

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

Cr.A No. 183-M/2015

(1) Said Karam alias Ajarr s/o Yousuf Khan (Appellant)
Versus

(1) The State
(2) Sher Muhammad s/o Said Muhammad alias Sheikh
(Respondents)

Present:

Mr. Badi-uz-Zaman Khan, Advocate for the appellant.

Mr. Rafiq Ahmad, Asst: Advocate General for the State.

Mr. Aftab Khan, Advocate for the complainant/respondent No. 2.

Cr.R No. 39-M/2015

(1) Ghani Muhammad s/o Abdul Jalil
(2) Sher Muhammad s/o Said Muhammad alias Sheikh
(Petitioners)
Versus

(1) Said Karam alias Ajarr s/o Yousuf Khan
(2) Ibrahim s/o Said Karam alias Ajarr
(3) State through A.A.G.
(Respondents)

Present:

Mr. Aftab Khan, Advocate for the petitioners.

Mr. Rafiq Ahmad, Asst: Advocate General for the State.

Mr. Badi-uz-Zaman Khan, Advocate for the respondent/convict.

Date of hearing: **03.10.2018**

CONSOLIDATED
JUDGMENT

SYED ARSHAD ALI, J.- Through this single judgment, we intend to decide this criminal appeal bearing No. 183-M/2015 as well as

connected Cr.R bearing No. 39-M/2015 as both these matters emanate from one and the same judgment dated 07.07.2015 rendered by the learned Sessions Judge/ Zilla Qazi, Buner at Dagger, in case F.I.R No. 392 dated 21.06.2013 under sections 302, 34 of the Pakistan Penal Code, 1860 (“PPC”) read with section 13 of Pakistan Arms Ordinance, 1965 (“A.O”) registered at Police Station Nawagai, District Buner, whereby the appellant namely Said Karam alias Ajarr was convicted under section 302 (b) PPC and sentenced to life imprisonment (on two counts) as *Ta’zir* along with payment of compensation of Rs.1,000,000/- (rupees one million) payable to the legal heirs of both the deceased as per their respective Shari share under section 544-A, Code of Criminal Procedure, 1898 (“Cr.P.C”) or in default thereof he was ordered to undergo further six (6) months of simple imprisonment after completion of substantive sentence. The accused/appellant was further convicted under section 13 A.O. and



sentenced to three (3) years imprisonment with a fine of Rs. 3,000/- (rupees three thousand) or in default thereof shall further undergo one (1) month simple imprisonment. However, the accused/appellant was extended the benefit of section 382-B Cr.P.C.

2. The prosecution case is that on 21.06.2013 at 20:15 hours the then injured/complainant, now deceased Fayaz Muhammad, who at the relevant time was in his senses reported the matter to the local police in the emergency ward of Dagger hospital that on the day of occurrence a quarrel had taken place between his uncle namely Amir Mahmood and Said Karam alias Ajarr (accused/appellant), however, both of them were later calmed by the people of the locality. The complainant was on his way towards the house of his uncle namely Amir Mahmood to inquire about the dispute, when he reached near the house of one Israr, where he saw that his grandfather namely Abdul Jalil (deceased) and Said Karam alias



Ajarr were in a heated argument with each other. In the meanwhile, Said Karam alias Ajarr took out his pistol and fired at complainants' grandfather Abdul Jalil in order to commit his *Qatl-e-amd*, as a result of which he was hit and died at the spot. At that moment, Ibrahim son of Said Karam alias Ajarr (absconding accused) duly armed with pistol came there and started firing upon the complainant. Due to shots fired by the accused, the complainant was hit on different parts of his body which resulted in him sustaining seriously injuries. In the same breath the complainant also mentioned the motive behind the occurrence as prior to the occurrence accused Said Karam had hit the dog of his uncle Amir Mahmood by throwing a stone at it, which lead to the quarrel between them. In addition to the complainant the occurrence is stated to have been witnessed by Nazeer Gul son of Bacha Gul (PW-4) and Israr son of Amir Mahmood (PW-3).



3. After reducing the aforesaid statement of the complainant in form of a written report, Wakil Zada, ASI, PS Nawagai (PW-5), read over the said report to the complainant and explained the same to him. The complainant after admitting the report to be correct thumb impressed the same in token of its correctness. The dead body of the deceased namely Abdul Jalil was shifted to Nawagai hospital for medical examination. The said PW has also prepared an injury sheet of the injuries caused to the body of the injured Fayaz Muhammad (complainant) and handed over the same to doctor Naeem PW for further proceedings. The 'Murasila' Ex. PA/1 was sent to Police Station ("PS") Nawagai through constable Habibullah, No. 1046, which culminated into FIR *ibid* Ex. PW-11/5. Later, the complainant succumbed to the injuries and died on 26.6.2013.

4. Investigation of the case was entrusted to PW-14. The investigation officer at PS Nawagai submitted challan before the

court after completion of the investigation. Since the accused were avoiding their lawful arrest, therefore, proceedings under section 512 Cr.P.C were *initially* initiated against them. Thereafter, upon arrest of the accused/appellant supplementary challan was submitted against him in the Court of learned Sessions Judge/Zilla Qazi, Buner at Dagger. At the commencement of the trial the prosecution examined as many as 16 witnesses whose statements were recorded and placed on file. On closure of the prosecution evidence, accused was examined under section 342 Cr.P.C, wherein he denied the charges, posed innocence and stated to have been falsely implicated in the case.

5. On conclusion of the trial, the learned Sessions Judge/Zilla Qazi, Buner at Dagger, convicted and sentenced the accused/appellant, vide the judgment impugned herein, hence these connected matters.

6. We have heard arguments of the learned counsel for the accused/appellant, learned counsel for the complainant and learned Assistant Advocate General appearing on behalf of the State and gone through the record of the case with their able assistance.

7. The entire case of the prosecution hinges upon the dying declaration of the injured/complainant Fayaz Muhammad which was recorded in shape of '*Murasila*' followed by a FIR, statement of Wakil Zada, ASI, (PW-5) who has recorded the statement/dying declaration of the complainant and the testimony of Israr Mohammad (PW-3) and Nazir Gul (PW-4), who according to the statement/dying declaration of the complainant have witnessed the occurrence.

8. The foremost question for determination before us is the veracity of dying deceleration of the complainant *qua* its corroboration by the ocular evidence. According to the prosecution version as narrated in *Murasla* Ex PA/1, which was


later on termed as the dying declaration of the complainant, the time of occurrence was 18:15 hours whereas report of the complainant was recorded on 20:15 hours by PW-5 i.e. Wakil Zada, ASI, at Dagger hospital. The entire record is silent about the distance from the place of occurrence and Dagger hospital nor it could be established from the record that who had accompanied the complainant at the relevant time from the place of occurrence to the hospital. Even otherwise, the prosecution has recorded statements of 16 PWs but they did not utter a single word regarding transferring of the complainant in such a critical injured condition from the place of occurrence to Dagger hospital.

The close perusal of the contents of the *Murasila*, later termed as dying declaration, would show that the complainant had minutely and specifically narrated the entire incident and has stated that he had sustained serious injuries on different parts of his body because of the shots fired by absconding



accused Ibrahim whereas it was because of the firing by present accused/appellant Said Karam alias Ajarr that his grandfather Abdul Jalil (deceased) was injured and died at the spot. He has also stated that the said incident was also witnessed by two (2) eyewitnesses of the occurrence namely Nazir Gul and Israr Mohammad. We have to see as to whether despite sustaining such severe and serious injuries, the complainant was still able to narrate the incident with such a particularity and precision. In this regard, the injury sheet of the complainant Ex. PW-6/1 and the *postmortem* report of the deceased Ex. PW-10/1 are of paramount importance which show the following injuries on the body of the then injured now deceased.

Injury sheet:-

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- i) Entry wound below xipisternum-epigastrium, exit wound back of chest left side.
 - ii) Entry wound right groin. No exit wound.
 - iii) Entry wound left iliac fossa. No exit wound.
 - iv) Referred to LRH. Detailed *postmortem* report is attached. He expired in LRH on 25.6.2013.

Postmortem examination:-

- a) A healing stitched firearm wound on the back of left chest, 6cm from midline and 9 cm above costal margin.
- b) One surgically produce wound (drain) on left outer chest, 6 cm lateral nipple and 9 cm below axilla.
- c) A healing stretched firearm wound on front of left side of chest, 3 cm from midline and 3 cm above costal margin.
- d) A healing stitched firearm wound on front of left side of abdomen, 11 cm from midline and 2 cm below costal margin.
- e) One surgically produced wound (drain) on front of left lower abdomen, 12 cm from midline.
- f) One stitched laparotomy wound on midline on front of abdomen.

Remarks:

In opinion of the doctor, the deceased died due to injuries to left lung, liver spleen, diaphragm, stomach and small intestines due to fire am.

Dr. Naeem-ul-Haq, (PW-6) who furnished the medical evidence stated in his cross-examination that at the time of examination of the complainant blood was still oozing from the injuries present on his body. However, in the injury sheet Ex. PW-6/1, he has not expressed his opinion as to whether at the relevant time the complainant was conscious and well oriented to narrate the incident. It is also evident from the statement of PW-5 who had reduced into writing the

'Murasila'/statement of the complainant in shape of dying declaration that indeed he was the first person who had seen the complainant and recorded his statement and the injured/complainant was examined by the doctor after recording of his statement, therefore, it was incumbent upon the said doctor (PW-6) to have stated in the injury sheet of the injured/complainant (Ex. PW-6/1) about his physical condition as to whether he was conscious at the relevant time and was able to speak. Moreover, no time and date of the examination of the complainant were mentioned in the injury sheet (Ex. PW-6/1) by the doctor nor was it mentioned as to who had brought the injured to the hospital for medical examination. Although, on the record, the police had solicited on the same day the opinion of the doctor through an application (Ex. PW-5/1) and on the same application/request, the doctor had opined that "he was conscious, well oriented and was able to record his statement". For this certificate, the

said Dr. Naeem-ul-Haq (PW-6) was again re-examined, however, from the bare reading of the said certificate it shows that it was provided subsequent to the examination of the complainant. Moreover, in view of the certificate being furnished by the Dr. Naeem-ul-Haq, PW-6 with regard to physical condition of the then injured/complainant now deceased Fayaz Muhammad to narrate the incident with such a particularity despite presence of severe firearm injuries on his body and that too on his vital parts. In similar situation as emerged in the present case, it has been held by the august Supreme Court of Pakistan in case of *"Mst. Zahida Bibi vs the State"* reported as PLD 2006 Supreme Court 255 :-

"The medical evidence revealed that 70% body of the deceased was burnt and this is a matter of common sense that in such a precarious condition, it was not

*possible for the deceased to narrate
the occurrence in such detail."*

9. Another intriguing aspect of the case is that the doctor who is an independent witness does not support the statement of the complainant. The natural course of happening would be that in the hospital the said dying declaration must have been recorded in the presence of the doctor or other medical staff, who had provided the first aid to the complainant because it is not the prosecution case that when the complainant was brought to the hospital the medical team was not available to provide first aid to the complainant. Even otherwise it is hard to believe that in presence of such serious injuries on the body of the complainant he was able to narrate the prosecution case with such particularity of events that he even mentioned the names of the witnesses who despite his close relative did not bother to

accompany the complainant and the deceased to take them to hospital.

It is established principle of law that dying declaration by itself is a weaker type of evidence which needs corroboration through confidence inspiring evidence. In this regard, wisdom is derived from the case of “Tahir Khan vs the State” (2011 SCMR 646) in the following manner:-

“Mere dying declaration shrouded by mystery and fraught with so many infirmities is not enough to convict a person. Dying declaration is weaker type of evidence, which needs corroboration when fully corroborated by other reliable evidence. Facts and circumstances of each case have to be kept in view and also credibility, reliability and acceptability of such declaration by Court.”

5.11 The aforesaid law laid down by the august supreme court also reflects in the case of “Muhammad Ameer and another vs. Riyat Khan and others (2016 SCMR 1233).

Indeed relying solely on the dying declaration

without other corroborative evidence being in line and in support of the said dying declaration would be against the basic principles of the jurisprudence of criminal administration of justice.

10. Now moving on to the statements of the eye witnesses of the occurrence in support of the afore-said dying declaration of the complainant. Both the eyewitnesses are not only closely related to the complainant but highly interested, besides being the chance witnesses. The fact that the testimony of chance as well as interested witnesses can be taken into account provided the same are confidence inspiring, steadfast and free from any kind of contradiction. Israr Mohammad (PW-3) is the son of Amir Muhammad and it is stated in the *Murasila* that earlier the said Amir Muhammad had altercated with the accused/appellant Said Karam alias Ajarr and later the accused/appellant had also exchanged heated words with the deceased Abdul Jalil, His close relations with the

deceased is admitted by him in his cross examination. However, the conduct exhibited by him soon after the occurrence is very unusual which creates serious doubts regarding his presence on the scene of occurrence. Despite the fact that it is stated that he had witnessed the occurrence he neither accompanied the deceased (Abdul Jalil) nor the complainant to the hospital. He has affirmed in his cross examination that "*I did not accompany the deceased and the injured to the hospital. Nazir Muhammad also did not accompany with them to the hospital. Both of us remained on spot and then went to our houses.*" Even, this PW further admitted in his cross-examination that he did not participate in the funeral of the deceased and he spent the entire day in his house. It is also in the evidence of the said PW that he was working as labourer at Rawalpindi. He has also made dishonest improvement in his statement regarding material facts.

Moving forward to the testimony of the other eyewitness Nazir Gul (PW-4), the said witness is the son-in-law of the deceased Abdul Jalil and despite the fact that he had allegedly seen the occurrence but neither he accompanied the deceased to the hospital nor the complainant and they (deceased and complainant) both were left at the mercy of others to take them to the hospital.

11. Another damaging factor for the prosecution case is change of stance from their statement recorded under section 164 Cr.PC followed by their initial court statement recorded under section 512 CR.PC where both, the eyewitnesses have stated that on the day of occurrence the police had come to the spot and had taken the dead bodies of the deceased along with blood stained earth coupled with the fact that in their presence the police had also taken pictures of the crime venue. However, during court statements, both the eyewitnesses have made considerable improvements in their testimony whereby a

different story was narrated. These material contradictions and improvements coupled with unnatural conduct of the alleged eyewitnesses are sufficient to take their testimony out of consideration. Indeed it is evident from their statement that both the PWs are working for gain at the town other than where the occurrence has taken place therefore they happen to be the chance witnesses. Hence it was incumbent upon them to have established the reasons for their presence with supportive evidence. In this regard reliance is placed on the case of "Mst. Rukhsana Begum and others vs. Sajjad and others" (2017 SCMR 596) wherein it has been held:-

"Chance witness was one who, in the normal course was not supposed to be present on the crime spot unless he offered cogent, convincing and believable explanation, justifying his presence there."

And regarding their testimony which is based on improvements, the august Supreme Court in similar circumstances has discarded the

statement of such witnesses. The Hounorable Supreme Court of Pakistan in case **“Muhammad Mansha vs. The State”** (2018 SCMR 772) has held that it is unsafe to rely on the statement of such witnesses who had made dishonest improvements in their statements.

12. The upshot of the afore-said discourse is that the entire prosecution evidence in respect of guilt of the accused/appellant is shrouded in mystery and the true facts have been concealed and it also discerns from record that the complainant was accompanied by number of his co-villagers/ relatives at the time of recording of his statement at Dagger hospital but for reasons best known to prosecution their statements were not recorded, therefore, the possibility cannot be ruled out that the name of accused/appellant might have been provided to Wakil Zada, ASI, (PW-5) by the said relatives of the deceased.

13. It is also on the record that the civil hospital at Nawagai is at a distance of two (2) kilometers from the place of occurrence and the deceased was initially taken to that hospital, therefore, the possibility that the complainant was also firstly taken to the said civil hospital and then to Dagger hospital cannot be ruled out because the record is completely silent as to who had taken the deceased and complainant to the hospital. In the meantime, there was enough opportunity for the relatives of the deceased/complainant to deliberate and consult with each other in order to incriminate the present accused/appellant.

14. We are also conscious of the fact that the accused/appellant remained absconder for more than 7 months. However, by know it is settled law that such abscondance could not be made sole basis of conviction of accused when the other prosecution evidence is doubtful and riddled with contradiction. Guidance in this regard is taken from the

judgment of the apex court passed in Muhammad Sadiq versus the State (2017 SCMR 144). In support of the same ratio, reliance is further placed on the case of "Rohtas Khan vs the State" reported as 2010 SCMR 566", wherein it has been held:-

"Abscondence of accused can never remedy the defects in the prosecution case".

In the above backdrop and after reappraisal of entire evidence, this Court is of the firm view that the prosecution case against the accused/appellant has not been proved beyond any reasonable doubt and the judgment of learned trial Court is based on wrong appreciation of evidence. Hence, we accept this appeal and set-aside the impugned judgment rendered by the learned trial Court. Therefore, the accused/appellant is acquitted of the charges leveled against him. He is in custody and be set free if not required in any other case.

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

16. Likewise, the connected criminal revision bearing No. 39-M of 2015 preferred by legal heirs of both the deceased/petitioners having become infructuous is hereby dismissed.

Announced
03.10.2018


JUDGE


JUDGE

Office
24/10/2018
W/R