

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

Crl. Appeal No.109-P/2004.

Khyber Khan son of Haji Gulfat Khan,
r/o Aza Khel Payan District Nowshera.

Appellant

VERSUS

Shahid Zaman son of Rawas Khan,
Resident of Aza Khel Payan Nowshera
And State.

Respondents

For Appellant :-	<u>Mian Muhib Ullah Kakakhel, Advocate.</u>
State :-	<u>Mr. Muhammad Riaz Khan AAG.</u>
For Respondent :-	<u>Mr. Ijaz Ahmad Nowshervi, Advocate.</u>

Date of hearing: **24.01.2019**

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This appeal under section 417 Cr.P.C., filed by Khyber Khan son of Haji Gulfat Khan, calls in question the legality and propriety of judgment dated 10.02.2004 of learned trial Court/ Sessions Judge, Nowshera, whereby he acquitted Shahid Zaman, the accused-respondent, in case FIR No.266 dated 10.07.1987, registered under section 302 PPC at Police Station Aza Khel, District Nowshera.

2. As per contents of FIR (Exh.PA)/report of complainant Muhammad Ishfaq, on the fateful day he had gone to the house of his relative, namely, Ghawar. At 10.15 hours, when on report of commotion he came out from the house and inquired about the commotion from the

accused/respondent standing on the roof of his house armed with rifle, he opened fire at him; as a result, he got hit. Asghar Khan, brother of complainant is stated to have witnessed the occurrence. On the report of deceased then injured, initially FIR mentioned above was registered under section 307 PPC, but on the next date he succumbed to injuries in LRH, Peshawar, hence, section 307 PPC was converted into 302 PPC in the FIR.

3. Autopsy on the dead body of the deceased was conducted on 10.07.1987 by Dr. Khalid Mehmood (PW.10). He noticed a single firearm entry wound on right inguinal region with corresponding exit on left buttock of the deceased. His stomach was found empty and healthy. As per opinion of the doctor, cause of death of the deceased was severe shock and bleeding leading to pulmonary embolism and pulmonary infarction due to injuries to his blood vessels and pelvic region caused by firearm.

Habib ul Haq S.I (PW.2) conducted investigation in the case. He proceeded to the spot and prepared site plan ExhPW.2/1, recorded statements of the PWs u/s 161 Cr.P.C., took into possession the bloodstained last worn clothes of the deceased, sent the same to the FSL, report whereof is Exh.PW.32/4 and initiated proceedings under sections 204 and 87 Cr.P.C. against the accused/respondent. Later on, accused/respondent was

arrested and supplementary challan was submitted against him before the learned trial Court, where he was tried and ultimately acquitted vide impugned judgment, hence, this appeal.

4. Arguments of learned counsel for the parties heard and record perused.

5. The prosecution has relied upon the ocular account furnished by purported eyewitness Asghar Khan. His statement was got recorded as PW.1, during trial of the accused under section 512 Cr.P.C.. Since at the time of trial of the accused, he had died, therefore, his statement was transposed. The prosecution has also relied upon the testimony of Mst. Zarsheda (PW.1), as well as dying declaration of the deceased.

6. A look over the testimony of Mst. Zarsheda reveals that she is not the eyewitness of the occurrence as she has categorically stated in her statement that after the occurrence she noticed the deceased in injured condition in a street, who told her that he had been fired at by the accused. Though, testimony of PW Asghar, is in line with the story mentioned in the FIR, however, site plan and medical evidence negate the same. In the site plan Exh.PW.2/11, the accused has been shown on the roof top of house of accused at point No.5, having height of more than 10-1/2 feet. The deceased has been shown at point No.2 i. in front of the house of Ghawar. If height of an

average man is added with the height of aforesaid roof, it will come to 15/16 feet. In such eventualities, direction of firearm entry wound on the person of the deceased should have been from upward to downward but contrary to above, the deceased has sustained firearm entry wound in the pubic region with corresponding exist on his left buttock depicting travel of missile as through and through. Neither any crime empty nor any blood have been shown recovered from the spot despite the fact that according to post mortem report the cause of death of the deceased is profuse bleeding, hence, this aspect further makes the prosecution case highly doubtful. Ghawar whose house had been allegedly visited by the deceased and the purported eyewitness has not been examined. Similarly, no inmate of his house has been produced as a witness in support of establishing the presence of the deceased and the purported eyewitnesses at the spot. According to FIR, the occurrence has taken place at 1015 hours, which has been reported at 1045 hours in Police Station. As per medico legal report, the deceased then injured had been shown received in the hospital at the aforesaid time of report i.e. 1045 hours. The presence of the deceased then injured at the same time on two different places is quite astonishing, which not only speaks volumes about the behavior and demeanor of the police but also that of the Medical Officer. As per prosecution version, report about the occurrence was made at Police

Station by the deceased then injured which was recorded by Shaukat Ali SHO (PW.7). Not only the facts that who brought the deceased then injured to the hospital and who accompanied him to Police Station, are shrouded in mysteries, but the scribe of FIR has also failed to note down a single word in the FIR that deceased then injured was conscious and perceiving the surroundings at the time of making report. Again, when allegedly shifted to the hospital, the deceased then injured was examined by Casualty Medical Officer, but the alleged dying declaration of the deceased then injured, does not bear the endorsement of any medical Officer to the effect that he was conscious, well oriented in time and space and capable to make statement. Similarly, medico legal report of the deceased then injured is also silent about the factum of his orientation in time and space and his capability to make statement. For believing a dying declaration, inter alia, one of the essential ingredient is that the prosecution shall establish through cogent evidence that the dying man was in full senses, conscious and alert to the surroundings, was fully oriented in space and time and was able to make a coherent statement and the doctor present at the occasion shall give a fitness certificate about the condition of a dying man, but such is not the case herein. Besides, the essential ingredients/requirements under rule 25-21 of the Police Rules, 1834, have not been complied with before

recording the alleged dying declaration of the deceased then injured. For the sake of convenience and ready reference the aforesaid rule is reproduced below:-

25-21 Dying Declaration:- (1) A dying declaration shall, whenever possible, be recorded by a magistrate.

(2) The person making the declaration shall, if possible, be examined by medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.

(3) If no magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.

(4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.

(5) A dying declaration made to a police Officer should, under section 162, Code of Criminal Procedure, be signed by the person making it.

7. In view of the above discussed doubtful circumstances, we are of the firm view that the incident has not taken place in the mode and manner as alleged by the prosecution, rather in some other mode, which on the face of record, is shrouded in mystery. It is universal principle of criminal justice that dying declaration by 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 injuries, caused to him, is ordinarily not expected to speak a false hood. To believe or disbelieve a dying declaration, is thus left to the ordinary human consideration, however, the courts always insists upon strong, independent and reliable corroboratory evidence for the sake of safe dispensation of justice. Relying blindly and without proper scrutiny on a dying declaration, would be no less dangerous approach on the part of the Courts.

8. In this case, neither the First Information Report nor the medical evidence nor other circumstances, much less strong, independent and reliable, corroborate the alleged dying declaration; therefore, the alleged dying declaration of the deceased has rightly not been relied upon by the learned trial Court. The prosecution evidence is pregnant with doubts, contradictions and discrepancies benefit of which has rightly been extended to the accused/respondent by the learned trial Court. The cardinal principle of criminal administration of justice is based on the concept of justice in Islam which is to be observed more consciously and carefully. Benefit of doubt features appearing in the case invariably are required to be given full effect while deciding the ancillary matters in a criminal case. Benefit of doubt, if any favourable to the accused

cannot be withheld in the exercise of discretion of the Court.

9. Moreover, it is also settled law that when an accused is acquitted by a competent court of law he earns the presumption of double innocence which cannot be disturbed by the appellate Court unless it is established through cogent and tangible evidence available on record that such acquittal is fanciful, erroneous or has resulted into grave miscarriage of justice. Guidance derived from the judgments of Hon'ble Supreme Court reported in **2004 SCMR 249, 2009 SCMR 288 and 2009 SCMR 946.**

10. For what has been discussed above, the trial court was completely justified in acquitting the accused/respondent of the charge. We find that the findings recorded by the trial court are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed. Resultantly, this appeal is hereby dismissed.

Announced:
24.01.2019

Siraj Afridi P.S.

JUDGE

JUDGE

*DB of Hon'ble Mr. Justice Rooh-ul-Amin Khan and
Hon'ble Mr. Justice Qalandar Ali Khan.*

