Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr. A No.337-B of 2019.
Lutf-ur-Rehman & another
Vs.
The State etc

JUDGMENT

For Appellants: ***Mr. Sultan Mehmood Khan, Advocate.***

For State: ***Mr. Saif-ur-Rehman Khattak, Addl: A.G.***

For Respondents: ***Mr. Anwar Hussain, Advocates.***

Date of hearing: 09.02.2022

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SAHIBZADA ASADULLAH, J.- This judgment shall also dispose of the connected Cr.A. No.360-B of 2019 titled Mst. Moi Gula Vs. Arsala Khan etc' and Cr.R. No.65-B of 2019 titled 'Mst. Moi Gula Vs. Shams-ur-Rehman etc' as all the three matters are the outcome of one and the same judgement dated 31.10.2019, rendered by learned Additional Sessions Judge, Karak at Takht-e-Nasrati, whereby the appellants Lutf-ur-Rehman and Shams-ur-Rehman were convicted under Section 302(b) PPC and sentenced to undergo imprisonment for life with compensation of Rs.2,00,000/- each to be paid to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. or in default thereof to suffer six months simple imprisonment. Benefit of Section 382-B, Cr.P.C. was extended to both the

convicts/appellants. Vide the same judgment, the co-accused (respondents in the connected Cr.A. No.360-B/2019) were acquitted of the charges levelled against them.

2. Brief facts of the case as divulged from the FIR, lodged on the basis of Madd No.13 dated 15.12.2012, are that on the eventful day, he alongwith Muhammad Islam son of Sakhi-ur-Rehman and his mother Mst. Moi Gula was busy in cutting Sarkanda plants in his fields situated within the limits of Zarkhan Kalla near Indus Highway, when at about 10:30 hours, accused Saqib, Imdad Ullah, Shams-ur-Rehman and Lutf-ur-Rehman, came there and forbade them from cutting the Sarkanda plants and on refusal he was assaulted with hoes/Ganti; that accused Shams-ur-Rehman hit him with his hoe on his head, while accused Lutf-ur-Rehman hit him with his Ganti on his leg, whereas accused Saqib and Imdad were administering fists and sticks blows, as a result of which he fell to the ground; that in the meanwhile, accused Muhammad Jamal, duly armed came there, asked the co-accused to get aside and that today he is going to finish him; that Naheed-ur-Rehman and Raza Khan also reached there; that accused Muhammad Jamal opened fire at all of them with the intention to kill them, but luckily they escaped unhurt, all this happened on the instigation of accused Arsala Khan. Besides the complainant, the

occurrence was stated to be witnessed by Muhammad Islam, Mst. Moi Gula, Naheed-ur-Rehman and Raza Khan. Motive for the offence was stated to be a dispute over landed property. He charged the accused for commission of the offence. Subsequently, the complainant succumbed to his injuries in the hospital, therefore, Section 302 PPC was inserted in the FIR.

3. After completion of investigation, complete challan was submitted against the accused before the trial Court, where at the commencement of trial, the prosecution produced and examined as many as fifteen witnesses, while Dr. Sadeeq Ullah and Naeem Ullah S.I. were examined as CW-1 and CW-2, respectively. On conclusion of the prosecution evidence, the accused were examined under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they opted to be examined on oath as provided under section 340(2) Cr.P.C, nor produced defence evidence. After hearing arguments, the learned trial Court vide the impugned judgment dated 31.10.2019, convicted the accused/appellants and sentenced them, as mentioned above, whereas the co-accused were acquitted from the charges. Hence, the instant criminal appeal as well as the connected criminal appeal against acquittal of the co-accused and criminal revision for enhancement of sentence awarded to the convicts/appellants.

4. We have heard learned counsel for the appellants, the learned A.A.G for the State, assisted by learned counsel for the complainant at length and with their valuable assistance, the record was gone through.

5. It was on the day of incident i.e. 15.12.2012, that the deceased alongwith the eye-witnesses visited the spot field to cut shrubs locally known as Sarkanda, while busy in cutting that in the meanwhile, the appellants along with co-accused attracted to the spot and forbade them to cut the plants. When the deceased refused to obey, the accused belaboured him with fists and stick blows, whereas the convict/appellant Lutf-ur-Rehman administered a blow with the hard side of a Ghanti (an agricultural instrument) in his possession which landed on his left foot, whereas from the Kahi (an agricultural instrument) blow of the convict accused Shams-ur-Rehman, he received a lacerated wound measuring 5 c.m in size on his scalp. He further disclosed in his report that co-accused Muhammad Jamal after reaching to the spot fired at the witnesses and the deceased but they luckily escaped unhurt. The report further tells that besides the eye-witnesses, some others, namely, Naveed ur Rehman and Muhammad Raza, also witnessed the incident, who were not produced. Soon after receiving injuries the deceased then injured was shifted to the civil hospital Takht-e-Nasrati for treatment.

On arrival to the hospital the matter was reported in the shape of daily diary No.13, duly endorsed by the deceased then injured, whereas at the same time the doctor examined the injured and prepared his medico-legal certificate, which shows an injury on right side of scalp 5 c.m in size caused with sharp weapon and also swelling on his left leg. Keeping in view the uncertain character of the injuries caused, F.I.R could not be registered, as by then the exact nature of the injuries was not known. The injured after receiving first aid was referred to KDA hospital Karak, for further treatment. In KDA Hospital Karak specialized treatment was given and on X-ray fracture was detected. After getting a sigh of relief the deceased then injured was referred to Hayatabad Medical Complex Peshawar, where he was operated for his leg and after remaining hospitalized for few days was discharged from the hospital.

6. After spending few days at home, his condition deteriorated and at last he lost his battle between life and death, and on his death the F.I.R was chalked out under sections 302/ 324/334/337-F(vi)/109/148/149 PPC, whereafter, the injury sheet was prepared and also the inquest report. Besides the postmortem examination Standing Medical Board was constituted to ascertain the cause of his death, and after thorough examination the board reached to the following conclusion:

> "He had fracture (Lt) Tibia & Fibula, for which he was operated in Hayatabad Medical Complex Peshawar on 21.12.2012. He suddenly collapsed & died on 01.01.2013. Standing Medical Board DHQ Hospital Karak carried the postmortem examination on the request of CMO Type-C Hospital Takhtin Nasrati Karak in his presence and also in the presence of EDO Health Karak Chairman Standing Medical Board (MS) Karak.
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> A huge clot of blood about 10 cm in size was recovered from the pulmonary trunk of dead body, suggesting & clearing cause of death".

7. The convicts/appellants alongwith their co-accused faced the trial which ended in conviction of the appellants and acquittal of the co-accused. Though, the learned trial Court did its best to reappraise the evidence and to see the involvement of the appellants and others in light of the collected and produced evidence, which ultimately led to the conviction of the appellants and acquittal of the co-accused. While going through the impugned judgment, we observed hesitation on part of the learned trial Judge regarding accuracy of the exact section of law, to be more specific, the learned trial Court despite efforts could not resolve the mystery created and fell into error in exercising the easiest choice of awarding life imprisonment under section 302(b) P.P.C. It is his lack of decision which keeps us on guard with an urge to reassess the already assessed evidence. We do not blame the learned trial Judge, who

convicted the appellants, rather he fell a prey to the mystery created by the attending circumstances of the case. We deem it appropriate to apply extra care to resolve as to whether the awarded sentence meets the situation and that the appellants fully deserved the treatment, and as such we feel it essential to touch the undiscovered aspects of the case. The atmosphere of the case has put us on caution to walk with care and to untwist the twists, as by doing so, miscarriage of justice could be avoided.

8. True, that in the incident an innocent person lost his life, and equally true that witnesses came forward in support of their claim, but we are still to see as to whether the incident occurred in the mode, manner and at the stated time. We are to ask from the record the presence of the witnesses at the stated time, who in turn are to establish their presence on the spot, that too, with a specific purpose.

9. The Investigating Officer visited the spot, prepared the site-plan on pointation of the witnesses. The blood stained earth and empties could not be secured from the place of incident, as the site-plan was prepared after registration of the F.I.R on 01.01.2013. The site-plan depicts that the disputed property was the ownership of the deceased, but the Investigating Officer did not collect anything in that respect. Not

only the deceased but the accused also claimed the same to be their ownership. The eye-witness disclosed in his court statement that the same was purchased by the deceased then injured from one Ajab Noor, but record is silent in that respect. Even the Investigating Officer did not record the statement of the actual owner from whom the property was allegedly purchased, so much so his name does not figure in the calendar of witnesses.

10. As the matter was reported in the shape of Daily Diary, the prosecution went with an understanding that until and unless inquiry is conducted F.I.R cannot be registered, and as such the statements of the witnesses could not be recorded soon after the incident, this at the most can be taken a procedural lapse, which cannot alone overturn the prosecution case. Though we are not in agreement with what the prosecution did, rather an F.I.R should have been registered soon after the injured was received in the hospital, but we are not in a happy mood to weigh it against the prosecution as for us the importance is the purpose and intent behind, we are not hesitant to hold that the intention was noble. True that some procedural lapses are there, but that alone is not the sole criteria to adjudge, as we are yet to pick a lot from the collected evidence. In case titled ***"Ashfaq Ahmad Vs the State"(2007 SCMR641)***, it is held that:

"We have also observed certain minor lapses on the part of investigation but it cannot be equated to that of dishonest investigation and such procedural lapse can be ignored in view of the eye account furnished by Muhammad Irfan (P.W.2) and Muhammad Rafi (P.W.3) which have been rightly considered and relied upon by the learned trial Court determination whereof has been upheld by the learned Division Bench of High Court after having gone through the entire evidence with diligent application of mind which is not only in accordance with the settled norms of justice but precedent law as mentioned above."

11. The peculiar circumstances of the present case demand a pragmatic and dynamic approach, as the litmus test "falsus in uno falsus in omnibus" will not work alone, as in case of disbelieving the eye-witness account we are to walk an extra mile, as the matter was reported by the deceased then injured. True that the complainant died after 15-days of his initial report, but that alone will not help in forming an outright opinion regarding the character of the deceased then injured and we cannot readily accept that the declarent had malice to charge. We are still to scan through the record and the collected evidence to gauge the truthfulness of the complainant and the evidentiary value of his statement. We are not eager to search for material with the sole interest to convict, but we are anxious to avoid

miscarriage of justice at all cost, as we are not ready to sacrifice justice, to appease the appetite of either side. We cannot ignore that society prospers when justice prevails.

12. As the prosecution case rests on the sole testimony of the eye-witness, medical evidence and the report made by the deceased then injured, we are to determine as to whether the incident occurred in the mode, manner and at the stated time, with an additional attempt to know as to whether the witnesses were present on the spot at the time of incident. Out of the lot Muhammad Islam is the most important witness, who was produced as PW-03, who stated that on the day of incident while busy in cutting shrubs, the convicts/appellants alongwith others assaulted the deceased. The witness specified the role played by each accused. It was the number of accused which turned to be the basis for insertion of sections 148/149 P.P.C with sections 302/324/337-F(vi)/109 P.P.C, but this is important to note that all other accused are acquitted, as some were charged for kicks and fists blows and one for ineffective firing. The learned trial Court did not convict the appellants under section 148/149 P.P.C, as the prosecution could not succeed in proving that particular aspect of the case. When such is the situation we are left with the only choice to hold that the parties were engaged in a free fight and in that eventuality instead of looking for joint

liability, the role of every individual accused charged is to be assessed on the basis of his involvement in the episode and the role played. It is essential to explore that what led the learned trial Court to acquit the co-accused of the charges and convicted the appellants for the murder of the deceased. We are to collect from the record the circumstances and evidence which led to acquittal of the convicts/appellants under section 148/149 P.P.C. In order to appreciate this particular aspect of the case, we are left with the statement of PW Muhammad Islam, who was examined as PW-03 and who is the sole eye-witness produced. During his cross-examination he admitted grappling between the parties and he also explained the way the deceased resisted. In order to appreciate this particular aspect of the case, we deem it essential to reproduce a portion of his cross-examination which reads as follows:

> ***"I cannot tell the exact time consumed in the altercation between the deceased and accused. Witness added that after commanding stoppage by the accused, the deceased Zahidullah told the accused party that he is the owner of the said property as the same had been purchased by him from one Gul Ahjab Khan and Anwar and refused to stop cutting process after which accused shams ur Rehman hit the deceased on his head with his Kahi while accused***

Lutfur Rehman hit him with Ginti on his foot. Again stated that accused Imdadullah and Saqibullah also gave stick blows to the deceased then injured. I and Mst. Mohi Gula, the mother of deceased were not attempted by any one. The fighting lasted for 3/6 minutes. No one from the outside could reached to the place of occurrence within house 5/6 minutes; however, Raza Khan and Naheed had reached at a distance of 30 to 35 feet when deceased Zahidullah fell to the ground. Deceased had not fallen to the ground on the first blow and had attempted a lot."

13. The relevant portion from his cross-examination has resolved the controversy regarding the counter claim of ownership to the property and the ensuing free fight between the parties and in case of a free fight the role played by every accused is to be judged individually in light of the attending circumstances of the case. In case titled ***"The State and another Vs Umer Hayat and another (2011 SCMR 1527),*** it is held that:

"It is settled law that in a case of a free fight every accused person is liable only for the part played or the injury caused by him. In the present case no particular injury found on the body of Muhammad Aslam (PW.15) had ever been attributed to the present appellant. In this view of the matter the then

hon'ble Chief Justice of the Lahore High Court, Lahore has been found by us to be unjustified in upholding and maintaining the appellant's convictions and sentences on any head of the charge framed against him. After holding the case in hand to be a one of a free fight the appellants could not have been convicted for an offence under section 148 P.P.C read with section 149 P.P.C because there was no common object between the culprits.

14. True that the prosecution failed to prove its case to the extent of acquitted accused and equally true that its failure will react upon veracity of the witnesses, and the defence also focused on this particular aspect of the case, but with utmost respect, we are not convinced with what was voiced for the appellants, as besides the eye-witness account, we are to see the report made by the deceased then injured, which on his death has transformed itself into a dying declaration. When the eye-witness account failed, in respect of some of the accused, whether the same can be pressed into service in support of the dying declaration. We cannot ignore that soon after the incident the deceased then injured was rushed to the hospital, who was examined by the doctor and his medico-legal certificate was prepared, whereafter he was referred to KDA hospital, Karak, and after getting confirmation regarding the fracture caused, the

deceased then injured was referred to Peshawar for specialized treatment, where he remained hospitalized for few days and after gaining stability was discharged from the hospital for further management at home. We are to answer as to whether the report was made by the complainant and as to whether at the time of making report he was fully oriented in time and space. True that no certificate was obtained from the concerned doctor, regarding the capability to talk and even nothing was brought on record that at the time when the deceased then injured was making the report, he was alert and conscious. This aspect of the case cannot be ignored that the deceased received a fracture on his leg which later on turned to be the cause of his death. As the injury was on non-vital part of the body and that the deceased then injured did not die on the day of incident, this in itself is suggestive of the fact that by the time the deceased then injured was fully conscious. His subsequent travel from hospital to hospital and his last management at home further clarifies the situation. The attending circumstances of the case lends support to the report made in the shape of dying declaration and even the subject of dispute between the parties leaves no ambiguity, that both the parties were claiming the property in question. The houses of the accused/appellants are situated near the place of incident and the use of weapons in their possession confirms that, they too, were

present in the spot field at the time of incident. The acquittal of the co-accused is justified, as the prosecution failed to establish their common object. The selection of weapons excludes the possibility that the convict/appellant came to the spot with the only intention to kill. Had they been attracted to the spot to kill then the selection of weapons would have been different, as the weapon used are ordinarily not used for killing. The eye-witness account to the extent of unlawful assembly and its common object has been disbelieved, but the co-accused were not acquitted for the only reason that they were not present on the spot, but were acquitted, as after assessment of the situation it surfaced that the parties were engaged in a free fight, so in the given circumstances the role of every accused was to be judged on the basis of his individual performance. As the medical evidence is silent regarding the injuries other than the injuries caused by the appellants, so participation of the co-accused with the intention to facilitate the convicts/appellants does not spell out from the record. As the approach of learned trial Court on this particular aspect of the case was correct and as the eye-witness account was not disbelieved out rightly, so the defence cannot press into service the maxim "falsus in uno falsus in omnibus", as still the prosecution has in its possession the remaining evidence, which can be read together with the report

made by the deceased while injured and the opinion of Standing Medical Board.

15. It has always been the subject of dispute, as to whether the sole statement of a dying person can lead to conviction and as to whether collection of supporting evidence is yet a condition. The approach regarding dying declaration went on changing constantly, but never ever its evidentiary value was ignored. The controversy was never regarding its character, but was regarding the fact that whether it alone was sufficient to convict or it must seek corroboration from attending circumstances of the case. We deem it essential to explore, that when it decorated itself as one of the best piece of evidence and that how it traveled to its present form? In medieval English Courts the principle originated of "Nemo moriturus praesumitur mentire", "no-one on the point of death should be presumed to be lying" In those cases where the expectations to die were less, the jurists expressed their reservations to convict on this score alone, with apprehension in mind that a declarant who was uncertain of his death could use the same to take revenge, with passage of time a balanced approach was reached to, and in either case, it was emphasized that to convict an accused charged, by a dying man in his report, apart from his statement the attending circumstances of that particular case must be taken

into consideration. The importance of a dying declaration cannot be overlooked as from time immemorial it got a permanent status in the statutes. It has remained in the Evidence Act as section 32, which was replanted as Article 46 of the Qanun-e-Shahadat Order, 1984, which explains that, the statement of a dying man is relevant and admissible in evidence it does not address the issue of its evidentiary value. This aspect has been amply dealt with by the case law. There is no dearth of decisions of the superior Courts, both in Pakistan and India, which have discussed the issue of evidentiary value of dying declaration and exact place in the prosecution's case. The keen interest of the superior courts in this particular matter manifest the propensity of human being to attach great importance to the statement of a dying man as it is assumed that a man in such a situation would not tell a lie or fabricate stories to implicate innocent person. At the same time, keeping in view this natural tendency, the superior courts always tend to caution the subordinate courts that dying declaration should be subjected to close scrutiny and viewed in their attending circumstances. Earlier the matter was looked into from a different angle as by then it was the inherent worth of the dying declaration that was opted for with no stress for corroboration. In this respect we are fortified by, Sir Lionel Leach C.J. presiding over full bench of Madras High Court observed, in re-

Guruswami (1940), that *"it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of other facts and the surrounding circumstances, but if the court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense."*

16. The same pattern was followed in one of the famous case of Abdul Razaq (1964), the Peshawar High court affirmed this principle, though impliedly, by stating that "it has now been irrevocably held that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of the conviction unless it is corroborated" when the same came before the apex Court, the Chief Justice Cornelius made some valuable observations, it was observed by him that believing or disbelieving dying declaration is not" an exercise in application of law" rather it is "an application of simple human judgment. There is no cavil with the assertion that ascertaining the genuineness of a dying declaration is an exercise into a question of fact. In case titled ***"Ibrar Hussain and another Vs the State" (2006 SCMR 962,*** it is held that:

> ***"The testimony of the complainant and eye-witnesses inspires confidence. It is noted that***

on the points of time, date and place of occurrence, the evidence led by the prosecution is consistent and no dents were created in the testimony of the P.Ws. Besides, dying declaration of the deceased was also there, which was corroborated by the testimony of the eye-witnesses, plus medical evidence which indicated that as many as 14 injuries were sustained by the deceased. Above named five co-accused were acquitted for the reason that even the prosecuting agency was suspicious about their involvement in this crime. The findings recorded by trial Court and affirmed by High Court are in accordance with the evidence available on record and not open to any exception. No interference is warranted."

17. The learned counsel submits that the statement was recorded to police during investigation, which is only and only a statement recorded under section 161 Cr.P.C. and that the same is not admissible in evidence, but we are not persuaded, the mere fact of recording the statement of the deceased by the police officer during investigation does not make it inadmissible in evidence, as section 162(2) specially excludes dying declaration from the restriction application. Ascertaining the veracity of a dying declaration in any particular case is an exercise into a question of fact and not of law. Thus, the usual aids employed by the courts for determining the truthfulness of any statement would all be relevant for evaluating a dying declaration. Each

and every dying declaration is liable to be scrutinized in its attending circumstances as well as on the basis of integrity of its maker.

18. In the present case it was the deceased then injured who reported the matter, who was fully conscious and oriented in time and space. The cause of death has fully been explained by the Doctors, who appeared before the trial court as witnesses. The attending circumstances of the case lend full support to the statement of the deceased recorded before the police.

19. We have no hesitation in holding that the prosecution fully succeeded in bringing home guilt against the appellants, but we are still to travel an extra mile to ascertain as to what should be the appropriate sentence in the given circumstances of the case. There is no denial to the fact that initially all the accused i.e. the convict/appellants and the co-accused were charged for forming unlawful assembly, but the same could not be proved on record, as the circumstances of the case convinced, the learned trial Court in that respect. As none of the accused has been convicted under section 148/149 P.P.C, which confirms that on one hand the learned trial Court was not satisfied with the evidence produced in that respect and on the other, the role of every accused was assessed individually, as

there was a free fight between the parties. The weapon used in the episode is another circumstance which attracts our attention to the intention behind. While reporting the matter, the complainant then injured attributed a blow to the convict/appellant, Lutf-ur-Rehman, with the dull side of the weapon, whereas to the appellant Shams-ur-Rehman an incised wound on his scalp was attributed. The record tells that the deceased died of the injury caused to his leg, so we deem it essential to assess from the record as to whether the intention was to kill. The record of the case and the statements recorded leads us nowhere but to hold that the intention was not to kill, as the selection of weapon and the seat of injury excludes the eagerness to kill, so we are not impressed with the approach of the learned trial court, on this particular aspect of the case. While assessing the collected material we are persuaded in holding, that the correct application of law, in case of the convict/appellant, Lutf-ur-Rehman, would be section 315 of the Pakistan Penal Code, 1860, and not section 302(b) P.P.C, i.e. Qatl Shibh-i-amd which reads as follows:

> ***"Whoever with intent to cause harm to the body or mind of any person causes the death of that or of any other person by means of a weapon or any act which in the***

> ***ordinary course of nature is not likely to cause death is said to commit Qatl Shib-i-amd."***

Whereas section 316 of the Pakistan Penal Code, 1860, describes its punishment which reads as follows:

> ***"Whoever commits Qatl Shib-e-Amd shall be liable to diyat and may also be punished with imprisonment of either description for a term which may extend to [Twenty-Five] years as Ta'azir."***

Resultantly, the sentence awarded under section 302(b) P.P.C to the convict Lutf-ur-Rehman is altered to one under section 316 P.P.C, he is convicted and sentenced to five years RI alongwith Diyat amount, to be paid to the legal heirs of the deceased.

20. Now diverting to the case of convict, Shams-ur-Rehman, we lurk no hesitation in mind that he is only and only responsible for the injury caused on the scalp of the deceased and the same is punishable under section 337-A(i) P.P.C, as such the sentence awarded under section 302(b) P.P.C is set aside and the convict/appellant is convicted under section 337-A(i) P.P.C to two years RI. He is further directed to pay Rs.30,000/- as Daman to the legal heirs of the deceased, in default thereof to further undergo one month SI.

21. In view of the foregoing reasons, coupled with the fact that the instant criminal appeal No.337-B of 2019 has been partially allowed, whereby conviction and sentence has been modified, the instant connected Cr. A No.360-B of 2019 against acquitted co-accused and Cr.R No.65-B of 2019 for enhancement of sentence of appellants, are dismissed.

Announced
Dt: 09.02.2022
Azam/P.S

JUDGE

JUDGE

(D.B)
Mr. Justice Sahibzada Asadullah &
Mr. Justice Muhammad Naeem Anwar

05/04/2022

05 APR 2022