting, therefore, genuineness of *Murasila*/dying declaration

cannot be questioned on the basis of the mentioned ground. Insofar as non-mentioning father's name of the appellant by deceased then injured and non-mentioning name of his co-accused or his physical features are concerned, these facts indicate spontaneous and straightforward mode of the dying declaration as well as absence of any mala fide on the part of injured complainant otherwise he would have named some other person instead of an unknown accused, hence, the objection of the learned counsel in this regard also holds no water. Since, prosecution has adequately discharged its burden in establishing that the dying declaration had been recorded by deceased then injured himself without being influenced or tutored besides the dying declaration has been verified by injured eye-witness/ seconder of *Murasila* namely Noor Hayat (PW-8) as well as by the author of dying declaration whose statements have not been damaged during their cross-examination, therefore, we feel no hesitation by considering dying declaration of the deceased as a substantive piece of evidence.

10. Another objection of the learned counsel for appellant was that the occurrence had taken place on 03.09.2017 while the deceased died on 07.09.2017, therefore, in view of the mentioned interval, death of the

deceased was not the direct consequence of the injuries attributed to the appellant. No doubt, the deceased had expired after four days of the occurrence as reflected from post-mortem report conducted by Dr. Attaullah (PW-4) as well as death certificate issued by him, however, he has reported two entry and two exit wounds on the body of deceased. As per pictorial annexed with the post-mortem report, both the entry wounds were caused by same bullet first hitting the lateral side of left thigh making its exit near the scrotum by causing damage thereto and made exit on the lateral side of right thigh in upward direction. It was brought during cross-examination of doctor (PW-4) that local anesthesia had been given to the injured complainant at Peshawar which not only suggests that deceased then injured was conscious even at the time of his arrival to Peshawar but the locale of injuries also shows that he was not under the immediate apprehension of death. In a similar situation in the case of ***"Sabir and others Vs. The State and others"*** **(2001 SCMR 94)**, wherein the deceased had died after five days of the occurrence, the Hon'ble apex Court held that the fact that deceased expired after five days further confirms that there was no eminent danger of his death and made the statement consciously. In the present case, when the deceased had died after four days of the occurrence, whether

his report can legitimately be treated as dying declaration or not, this question has been resolved by august Supreme Court of Pakistan in the case of ***"Wazir Gul Vs. The State"*** **(1975 SCMR 289)** by observing that:

> **In the first instance, the 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 the statutory provision any such extraneous limitation. In the absence of a statutory requirement in this regard, the last incriminating statement made by the deceased could be legitimately treated as dying declaration as was rightly done in the instant case. It was a quite unembellished and straightforward statement having a ring of truth.**

The record shows that after the occurrence, the deceased was taken to DHQ hospital *Batkhela* in injured condition where he was examined by Dr. Gul Rahman (PW-3) who, after applying tight compressive bandages to the wounds, referred him to LRH Peshawar for further management. After his death, he was brought back to *Batkhela* hospital on 07.09.2017 and post-mortem was conducted on the same day. The learned defence counsel has taxingly cross-examined the PWs especially Dr. Attaullah (PW-4) to shatter his opinion regarding death of the deceased as direct result of the injuries he had sustained in the occurrence and likewise the appellant has taken the plea in his statement u/s 342, Cr.P.C that death of the deceased had not occurred as consequence of the injuries he had sustained

in the occurrence. The above objections on behalf of defence are dealt with under the doctrine of *Novus Actus Interveniens*, a Latin phrase which literally means 'new act intervening'. According to explanation in **Advanced Law Lexicon (5th Edition) Volume 3**, the phrase means *there was not such a direct relationship between the act of negligence and the injury that the one could be treated as flowing directly from the other*. Thus, the doctrine mainly speaks about a new act or event intervening between the injury as result of initial act and death of the injured. In other words, an accused who caused injury to a person resulting into his death would be held responsible for murder of the latter but under the above principle, he cannot be held criminally liable for the consequences of a new event which intervened between the initial injury and death of the deceased. The **Supreme Court of Canada** in the case titled ***"Kenneth F. Salomon And Sterathal Katzaelson Montigny LLP Vs. Judith Matte-Thompson And 166376 Canada Inc."*** reported as **2019 SCMR 238** has laid down two conditions for applicability of the principle of *Novus Actus Interveniens* firstly, the causal link between the fault and the injury must be completely broken. Secondly, there must be a causal link between that new event and the injury. However, in the present case, neither the learned defence counsel was

able to bring on record something from PWs that the deceased had sustained any injury other than those reported by Dr. Gul Rahman in his medico-legal report Ex.PW-3/1 nor the medical evidence divulge that some event had happened to break the causal chain between the injuries sustained by deceased at the time of occurrence and his death. Thus, the two conditions mentioned above have not fulfilled, therefore, the doctrine of *Novus Actus Interveniens* cannot be applied to the present case, as such, the irresistible conclusion is that death of the deceased was the logic and direct consequence of the injuries he had sustained in the occurrence by firing of the appellant, which have been reported in medico-legal report in Ex.PW-3/1.

11. Learned counsel for the appellant, while placing reliance on the judgment of this Court in the case titled ***"Shah Rukh Vs. The State"*** **(2013 P Cr. L J 237)** raised another objection that dying declaration had not been put to the appellant during his examination u/s 342, Cr.P.C, therefore, the last incriminating statement of deceased cannot be used against him. No doubt, it is settled principle of law that if any incriminating piece of evidence is not put to an accused in his statement under section 342, Cr.P.C. for his explanation then the same cannot be used against him for his conviction, however, we do not find ourselves in

agreement with the contention of the learned counsel for the reason that dying declaration in the present case is available on record in shape of *Murasila* (Ex.PA) on the basis whereof FIR (Ex.PW-7/1) was chalked out against the appellant. Though the word 'dying declaration' has not been specifically mentioned in statement of the appellant u/s 342, Cr.P.C but he has duly been confronted with *Murasila* and FIR in question No.3, which is reproduced below for the sake of convenience.

سوال نمبر۳۔ یہ بات شہادت میں ہے کہ مجروح خائستہ رحمان نے مورخہ 03.09.2017 کو بوقت 22:50 بٹ خیلہ ہسپتال میں PW-2 ضیاء اللہ IHC کو وقوعہ کی رپورٹ کی جو اُس نے بشکل مراسلہ Ex.PA تحریر کرکے بغرض قائمی مقدمہ تھانہ خار ارسال کیا جس پر PW-7 محمد علی محرر نے Ex.PW7/1, FIR درج رجسٹر کی اور مجروح نور حیات نے بطور تصدیق مراسلہ پر دستخط ثبت کیا۔ تم اس بارے میں کیا کہتے ہو؟

جواب: یہ غلط ہے۔

In our view, when *Murasila* and FIR have been put to appellant during his examination u/s 342, Cr.P.C, non-specification of the term 'dying declaration' would not make any difference. Especially when the appellant has made only denial to above question. Thus, the dying declaration in the present case, being straightforward and confidence inspiring can safely be relied upon towards the guilt of appellant.

12. It is a well-settled principle of law, as observed by Hon'ble apex Court in the case of ***"Majeed V/s. The***

State" **(2010 SCMR 55)** that a dying declaration, if made even before a private person, is free from influence and the person before whom such dying declaration was made was examined then it becomes substantive piece of evidence and for that no corroboration is required and such declaration can be made basis of conviction, as such, in light of the rule laid down in the afore-referred judgment, corroboration of dying declaration is not a rule of law, but requirement of prudence. In the present case, besides the dying declaration, which by itself is sufficient to base conviction of the appellant, there is also unimpeached ocular account and circumstantial evidence of convincing nature on record through which prosecution has proved the guilt of appellant beyond shadow of reasonable doubt. Noor Hayat, who was victim of the same occurrence and verified the dying declaration by signing the same in hospital, appeared in the witness box as PW-8. In examination-in-chief, he reiterated the same facts as emerging from FIR. His presence on the spot at the time of occurrence cannot be doubted in view of firearm injuries on his person because of which he was shifted to DHQ hospital *Batkhela* for medical treatment alongwith the deceased at the same time though through a separate vehicle. He had attracted to the sport on hearing commotion in the street where he found the deceased and

appellant indulged in a fight with each other. He tried to separate them but the appellant opened firing resulting into injuries on him as well as deceased. During cross examination he stated that when he came out, the deceased and appellant were fighting with each other which continued for 4/5 minutes. Although I.O has not shown the house of the injured witness in the site plan, however, this omission on the part of I.O is not sufficient to damage the version of injured eye-witness when admittedly he is nephew of the deceased and his house is situated in the same vicinity as reflected from his answers to various questions put to him by defence counsel during his cross-examination. The stamps of firearm injuries on his person are sufficient to establish his presence on the spot and we have no reason to discredit his statement, being honest, straightforward, natural and having ring of truth. Reliance is placed on ***"Shah Nawaz and 02 others Vs. The State"*** reported as **2011 SCMR 713**.

13. Mudassir Khan (PW-9) was also examined as eye-witness of the occurrence. He is a natural eye-witness of the occurrence as he is son of the deceased while the occurrence had taken place in front of his house. The deceased then injured, at the time of lodging the report, duly mentioned him and his other son Waqar Ali (abandoned) as

eye-witnesses of the occurrence. Though his name has not been mentioned in medico-legal report of the deceased on the injury sheet but he stated in his cross-examination that he, Majid, Hssan Zaman, Waqar Ali and Noor Hayat had come to the spot and they had taken his father and uncle to hospital for medical treatment. He recorded his examination-in-chief in line of the dying declaration and statement of the injured eye-witness. When confronted during cross-examination with regard to firing and role of injured Noor Hayat, this witness confirmed that when he and Waqar Ali came out of the house, his uncle Noor Hayat was trying to release the deceased and appellant. Further stated that his uncle had managed to release the deceased from the appellant but thereafter the appellant fired at both of them. This witness and injured Noor Hayat were specifically asked regarding arrival of other people to the spot but PW Mudassir plainly stated during his cross-examination that they had shifted the injured persons to hospital after 3/4 minutes of the occurrence. Their ignorance about presence of other people on the spot after the occurrence is natural because they had shortly left the spot for shifting the injured persons to hospital as the circumstances demanded. Though the occurrence has taken place during nocturnal hours but I.O has taken into possession an energy saver bulb from the

gate of the deceased's house in front of which the occurrence had taken place. Hence, there was no apprehension of misidentification of the appellant by both the eye-witnesses. Though the defence counsel has put a suggestion to both the eye-witnesses that there was storm at the time of occurrence because of which electricity was disconnected, however, the occurrence had taken place because of disconnection of electricity to the house of appellant and for the said reason he had come to the house of deceased. Had the power shut down happened because of storm and heavy rain at the relevant time, the unfortunate incident would have never taken place as in that eventuality the appellant would have no justification to enter into a fight with the deceased. Both the eye-witnesses have supported each other on material particulars of the occurrence and they have remained firm and consistent during cross-examination. No doubt, they are closely related with the deceased besides PW Noor Hayat is victim of the same occurrence, but they cannot be disbelieved on the sole ground of their close relationship with the deceased when otherwise they have given a truthful account of the occurrence in a straightforward manner nor there was any previous enmity between the parties or other ulterior motive to charge the appellant in a false case. Reliance is placed on

"Sajid Mehmood Vs. The State" **(2022 SCMR 1882)** wherein the Hon'ble apex Court has held that:

> **As far as the question that the complainant was brother of the deceased, therefore, his testimony cannot be believed to sustain conviction of the appellant is concerned, it is by now a well-established principle of law that mere relationship of the prosecution witnesses with the deceased cannot be a ground to discard the testimony of such witnesses unless previous enmity or ill will is established on the record to falsely implicate the accused in the case.**

In view of the above settled principle, the ocular account of both the PWs is worth reliance irrespective of their close relationship with the deceased. It is not a rule of universal application that a disinterested or independent witness will always tell the whole truth and a related or interested witness will utter only lies before the Court. When the Court is satisfied that a witness, though related to deceased or interested in conviction of accused, has told the truth then his testimony should be accepted without any hesitation. As regards the objection of learned counsel for the appellant regarding non-association of inmates of the deceased's house and other independent people of the *muhalla*, since, prosecution has fully established the guilt of appellant beyond shadow of doubt through direct and circumstantial evidence, therefore, non-association of other inmates of the house of deceased or residents of the locality

with the process of investigation would not damage the prosecution case.

14. The version of deceased then injured in his dying declaration and ocular account is further corroborated by circumstantial evidence on record. Post-mortem report of the deceased and medico-legal report of the injured eye-witness are in line with the prosecution version. I.O has collected blood of the deceased and injured from the spot and secured their blood-stained garments as well as slippers of the deceased. The matching FSL report in this regard is available on record as Ex.PW-10/21. The crime weapon, a 30-bore pistol has been recovered on pointation of the appellant which has matched with the two crime empties recovered from the spot. Report of the Fire Arms Expert in this regard is Ex.PW-10/20. Objection of the learned counsel for the appellant that no private person was associated with the recovery, is having no force because the recovery was made from a stream, a non-residential area, therefore, in our view non-compliance of section 103, Cr.P.C is condonable in such situation. Reliance is placed on ***"Mir Muhammad V/s. The State"*** **(1995 SCMR 614),** wherein it was observed that:

> **"The plain reading of section 103, Cr.P.C. would show that the provisions of this section apply to a case where the Police conducts search of a house/place to**

> **recover an article for which search is to be made and not to a case where anything is to be discovered in consequence of the information given by or on the pointation of the accused. The recovery to be made on the pointation of the accused is relevant under Article 40 of the Qanun-e-Shahadat, 1984. The association of the two respectable inhabitants of the locality is not required in a case where the accused himself leads the Police to a particular place and gets the article recovered".**

Prosecution has discharged its onus in bringing home guilt of the appellant beyond shadow of doubt through direct as well as circumstantial evidence, therefore, he was rightly convicted by learned trial Court.

15. Learned counsel for the appellant also controverted the motive as well as the mode and manner of the occurrence. The evidence on record reflects that deceased was serving as lineman in WAPDA and appellant had come to his house at late evening time to question him for disconnecting electricity of his village *Jarbutt* and some other adjacent areas. Though specific evidence to this effect is not available on record but on the other hand the motive so set up by prosecution has not been challenged before the learned trial Court. Keeping in view the attending facts and circumstances of the present case especially the place and time of occurrence, the motive mentioned by deceased then injured in his dying declaration appeals to prudent mind. Even otherwise, the law is settled that motive is not the

requirement of law and conviction can be recorded even in the absence of motive. Reliance in this regard is placed on *"Mukhtar Ahmad and others Vs. The State"* **(PLD 2004 S.C 563)**. In another case titled ***"Hameed Khan alias Hameedai Vs. Ashraf Shah and another"*** **(2002 SCMR 1155)** the Hon'ble apex Court of Pakistan held that absence of motive or failure to prove the motive would not adversely affect the prosecution case if it has been proved by reliable evidence. Insofar as the mode and manner of the occurrence are concerned, the fight took place between the parties in front of the house of deceased. Identification of the appellant by deceased then injured and eye-witnesses cannot be questioned for the reasons that both the parties are residents of the same area. There was no previous enmity between the parties, as such, there was no need for the appellant to conceal his identity rather he had come to the house of deceased to interrogate him for disconnecting electricity of his village. I.O has taken into possession an energy saver bulb from the main gate of deceased's house in light of which the deceased and eye-witnesses had identified the appellant. All the events of the occurrence have been brought on the record in a natural manner and nothing is available on record to suggest fabrication or maneuvering of evidence by prosecution. Though there are some

contradictions in the statements of PWs but same can be ignored being minor in nature and not capable of having adverse bearing on the prosecution case when other overwhelming evidence is available on record against the appellant. Reliance is placed on ***"Zulfiqar Ahmad and another Vs. The State"*** **(2011 SCMR 492)** wherein it was held that minor contradictions do creep in with the passage of time and can be ignored.

16. Adverting to the defence version, while deciding earlier appeal of the appellant, this Court had taken notice of the cross report lodged by appellant through DD dated 04.09.2017 against the deceased and other unknown accused for causing him injury on his forehead. Since, the documents of the cross version had not been brought on the record through the respective authors, therefore, the case was remanded to the learned trial Court for doing the needful in accordance with law. During the post-remand proceedings, Abdul Kamal IHC was examined as CW-1 who arrested the appellant on 04.09.2017 in injured condition and produced him before Dr. Shafiq (CW-2) at 22:02 hours for medical examination who, after examining the appellant, recorded his opinion in his report (Ex.CW-2/1) on the injury sheet. Said report is as under:

> Patient Muqadar Khan ID 15402-0753309-1 s/o Mir Afzal brought by AHC Abdul Kamal at 10:02 P.M on

> 04.09.2017 vitally stable having 01 cm long laceration skin deep at forehead with two stitches and dressing done at Private Hospital.

During cross-examination he stated that the dressing and stitching of the wound had already been done in private hospital. Muharrir Sardar Ali was examined as CW-3 who had recorded report of the appellant through DD No. 9 dated 04.09.2017 (Ex. CW-3/2). When confronted with Q.1 in his statement u/s 342, Cr.P.C during post-remand proceedings, appellant stated that deceased had committed aggression because of which he had sustained injury on his forehead. The record reflects that appellant has adopted two distinct versions regarding the injury on his body. The first is emerging from cross-examination of his counsel upon the I.O to whom a suggestion was put that he had tortured the appellant during custody by causing injury on his forehead but during examination u/s 342, Cr.P.C, the appellant took another plea by attributing the injury to deceased blaming him for aggression. In light of the cross version and injury on the forehead of the appellant, his learned counsel contended that not only complainant has suppressed the injury of the appellant which creates a reasonable doubt in prudent mind qua the genuineness of the prosecution case but the appellant had acted in his self-defence, therefore, the learned trial Court has illegally

convicted him u/s 302(b) PPC instead of section 302(c). In support of his above contention, he placed reliance on ***"Muhammad Javed Vs. The State"*** **(2020 SCMR 2116)**, ***"Muhammad Ashraf alias Nikka Vs. The State"*** **(2022 SCMR 1328)**, ***"Abdur Rehman Vs. Sabir Hussain and others"*** **(2016 P Cr. L J 888)**, ***"Ibrahim and others Vs. The State*** **(2015 P Cr. L J 712)**, ***"Sultanat Khan Vs. The State and another"*** **(2018 P Cr. L J 1563)** and an unreported judgment of this Court dated 14.01.2021 in **Cr.A No. 302-M/2019** titled ***"Saif Ullah Vs. Wahid Shah and another"***. He further contended that though the appellant has not specifically taken the plea of self-defence during his examination u/s 342, Cr.P.C, however, the Court can consider the same if reflected from evidence on record. Before recording our findings on the above contention of the learned counsel, it is important to note that appellant has neither disowned the report recorded vide daily diary nor denied his presence on the spot at the time of occurrence, as such, the above facts are admitted on record in support of the prosecution version. Insofar as the submission of learned counsel for the appellant with regard to suppression of injury on the body of appellant is concerned, according to medico-legal report Ex.CW-2/1, appellant sustained a single lacerated skin deep wound of 01 cm in size on his forehead

for which he charged the deceased and 06 other unknown persons. The question that who was aggressor and who was aggressed upon, seems well explained in light of the attending circumstances of the present case. Admittedly, the occurrence took place in front of the house of deceased at night time which fact is sufficient to establish that appellant had come to the house of deceased at night time, in such situation it would be very hard to conclude that complainant and his companions were aggressors especially when two were injured from complainant side (the deceased and PW Noor Hayat) as result of firing of the appellant. Neither any firearm was recovered from deceased or his companions nor any empty, except the two of 30 bore which have matched with the pistol of appellant, was recovered from the spot. Even the I.O has not recovered the blood of appellant from the spot to corroborate his contention, therefore, it cannot be said with certainty as to whether the injury was self-inflicted or it was caused by the rival party. In the above stated attending facts and circumstances of the case, the alleged suppression of the injury sustained by appellant by complainant side would not damage the prosecution case. As regards the contention of learned counsel for the appellant that original record of the cross-version is missing and I.O had not investigated that case at all, it appears that appellant

has raised this objection for the first time before this Court as no application to this effect is available on the record on behalf of appellant before the learned trial Court.

17. Regarding the pleas of appellant with regard to self defence as well as his version that deceased had got hit by the firing of his own companions as emerging from his statement u/s 342, Cr.P.C., it is a well-celebrated principle of criminal administration of justice that initial burden is always on prosecution to prove the guilt of accused beyond shadow of reasonable doubt. In case of failure of prosecution in proving the guilt of accused, no burden would lie on accused to prove his defence plea, if any, however, when prosecution succeeds in discharging its onus of establishing the guilt of an accused through evidence then the accused is bound under Article 121 of Qanun-e-Shahdat Order, 1984 to prove his plea of defence. Guidance in this regard is sought from ***"Ali Ahmad and another Vs. The State and others"*** **(PLD 2020 S.C 201)** wherein it was held that burden shifted upon the accused under Art.121 of the Qanun-e-Shahadat, 1984 to prove his defence plea, only when a prima facie case was made out against him by the prosecution on the basis of its evidence. Further held that if the prosecution failed to prove its case against the accused, the question of shifting of burden on the accused did not

arise. In the present case, a specific plea of self defence is emerging from statement u/s 342, Cr.P.C of the appellant in support of which his learned counsel has advanced his arguments by placing reliance on various judgment of the Hon'ble apex Court as well as this Court. Although it is settled law that if the plea of self defence is not specifically taken by accused but the evidence on record suggests so, same may be deduced and considered in his favour, however, in the present case the situation is altogether different. We have already mentioned above that appellant has adopted two versions in respect of the injury on his person firstly; it was attributed to I.O with the allegation that he had caused the injury to appellant by subjecting him to torture during police custody by concealing his arrest on 03.09.2022 and secondly; he took another plea during his examination u/s 342, Cr.P.C by stating that the injury was caused to him by complainant side being aggressors. Hence, taking divergent pleas at the same time, the appellant himself is not consistent, therefore, it cannot be ascertained that which of the two versions of the appellant is correct. The burden was on appellant to prove his above version, however, neither he recorded his own statement on oath nor produced any witness in support of his above contention. Even he did not move any application for summoning the

doctor who had stitched his wound in a private clinic. The defence counsel has not put a single question to eye-witnesses regarding the injury on the body of appellant or with regard to the firing allegedly made upon the accused rather they were suggested that some unknown accused had made the firing which was specifically denied by both the eye-witnesses. In such situation, bald statement of the appellant would not benefit him nor on the basis thereof the prosecution evidence could be discarded. Reliance in this regard is placed on ***"Muhammad Arif Vs. The State"*** **(2008 Y L R 291 Karachi)** wherein it was observed that law required that if accused had a defence plea, same should have been put up to the witnesses in cross-examination and then put up the same at the time of recording the statement under S.342, Cr.P.C. The evidence brought forth by prosecution against the appellant is sufficient to prove the guilt of appellant beyond shadow of doubt; the appellant has admitted his presence on the spot by taking a specific plea in his defence but failed to prove the same in view of his burden under Article 121 of the Qanun-e-Shahdat Order, 1984, thus, there is even no reasonable possibility of defence plea being true. In almost similar situation in the case of ***"Muhammad Javed Vs. The State"*** **(2015 SCMR 864)**, the

Hon'ble Supreme Court maintained conviction of the accused by holding that:

> **According to the provisions of Article 121 of the Qanun-e-Shahadat Order, 1984 the onus to prove his plea of exercise of private defence was squarely upon the petitioner but he had utterly failed to discharge that onus inasmuch as he had neither made any statement on oath under section 340(2), Cr,P.C. nor had he produced any witness in his defence who could support the version of the incident advanced by him.**

The case law referred by learned counsel for the appellant cannot be applied to the present case in view of its peculiar and distinct facts and circumstances.

18. Prosecution has proved its case against the appellant beyond shadow of doubt through trustworthy and reliable direct and circumstantial evidence which has properly been appreciated by learned trial Court, hence, conviction of the appellant for murder of deceased and attempting at the life of injured Noor Hayat is not open to any exception. No doubt, the appellant was armed with pistol at the relevant time but in view of the motive mentioned by deceased in his dying declaration and in absence of previous enmity between the parties, it cannot be concluded that appellant had left his house with the intention to kill the deceased. One person has died in the occurrence by sustaining injuries though as a result of a single fire shot but another person was also wounded in the same

occurrence by sustaining two entry wounds on his body. In the afore-mentioned situation, neither we deem it just to award death penalty to appellant nor it would be a fair and just decision to convert conviction of the appellant from section 302(b) to 302(c) PPPC. Thus, the connected revision petition filed by injured and LRs of the deceased is devoid of any force.

19. For what has been discussed above, instant appeal as well as the connected Cr.R No. 44-M/2021, having no force, are accordingly dismissed, resultantly, conviction and sentences of the appellant recorded by learned trial Court in the impugned judgment are maintained.

Announced
Dt: 31.01.2023

JUDGE

JUDGE

Office
9/2/2023
WR