

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.713-P/2017

Mashad Ali son of Awan Ali,
r/o Usterzai Payan, District Kohat.

Appellant (s)

VERSUS

The State etc

Respondent (s)

| | |
|--------------------|--|
| For Appellant :- | <u>Mr. Arbab Shabbir Ahmad Advocate.</u> |
| For State :- | <u>Mr. Nisar Khan AAG.</u> |
| For complainant :- | <u>In person.</u> |
| Date of hearing: | <u>06.11.2019</u> |

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This criminal appeal has been filed by appellant Mashad Ali against the judgment dated 26.10.2017, passed by the learned trial Court/Additional Sessions Judge-II, Kohat, whereby the appellant has been convicted under section 302(b) PPC and sentenced to undergo simple imprisonment for 25 years as Ta'azir and to pay Rs.3,00,000/-, as compensation to legal heirs of Maroof Ali deceased in terms of section 544-A Cr.P.C. and in default thereof to undergo 06 months S.I. Similarly, the appellant has been further convicted under section 13 of the West Pakistan Arms Ordinance 1965, and sentenced to undergo 03 years simple imprisonment (SI) and to pay a fine of Rs.50,000/- or in default thereof to undergo 03 months SI., in case FIR No. 164 dated

22.06.2013, under sections 302/34 PPC and section 13 Arms Ordinance (ibid), Police Station Usterzai Kohat. Benefit of section 382-B Cr.P.C. has been extended to the appellant.

2. The State through Advocate-General Khyber Pakhtunkhwa, Peshawar, has filed connected **Cr.R. No. 17-P/2018**, seeking enhancement of sentence of the convict/respondent from life imprisonment to normal penalty of death as provided for the offence of murder.

3. As, both the matters are emanating from one and the same judgment of the learned trial Court dated 26.10.2017, therefore, are being decided through this single judgment.

4. The prosecution case as set forth in First Information Report is that on 21.06.2013 at 2230 hours, Maroof Ali, in injured condition in emergency room of DHQ KDA hospital Kohat made report to Tahir Khan ASI (PW.2) to the effect that on the fateful day he along with his uncle, namely, Nawaz Ali (PW.11), was present near the house of Nawaz Ali, situated in village Usterzai Payan, when at 2120 hours, Mashad Ali (the appellant-convict) along with Haider Ali (now dead), Waqar Ali and Qasid Ali (acquitted co-accused), duly armed with firearms came there and started abusing them and when his uncle Nawaz Ali (PW.11), forbade them, Mashad Ali (the appellant) opened fire at him (Maroof Ali), as a result, he got hit. Co-

accused, attacked PW Nawaz Ali, but he luckily remained safe. A dispute over a shop has been alleged as motive behind the occurrence. Besides Nawaz Ali the occurrence is also stated to have been witnessed by Matloob Hussain. Report of the injured was recorded by Tahir Khan ASI (PW.2), in the shape of Murasila Exh.PA on the basis of which FIR mentioned above was registered against the accused. PW.2 prepared injury sheet Exh.PW.2/1 of the injured and referred him for medical examination.

5. Dr. Rehman Afridi (PW.1) medically examined the injured on 21.06.2013 at 10.10 p.m. and observed a firearm entry wound on right side of his lower chest. According to (PW.1), the injured was haemodynamically stable, however, was complaining of dyspnoea. The injured was referred to Tertiary Hospital Peshawar for further management. On 07.07.2013, the injured succumbed to injury. Muhammad Ashfaq MO (PW.8) conducted autopsy on his dead body and opined the cause of his death to be the aforesaid firearm injury damaging vital organ of the deceased.

6. Hashmat Ali ASI (PW.10) conducted investigation in the case, he proceeded to the spot and prepared site plan Exh.PB at the pointation of eyewitness Nawz Ali. During spot inspection he secured bloodstained earth Exh.P.1 from the place of the injured and a 30 bore empty shell Exh.P.2 from the place of the appellant. In the meanwhile, one

Matloob Hussain produced 30 bore pistol Exh.P.3 which according to him was snatched by him from possession of the appellant after commission of the offence. The I.O. took the pistol into possession vide recovery memo Exh.PW.6/1 and added section 13 A.O in the case. Vide recovery memo exh.PW.9/1, he took into possession the bloodstained last worn garments of the deceased then injured brought by Muntazir Ali LHC, sent the same along with blood secured from the spot to the FSL and 30 bore pistol along with crime empty, reports whereof are Exh.PZ and Exh.PZ/1, respectively. On death of the injured, he prepared his inquest report Exh.PW.10/11 and added section 302 PPC in the FIR.

7. On arrest of the appellant and co-accused Waqar Ali and Qasid Ali, challan was submitted against them before the learned trial Court, where they were formally charge sheeted to which they pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as thirteen witnesses. After closure of the prosecution evidence, statement of the accused were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed innocence. They, however, declined to be examined on oath or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides convicted and sentenced the appellant as mentioned above, however,

acquitted co-accused Waqar Ali and Wasid Ali vide judgment dated 26.10.2017, impugned herein.

8. We have given our anxious consideration to the arguments of learned counsel for the parties and perused the record with their able assistance.

9. The prosecution case hinges upon the dying declaration of the deceased then injured Maroof Ali; ocular account furnished by Nawaz Ali (PW.11); medical evidence furnished by Dr. Rehman Afridi (PW.1) and Dr. Muhammad Ashfaq (PW.8), coupled with circumstantial evidence in the shape of recovery of blood from the spot from the place of the deceased, his bloodstained garments, positive serologist report Exh.PZ in respect thereof and positive FSL report Exh.PZ/1s about the crime empty taken from the spot and the crime pistol recovered from the appellant by Matloob Hussain.

10. We would take first the dying declaration of the deceased then injured Maroof Ali. Sanctity is attached to a dying declaration because a dying man is not expected to tell lie; however, it requires close scrutiny and corroboration and if the Court is satisfied about genuineness and truthfulness of the dying declaration, it can be acted upon without any corroboration.

In this case the dying declaration of the deceased then injured Maroof Ali has been recorded in the shape of Murasila Exh.PA by Tahir Khan ASI (PW.2). It has been

categorically mentioned in the dying declaration/Murasila Exh.PA by its author (PW.2) that at the time of making report the deceased then injured was fully conscious. The dying declaration bears the thumb impression of the deceased then injured as well as signature of its author. The factum of orientation and consciousness of the deceased then injured at the time of making report can also be gathered from the testimony of Dr. Rehman Afridi (PW.1), who medically examined the deceased then injured on 21.06.2013 at 10.10. p.m. He deposed that the deceased then injured was haemodynamically stable. Both, the author of Murasila and the medical Officer have been subjected to cross-examination by the defence but nothing was brought from their mouth that the deceased was not capable to make statement/report. Both the PWs have established the factum of consciousness of the deceased then injured and his capability to talk and make statement. The dying declaration of the deceased then injured has been recorded on 21.06.2013. After medical examination of the deceased then injured in DHQ KDA, Kohat, he was referred to Peshawar. The deceased then injured remained alive till 07.07.2013 and as per opinion of Muhammad Ashfaq MO (PW.8), who conducted autopsy on the dead body of the deceased, the firearm entry wound on right side of lower chest of the deceased then injured damaging vital organs i.e. liver, resulted into the death of the deceased. In

view of the statement of author of Murasila and the medical Officers coupled with the fact that the deceased then injured remained alive till 07.07.2013 i.e. for more than fifteen days of the occurrence, we are firm in our view to hold that he was fully conscious, well oriented in time and space and capable to make a statement/report. The dying declaration Exh.PA reveals that the deceased then injured has directly charged the appellant with specific role of firing at him, with which he got hit and sustained injury.

11. The dying declaration of the deceased then injured has been corroborated by PW Nawaz Ali in his statement. He while appearing as PW.11 in the witness box deposed as under:-

“Stated that on the day of occurrence I along with deceased Maroof Ali was present on the spot meanwhile the accused facing trial came duly armed and started abuses; upon which, I forbade them not to abuse us, and the accused Mashad Ali opened firing at the deceased due to which, he got hit and fell down while the other accused attached at me. With the intervention of neighbours, I was separated from the other accused. Meanwhile, Matloob Hussain came from backside and snatched pistol from accused Mashad Ali which was later on produced to the I.O. before me. The injured was brought to LRC Usterzai. After first aid the deceased then injured was referred to KDA hospital where he reported the matter to local police and from there he was referred to Peshawar for further treatment and I came back to the village. The local police came there and prepared site plan at my pointation and also recovered the bloodstained earth and empties from the spot. The I.O. recorded my statement under section 161 Cr.P.C. The motive for the occurrence was a dispute over a shop.

The injured expired at North West Hospital, Peshawar. I charge the accused facing trial for commission of the offence.”

PW Nawaz Ali has been subjected to length and taxing cross-examination, but nothing beneficial to defence could be extracted from his mouth. He corroborated the dying declaration of the deceased then injured and remained consistent with the version set forth by the deceased then injured in his dying declaration. He corroborated the dying declaration on all material particulars of the occurrence i.e. the day, date, time and place of occurrence as well as the role of the appellant and that of co-accused. Like deceased then injured, PW Nawaz Ali also charged the appellant with specific role of firing at the deceased then injured. No doubt, he is the uncle of the deceased then injured but on the sole ground of his close relationship with the deceased, his testimony cannot be discarded because he has furnished a straightforward and confidence inspiring testimony corroborated by circumstantial evidence in the shape of recoveries and supported by medical evidence. It is well established principle of law that testimony of a witness which is trust worthy and inspiring confidence cannot be discarded on mere ground of his close relation with the deceased. A close relative, if proved to be the natural and truthful witness of the occurrence, cannot be termed as interested witness. Statement of a witness on account of being interested can only be discarded if it is proved that

he/she has ulterior motive on account of enmity or any other consideration. No evidence whatsoever has been brought by the defence to prove any enmity or grudge of PW Nawaz Ali with the appellant. In support of the above findings reliance may be placed on case titled, **“Khizar Hayat Vs the State” (2011 SCMR 429), case, titled, “Saeed Akhtar and others Vs the State” (2000 SCMR 383) and case titled, “Amal Sherin and another Vs the State through A.G.” (PLD 2004 Supreme Court 371).**

12. Medical evidence furnished by Dr. Rehman Afridi (PW.1) who initially examined the deceased then injured and Dr. Muhammad Ashfaq (PW.8) who conducted autopsy on the dead body of the deceased, supports the ocular account furnished by PW Nawaz Ali and the dying declaration of the deceased then injured.

13. Recovery of blood from the place of the deceased then injured, his last worn bloodstained garments coupled with positive Serologist report Exh.PZ in respect thereof corroborate the dying declaration of the deceased then injured and ocular account of PW Nawaz Ali. The testimony of PW Nawaz Ali and Hashmat Ali ASI (PW.10), the Investigation Officer, are in line with each other on the point that the crime pistol recovered from possession of the appellant at the spot by Matloob Hussain was produced to the I.O. at the spot, who took the same in his possession in presence of PW Nawaz Ali,

which along with the crime empty was sent to the FSL, report whereof Exh.PZ/1 is in positive. No doubt, PW Matloob Hussain has been abandoned by the prosecution, but the testimony of the above named PWs being in line with each other, his non-production would not be fatal for the prosecution case so as to make it a case of acquittal. Admittedly, PW Matloob Hussain is the co-villager of the parties and we are mindful of the fact that in such like cases people do avoid to give statement in favour of any party, particularly, against the accused due to fear of enmity. Even otherwise, in the case in hand, the ocular/direct evidence furnished by PW Nawaz Ali, is trustworthy and confidence inspiring, therefore, in such circumstances, there would hardly be significance of any corroboration from recovery of pistol. The august Supreme Court of Pakistan in case titled, “ **Muhammad Ehsan Vs the State**” (2006 SCMR 1857), while dilating upon a similar proposition was pleased to hold:-

“That if the court is satisfied about the truthfulness of direct evidence available on record, requirement of corroboration is not of much significance”.

14. For what has been discussed above, the prosecution have proved the guilt of appellant upto the hilt through dying declaration of the deceased then injured corroborated by testimony of eyewitness Nawaz Ali, supported by medical evidence as well as the

circumstantial in the shape of recoveries discussed above, hence, the learned trial Court has rightly held him guilty of the offence to which no exception can be taken. Since, an iota of evidence has not been brought on record to prove the motive advanced by the prosecution, therefore, the learned trial Court was justified by not awarding capital sentence to the appellant. In this regard reliance can be placed on the judgment of the Hon'ble Supreme Court in case titled, **“Ghulam Muhammad and another vs the State” (2017 SCMR 2048)**, wherein it has been held that:-

“It is well settled by now that **once the prosecution alleges a motive and fails to prove the same during the trial, the same can be taken as a mitigating circumstance** while deciding the quantum of sentence of the convict. Therefore, Criminal Appeal No.73-L of 2009 is partly allowed and the sentence of death awarded to Wazir Ali appellant is altered to imprisonment for life”. **(emphasis supplied)**.

Similar view has been taken by the Hon'ble apex Court in case titled, **“Haq Nawaz vs the State” (2018 SCMR 21)** while placing reliance on the judgment rendered in cases of Ahmad Nawaz vs the State (2011 SCMR 593), Iftikhar Mehmood and another Vs Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz vs the State and another (2012 SCMR 267), Muhammad Imran @ Asif vs

the State (2013 SCMR 782), Sabir Hussain alias Sabri Vs the State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another Vs the State and another (2013 SCMR 1602), Naveed alias Needu and others vs the State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another vs the State (2014 SCMR 1658), Muhammad Asif vs Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others vs the State (2017 SCMR 148). The relevant parts i.e. Para No.3 and 4 of the judgment (supra) are reproduced below:-

“After hearing the learned counsel for the parties and going through the record we have observed that the High Court had categorically concluded that the motive set up by the prosecution had not been proved by it. **The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder.....**

For what has been discussed above this appeal is dismissed to the extent of appellant’s conviction for the offence under section 302 (b) PPC, but the same is partly allowed to the extent of his sentence of death on the charge of murder which **sentence is reduced to imprisonment for life.**”(emphasis supplied).

15. For what has been discussed above, this appeal and the connected **Cr.R. No.17-P/2018**, being meritless are hereby dismissed.

Announced:

06.11.2019

M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan: and
Hon'ble Mr. Justice Ishtiaq Ibrahim.