

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR.**

JUDICIAL DEPARTMENT

Criminal Appeal No.375-P of 2015

**Abdul Jabar son of Gul Akber resident of Bazed Khel,
District, Peshawar.**

Versus

The State and another.

J U D G M E N T

Date of hearing: 12.12.2018

Appellant by: Syed Abdul Fayaz and Mr. Bashir
Ahmed Khan, Advocates.

The State by: Ms. Zarmina Gul, Advocate, State
Counsel, for the State/respondent
No.1.

Complainant/respondent by: Mr. Hussain Ali, Advocate, for the
complainant/respondent No.2.



QALANDAR ALI KHAN, J:- This single
judgment in the instant criminal appeal by
Abdul Jabar, appellant, against his conviction
and sentence of life imprisonment, with
compensation of Rs,300000/- payable to the

legal heirs of the deceased under section 544-A Cr.P.C awarded to him vide judgment/order dated 28.05.2015 by the learned trial Court/Additional Sessions Judge-V, Peshawar, is also directed to dispose of criminal revision No.72-P/2015 for enhancement of the punishment awarded to the appellant in the instant appeal to that of normal sentence of death, by Mst. Misraj widow of deceased-complainant, Aziz Ullah; and also criminal appeal No.351-P/2015 by widow of the deceased-complainant against acquittal of Said Akbar, co-accused in the case; as the instant appeal as well as the said criminal revision and criminal appeal pertain to the same case vide FIR No.755 dated 18.09.2010 under section 302 PPC read with section 34 PPC Police Station Badaber, Peshawar.

2. The F.I.R shows that deceased Aziz Ullah, then injured, reported to Hameedullah SI in casualty LRH, Peshawar, at 18:15 hours on 18.09.2010 that he came out of his house

and was proceeding towards the nearby shop and when reached the path leading to Bazid Khel at 17:10 hours, the appellant, Abdul Jabar, and his brother, Said Akbar, sons of Gul Akbar, came there in a motorcar, and Said Akbar commanded/directed the appellant to fire at him, and the appellants accordingly opened fire at him, causing him firearm injury on right chest. The motive for the offence was cited as dispute between them over trees. The occurrence was stated to have been witnessed by Muhammad Umar son of Majeed and his son Muhammad Rafique as well as other people. The injured complainant also mentioned that his son Abid and other relatives brought him for treatment to LRH.

3. Hamidullah, SI (deceased) scribe of the *murasila* (EX.PW3/1), also added a note at the end of *murasila* that statement of the injured was recorded as 'dying declaration'; and the Medical Officer who medically examined the injured complainant recorded following endorsement;

*“Patient is semi conscious.
Statement is recorded in my
presence”*

The entry at serial No.10 of the daily diary of the Police Station at 20:15 hours on 18.09.2010 shows that the injured complainant later succumbed to the injuries in the hospital, therefore, section 324 PPC was substituted with section 302 PPC.

4. During investigation, the spot was inspected by the I.O on the pointation of eyewitnesses mentioned in the FIR, and during spot inspection, 12 empty shells of 7.62 bore were recovered from place A in the site plan; and points B, C and D having bullet marks were also mentioned in the site plan; where point E was added, showing the place of accused while coming down from the motorcar. The blood stained garments of the deceased and a spent bullet were also taken into possession by the I.O; but only the blood stained shirt and *Shalwar* of the deceased were sent to the FSL, Peshawar, wherefrom the result was only to the effect that “it was

human blood". The medical examination of the injured complainant at 06:15 P.M on 18.09.2010 revealed the following:-

"On 18.09.2010 at 06:15 PM I examined injured Aziz Ullah son of Safi Ullah r/o Bazed Khel Kohat road, Peshawar and found the following:

On examination the injured was semi conscious. There was entry wound of the right side of the chest and exit wound on back of right side chest. Entry wound on right side nose. The patient was advised for X-Ray chest and X-Ray head. The patient was referred to Neuro surgery, cardiothoracic ward and radiology for their opinion. Kind of injury was firearm injury. Nature of injury given later on."

After the injured complainant succumbed to the injuries, his PM examination was conducted, with the following report:-

"On 19.09.2010 at 08:30 AM I conducted the autopsy of deceased Aziz Ullah son of Saif Ullah r/o Bazid Khel aged about

38+-5 years identified by Zain Khan and Muhammad Umar brought by Iftikhar Khan FC No.5551 and found the following:-

External appearance.

A young man average built wearing white color Shalwar. R.M and PM lividity are fully developed. Shirt, sent in a plastic bag, blood stained cut in hospital with scissors during treatment.

Injuries.

1. F/A dress wounds on back of right abdomen, 2x2 cm in size oval in shape 5 cm from mid line, 1 cm below coastal margin.
2. F/A stitched wound on front of right chest, 1x1 cm in size, circular in shape, 4 cm from mid line, 4 cm from nipple.
3. An abrasion, 2x0.3 cm in size on right side of nose, 2 cm from tip of nose.

Thorax.

1. Walls, ribs, cartilages, pleura, right lung were injured.

Abdomen.

Walls, peritoneum, diaphragm, small and large intestines were injured.

Opinion.

In my opinion the deceased died due to injuries to the right lungs, small and large intestines due to firearm.

*Probable time between injury and death---
Hospitalized.*

Between death and PM-----10 to 14 minutes.”

Both the accused brothers, named in the FIR, initially, remained at large and were, therefore, proceeded against under sections 204 and 87 Cr.P.C; and challan was submitted against them under section 512 Cr.P.C; but after their arrest on 16.12.2011, supplementary challan was submitted against them to the learned trial Court, where they were formally charged under sections 302/34 PPC; to which they pleaded not guilty and claimed trial. During trial, the prosecution produced as many as thirteen (13) PWs, and

besides formal witnesses, also produced material witnesses like both the eyewitnesses named in the FIR, namely, Muhammad Rafique (PW-4) and Muhammad Umar (PW-5); Doctor Muhammad Yousaf (PW-8), who conducted autopsy of the deceased; Liaqat Ali Khan SI (PW-9), the investigating officer; and Doctor Asif-ur-Rehman (PW-10), the Medical Officer who conducted initial medical examination of the deceased-complainant, then injured.

5. After prosecution closed its evidence, statements of both the accused were recorded under section 342 Cr.P.C. In their statements, the accused denied allegations of the prosecution, while pleading their innocence; but declined to be examined on oath or produce defence evidence. The learned trial Court also recorded their further statements under section 342 Cr.P.C; where-after the impugned judgment dated 28.05.2015 was rendered by the learned trial Court/ASJ-V, Peshawar, whereby accused Said Akbar was

acquitted of the charges, whereas the appellant, Abdul Jabar, was convicted under section 302 (b) PPC and sentenced to life imprisonment as *ta'zir*, and also compensation of Rs.300000/- payable to legal heirs of the deceased and in default thereof to six months SI under section 544-A Cr.P.C; hence the instant appeal by the convict-appellant, Abdul Jabar; connected criminal revision No72-P/2015 by Mst. Misraj widow of the deceased for enhancement of sentence of life imprisonment awarded to the appellant, Abdul Jabar, to that of normal penalty of death; and criminal appeal No.351-P/2015 by the widow, Mst. Misraj against acquittal of co-accused, Said Akbar.

6. Arguments of learned counsel for the parties and learned State Counsel heard; and record perused.

7. The prosecution placed reliance, mainly, on the so-called 'dying declaration' of the deceased-complainant, then injured, and also ocular account of eyewitnesses named in

the FIR i.e. PWs 4 and 5. However, the so-called 'dying declaration' could not inspire confidence for the simple reason that the Medical Officer (PW-10) who examined the complainant in injured condition reported that he was "***semi conscious***", thereby indicating that he was not "***fully conscious***". The Medical Officer also did not report that the complainant was fully oriented in space and time and was able to make a coherent statement, besides showing the complainant in full senses, conscious and alert to surroundings. On the other hand, his further endorsement on the *murasila* was only to the effect "statement is recorded in my presence". His such report also loses credibility when seen in the light of his own report that there was an entry wound on right side nose, and further that the patient was advised X-Ray head and referred to neuro surgery, cardiothoracic ward and radiology for their opinion. Besides, addition of note on *murasila* by deceased S.I, Hamidullah to the effect that

the statement of the injured was recorded as 'dying declaration' would naturally raise question that how at that stage he was sure that the injured was going to die; and, as such, the statement was being recorded as a 'dying declaration'; because the complainant subsequently succumbed to the injuries in the hospital; and according to version of the prosecution, the complainant was not that serious so as to raise such a serious concern about his life. Additionally, the attempt on the part of the prosecution to show entry wound on the nose, shown in the medical report, as an "abrasion" in the PM report would make the status of the *murasila* as a 'dying declaration' all the more doubtful; more-so, when the relevant column in the medical report about names of relative or friend of the injured was left blank; while in both the inquest and PM reports Muhammad Umar (PW-5) was shown as one of the two identifiers of the dead body besides Zain Khan (PW-1); but, surprisingly, neither of the two eyewitnesses and close

relative of the deceased mentioned in the FIR, were either shown present at the time of initial medical examination of the deceased-complainant, then injured, immediately after he was brought to the hospital for treatment and medical examination, or cited as witnesses to the so-called 'dying declaration' of the deceased-complainant, then injured. All the above stated facts, discernable from the record, would render the FIR doubtful as a 'dying declaration', in the light of judgments reported as **2018 P Cr. L J Note 66 (Peshawar), 2016 P Cr. L J 836 (Peshawar), 2016 P Cr. L J Note 36 (Peshawar), 2016 P Cr. L J Note 90 (Peshawar), 2015 M L D690 (Peshawar) and 2003 P Cr. L J 1186 (Lahore).**

8. As regards the testimony of PWs 4 and 5, suffice it to say that neither house of the deceased-complainant had been shown in the close proximity of the scene of occurrence in the site plan, neither houses of these witnesses were shown somewhere near the

spot in the site plan. The deceased-complainant reported that he came out of the house and was proceeding towards the shop, shown in the site plan as that of Nazar Muhammad; but no such reason, or even any other reason was forthcoming for the said two claimed eyewitnesses, who are son and father inter-se, and close relatives of the deceased-complainant. As such, they could at best be regarded as chance witnesses; but their testimony, nevertheless, receiving no corroboration from independent witnesses residing in the vicinity. Their conspicuous absence at the time of lodging of the report by the complainant and also during his initial medical examination also tend to raise serious question about their claim as eyewitnesses of the occurrence. Muhammad Rafique (PW-4) admitted this fact that blood was oozing from body of the injured in the vehicle while travelling from the spot to the hospital and that his hands and garments were smeared with blood of the injured; but neither blood was

collected from the spot or the vehicle, nor blood stained garments of the PW were taken into possession; and only blood stained garments of the deceased-complainant were taken into possession, showing that blood was, indeed, oozing from the body of the deceased-complainant; but its absence from the spot, vehicle and garments of the PW would also raise question not only about the scene of occurrence but also about presence of the PW on the spot at the time of occurrence; and would also be sufficient to discredit his testimony as well as statement of his father (PW-5), who also claimed to have accompanied the complainant, then injured, to the hospital. As such, their statements as eyewitnesses were rendered not worthy of reliance.

9. Moreover, neither the 12 empty shells of 7.62 bore, reportedly collected from the spot near the place assigned to the appellant in the site plan, nor the spent bullet recovered from the dead body were sent to the FSL to,

at least, procure a positive result about the empties and spent bullet fired from one weapon of offence; particularly when only one i.e. the appellant out of two accused named in the FIR was charged for effective firing on the deceased-complainant. The motive of dispute over trees, cited in the FIR beside being not proved, also became doubtful in view of disclosure by PW-4 about murder of brother of the appellant/accused for which brother of the deceased-complainant was charged, beside another enmity in the village. In the aforesaid circumstances, neither pointation of the spot by the accused, without recovery or discovery, nor abscondance of the accused for some time would be strengthen the otherwise weak case of the prosecution. In short, there was nothing incriminating to implicate the appellant in the case, warranting his conviction and award of sentences of life imprisonment and compensation of Rs.300000/- to him, vide the impugned judgment of the learned trial Court/ASJ-V, Peshawar, dated 28.05.2015.

The impugned judgment, together with conviction of the appellant-accused and sentences of life imprisonment and compensation of Rs.300000/-, payable to legal heirs of the deceased, are, therefore, set aside, pursuant to acceptance of the instant appeal by the appellant, Abdul Jabar. The appellant is, consequently, acquitted of the charges; and be set free, forthwith, if not required in any other case.

10. The appeal of the appellant against his conviction and sentences awarded to him, having been accepted, and his conviction and sentences awarded to him set aside, for reasons enumerated hereinabove, the criminal revision (Cr.R No.72-P/2015) by the widow of the deceased-complainant Mst. Misraj, for enhancement of the punishment of life imprisonment awarded to Abdul Jabar to that of normal penalty of death becomes infructuous; and is dismissed, accordingly.

11. The acquitted co-accused and respondent No.1 in the criminal appeal (Cr.A

No.351-P/2015) by widow of the deceased-complainant, Mst. Misraj, namely, Said Akbar was imputed the only role of *Lalkara/Command* in the FIR, therefore, with the acquittal of main accused and his brother Abdul Jabar charged for effective role of *qatl-i-amd* of deceased-complainant, the appeal against acquittal of the co-accused/respondent No.1, Said Akbar, become redundant, in the light of grounds mentioned hereinabove; hence dismissed being devoid of merit.

Announced.
12.12.2018.

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(D.B) Hon'ble Mr. Justice Rooh-ul-Amin Khan.
Hon'ble Mr. Justice Qalandar Ali Khan.

(M. Iqbal)

