JUDGMENT SHEET
PESHAWAR HIGH COURT,PESHAWAR
JUDICIAL DEPARTMENT)

Criminal Appeal No.476-P of 2012.

Riaz……Versus……..The State.

J U D G M E N T.

Date of hearing 31st March 2015.

Appellant(s) by Mr. Jalal ud Din Akbar Azam (Gara), advocate.

Complainant by Ishtiaq Ibrahim, advocate & Rab Nawaz Khan AAG.

WAQAR AHMAD SETH, J:- *Riaz appellant has, through the instant appeal, challenged his conviction and sentence awarded by the learned Additional Sessions Judge-III,Swabi vide judgment dated 10/10/2012, whereby he was found guilty for the murder of Suhail Shah deceased. The appellant has been convicted under section 302(b) PPC and sentenced to imprisonment for life in case FIR No.599 dated 09/07/2004 under section 302/324/34 PPC registered at Police Station, Kalu Khan Swabi.*

2- Precisely stating facts of the case as disclosed by the prosecution before the trial Court are that on 09/07/2004 at 19.40 hours complainant Sohail Shah then injured and in conscious condition made a report to the police at Civil Hospital, Kalu Khan, to the effect that four days prior to the occurrence, an altercation took place

with accused Mujahid, Abid Khan, Ijaz and Farman Said over playing a cricket and on the day of occurrence he alongwith his brother Fawad Shah and Samiullah son of Bacha Khan had gone to playground for playing cricket, meanwhile accused Mujahid, Abbas Khan, Ijaz and Farman Said duly armed with deadly weapons came there and started firing as a result of which the complainant sustained injuries while his other companions escaped unhurt. The complainant succumbed to his injuries in the Lady Reading Hospital, Peshawar at night time. After the commission of offence the accused decamped from the spot.

3- The above report of the complainant then injured was recorded by Afsar Said SI (P.W.3) in the shape of Murasila Ex.PA/1 in presence of his brother Fawad Ali Shah which was read over to him who after admitting the same to be correct thumb impressed the same. The report was also signed by Fawad Ali Shah as verifier. P.W.3 also prepared injury sheet Ex.PW2/2 of the injured Sohail and sent the Murasila to the Police Station for registration of the case. The aforesaid report was also verified by the concerned doctor.

4- The first to surrender was Farman Said co-accused of the appellant who was arrested in the case on 26/07/2004. He was tried in the Court of learned

Additional Sessions Judge-III,Swabi and on conclusion of trial, he was acquitted from the charges levelled against him vide judgment dated 16/09/2006.

4- Subsequently, the appellant Riaz was arrested in the case and supplementary challan was submitted before the trial Court where on 21/07/2011 he was formally charged to which he pleaded not guilty and claim trial. In order to prove its case the prosecution examined as many as thirteen witnesses. Statement of the convict-appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegations and professed his innocence. He however, neither wished to be examined on oath as his own witness under section 340(2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, learned trial Court, after hearing both the sides, convicted and sentenced the appellant, as mentioned above. Hence, the instant appeal.

5- We have gone through the record carefully and considered the arguments advanced by the learned counsel for the parties.

6- The record reveals that Suhail Shah having been injured was taken to the Hospital where he lodged the report in the Casualty. Since he died, this report was treated as dying declaration. The prosecution besides relying on this piece of evidence, also examined Syed

Fawad Ali Shah brother (P.W.10) and Samiullah maternal cousin (P.W.11) of the deceased, then injured, who according to the dying declaration, happened to be eye witnesses of this incident. Thus the prosecution case primarily rest on the dying declaration of the deceased and the ocular account of the incident furnished by P.Ws.10 & 11. There can be no cavil with the proposition that the statement of the deceased in the form of an F.I.R. can be treated as a dying declaration which itself is good enough under Article 46 of Qanun-e-Shahadat Order, 1984 for sustaining conviction on a capital charge. But for believing dying declaration and convicting a person on its basis, the following essential conditions must be established by the prosecution:-

(i) That dying man was in full senses, conscious and alert to the surrounding, was fully oriented in space and time and was able to make a coherent speech.

(ii) That the dying declaration otherwise rings true and is sound in substance to be relied upon.

(iii) That it is free from promptness given by the outside quarter.

(iv) That Doctor present at the occasion shall give a fitness certificate about the condition of the dying man.

7- Keeping in view the above principles in mind, it is to be seen that whether the maker of the statement Ex.PA/1

was in a fit condition to make a statement. Afsar Said Khan Sub Inspector, who recorded the report of the deceased then injured in the shape of Murasila Ex.PA/1 was examined as P.W.3. He has stated that on 09/07/2004 at 1940 hours Suhail Shah son of Hidyat Bacha resident of Ismaila in full senses reported the matter to him in injured condition which he recorded in the shape of Murasila Ex.PA which was read over and explained to him and after admitting the same to be correct he thumb impressed the same. He further stated that the report of the injured was recorded in the presence of his brother Fawad Ali Shah who confirmed it and also signed it. The report of the complainant/injured was also verified by the concerned doctor. He prepared the injury sheet Ex.PW2/2 of the injured complainant and referred him for medicolegal examination to the doctor through Constable Saqib Shah. In his cross examination this witness had admitted some overwriting in the Murasila regarding time of report. He had not inquired about the literacy of the complainant. The signature of the doctor was obtained on the Murasila after about fifteen minutes of recording the same. He was in the Police Station when asked by the Moharrir to proceed to the hospital where according to him an injured had taken. After recording the report and obtaining thumb impression

of the complainant and signature of Fawad Ali Shah thereon he prepared the injury sheet. There is nothing in his statement that he obtained any fitness certificate from the doctor about the condition of the dying man. Dr.Gul Muhammad Khan, who examined the deceased then injured was examined as P.W.2. He stated that he examined the patient at 0730 PM on 09/07/2004 and prepared medicolegal report Ex.PW2/1. It means that the deceased then injured was examined by the Doctor before making the report, which was drafted by P.W.3 at 19.40 hours. In his cross examination he stated that he had correctly noted the time of arrival of victim as 07.30 PM in the MLR and same is the time of examination of the injured. His signature was obtained by the police on the report of the injured. He had not specifically noted the condition of injured being dangerous to life by then. He further deposed that duration between the death and post mortem examination as assessed by him approximately is within 4 to 5 hours which show the time of death between 08.15 and 09.15 PM keeping in view the time of PM examination. The prosecution has failed to examine/produce the Doctor who examined the deceased then injured in the Lady Reading Hospital, Peshawar. It is pertinent to mention here that the said Doctor namely Ihsanullah who examined the deceased then injured in

the Lady Reading Hospital, Peshawar was examined as P.W.13 in the earlier trial of the acquitted accused wherein he stated that he attended the injured Sohail at 1020 A.M. on 09/07/2004 who expired at 1030 A.M. In the face of this medical evidence it was the duty of the police official concerned to have obtained the certificate from the Doctor before recording the statement of the injured that he was in fit condition to give statement. Such certificate was not obtained and no reasonable explanation for this omission was given by the police official concerned. In the circumstances fitness of injured to make a statement Ex.PA remained doubtful. Reliance in this respect is made to ***(1983 P.Cr.L.J. 2075) and (1989 P.Cr.L.J.1).***

8- It is universal principle of criminal jurisprudence that dying declaration itself is not strong evidence being not tested by way of cross-examination. The only reason for accepting the same is the belief phenomenon of the Court of law that a person apprehending death due to injury, caused to him is ordinarily not expected to speak a falsehood. To believe or disbelieve a dying declaration, thus, is left to the ordinary human judgment. However, the Courts always insist upon strong, independent and reliable corroborative evidence for the sake of dispensation of justice. As it is repeatedly held by the august Supreme Court that relying blindly and without

proper scrutiny on such a statement, would be no less dangerous approach on the part of the Courts of law. Reference is made to ***"Muhammad Yaseen…Vs….The State (1972 S C M R 303).*** *A rule of caution was also laid down by the Hon'ble Supreme Court in case of* ***"Tawab Khan and another….Vs….The State (PLD 1970 Supreme Court 13). Reference is also made to (2011 S C M R 464) wherein the Hon'ble Judge while dealing with similar situation observed as under:-***

> ***"Mere Dying Declaration shrouded by mystery and fraught with so may 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".***

9- From the perusal of the impugned judgment of the trial Court, we came to the conclusion that the learned trial Judge has not properly appreciated and scrutinized the evidence produced on the record. It is based on misreading and non-reading of evidence and also on surmises and conjectures. The prosecution could not prove this material piece of evidence.

10- The next piece of evidence relied upon by the prosecution is ocular account furnished by Syed Fawad

Ali Shah (P.W.10) and Samiullah (P.W.11). Both are brother and maternal cousin of the deceased, thus closely related inter se. It is well settled principle of criminal justice that in case where the eye witnesses are closely related and inimical towards the accused in that eventuality intrinsic worth of the testimony of those witnesses is to be assessed/seen whether they are truthful witnesses and their presence at the spot at the relevant time of occurrence is established and their testimony would require strong corroboration from other reliable circumstantial evidence on record. Syed Fawad Ali Shah while appearing in the witness box as PW-10 has narrated the same story which was put forward by Sohail Shah deceased then injured in the Murasila Ex.PA/1. Samiullah appeared as PW-11 has also supported Syed Fawad Ali Shah (P.W.10) in the examination-in-chief of his statement. During the cross examination Syed Fawad Ali Shah (P.W.10) had deposed that he signed the report at about 7.30 or 7.40 PM and his statement was recorded by the police at 9.30 or 10.00 PM and he do not know ASI Afsar Said Khan. He further deposed that on the day of occurrence only the children were playing cricket at the relevant time while they were simply sitting. He had not produced any cricket bat, ball or wicket to the I.O. He had not stated in

police statement that his brother Suhail Shah made report to the police. He had not counted the number of fire shots opened at them. He was fired at from a distance of 15/20 paces. Shohail Shah had died in Peshawar, however, he was not accompanying him at that time. His injured brother had not narrated the occurrence to his brother Fayyaz Ali and other persons attracted to the spot. Fayaz Ali and other Mohalladars reached the spot after 5/10 minutes of the occurrence. Samiullah appeared as P.W.11 who stated that he came behind the deceased Suhail Shah and P.W.Fawad and went to cricket ground in routine at about 6.15 or 6.30 PM where the accused party came there armed with Kalashnikovs and pistol and opened firing at them as a result of which Suhail Shah was hit while they escaped unhurt and the accused decamped from the spot. The deceased then injured was shifted to CH Kalu Khan In his cross examination he deposed that the house of the deceased may be at a distance of 150 meters from the spot. He only remember Sajjad Ali Shah who put the injured on cot and none else. The injured had not narrated the occurrence to the persons attracted to the spot after the occurrence. The injured also did not talk to him. They used to go to the playground for practicing cricket and for that practice six persons used to

participate on either side. He had not shown any plying instrument to the IO during spot inspection. He had not accompanied the injured to the hospital. He cannot give the number of fire shots fired by the accused however, many shots were fired. Hence, the above glaring contradiction in their statements is sufficient to discard their testimony and to brush it aside because it is by now well settled proposition of law that single glaring contradiction in between the statement of the eye witnesses is sufficient to cast doubt on the veracity of their testimony and render it unbelievable. Moreover, in the Murasila Ex.PA/1 the deceased then injured has shown the time of occurrence as 18.30 (6.30) hours which was reported by him at 19.40 (7.40) hours while time of examination of the injured by the doctor has been shown as 7.30 PM. There is also delay of one hour and ten minutes in lodging of the report for which no plausible and convincing explanation has been furnished by both the alleged eye witnesses. Their presence on the spot at the time of occurrence and telling truth regarding the occurrence has been held by us in the earlier paragraph to be doubtful hence, this inordinate delay is also fatal to prosecution because place of occurrence is not situated in far flung area and it also casts doubt on the prosecution case and presence of the

witnesses on the spot at the time of occurrence and renders the authenticity of the contents of report shaky. Had they been present with deceased at the time of occurrence on the spot then why such inordinate delay took place in shifting the deceased then injured to hospital and moreover why they were spared by the accused two in number armed with firearms as per story of the prosecution. None of the two PWs have sustained any scratch what to say about any firearm injury, despite that they were at the mercy of the accused having automatic weapons which eject number of shots in seconds. It is not the case of the prosecution that the PWs took shelter somewhere at the time of incident. It does not appeal to a prudent mind that the assailants who are mentally and physically well prepared to take the two brothers and cousin, would spare the other brother who is at their mercy or to spare their other relative, so as to stand eyewitness against them. In view of the above discussion we have reached to an irresistible conclusion that the statements of both the eye witnesses are suffering from material contradictions, discrepancies and deliberate dishonest improvements, making their presence on the spot highly doubtful, therefore, we disbelieve their testimony which cannot be relied upon.

11- It is pertinent to mention here that earlier Farman Said co-accused of the appellant was tried by the learned Additional Sessions Judge-III, Swabi and after conclusion of the trial, he was acquitted from the charges levelled against him vide judgment dated 16/09/2006 against which no appeal either by the State or by the complainant party has been filed and in the instant trial the same evidence has been produced by the prosecution which was produced in the earlier trial. It is settled principle of criminal jurisprudence that when a competent Court has not believed the evidence produced by the prosecution in convicting an accused, then the same evidence would thus not be considered sufficient to convict the other co-accused in the case, more so, for a capital charge.

12- No doubt, proceedings under section 512 Cr.P.C. were initiated and completed against the appellant, however, he has denied his abscondance in his statement under section 342 Cr.P.C. There is no cavil to the proposition, that abscondance may constitute a corroborative evidence against a person accused for an offence. However, when there is no direct evidence against an accused or the evidence produced is not reliable or trustworthy to convict a person for a capital charge, then abscondance, even if for a prolonged

period, would be of no legal avail to the prosecution's case. Reliance may be sought from ***"Siraj Din….Vs…Vs…Kala (PLD 1964 Supreme Court 26) and Taj Muhammad….Vs…Resham Khan (1986 S C M R 823). Sardar Khan….Vs…The State (1998 S C M R 1823 and Muhammad Khan…Vs….The State (1999 S C M R 1220).***

13- In the circumstances, this Court finds that the case of the present appellant is not distinguishable from that of the acquitted co-accused Farman Said, therefore, his conviction based on the insufficient evidence cannot legally stand the test of safe administration of criminal justice.

14- In the wake of the aforesaid discussion, we are of the considered view that the prosecution has failed to establish its charge against the appellant beyond reasonable shadow of doubt and the trial Court has not properly appreciated the facts and circumstances brought on record and the evidence on file while convicting him. Thus the impugned judgment being based on mis-reading and non-reading of evidence in its true perspective is not sustainable in the eye of law and liable to be set aside. Consequently, we while extending the benefit of doubt to appellant Riaz, accept this appeal, set aside his conviction & sentence awarded to him

through impugned judgment dated 10/10/2012 by the learned Additional Sessions Judge-III, Swabi and acquit him from the charge levelled against him He be set at liberty forthwith if not required to be detained in any other case. However, the findings/observations recorded above shall have no bearing upon the case of the absconding accused who have been declared proclaimed offender by the trial Court and they shall be tried independently after their arrest and their case shall be disposed of on its own merits after their arrest.

ANNOUNCED.
Dated: 31/03/2015.

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