

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

**Crl. Appeal No.567-P/2017**

Nawab Khan son of Hassan Khan,  
r/o Besak Gadoon, District Swabi.

Appellant (s)

**VERSUS**

The State etc

Respondent (s)

For Appellant :-	<u>Malik Misraf, Advocate.</u>
For State :-	<u>Mr. Mujahid Ali Khan, AAG.</u>
For respondent No.2.	<u>Muzamil Khan, Advocate.</u>
Date of hearing:	<u>04.03.2020</u>

**JUDGMENT**

**ROOH-UL-AMIN KHAN, J:-** At a trial held by the learned Additional Sessions Judge-III, Swabi, accused Nawab Khan, having been found guilty of committing murder of Sultan Sharif deceased, has been convicted under section 302 (b) PPC and sentenced to undergo imprisonment for life and to pay Rs.2,00,000/-, as compensation to legal heir of the deceased in terms of section 544-A Cr.P.C., vide judgment dated 18.09.2017, in case FIR No.71 dated 23.06.2014, registered at Police Station IDS. Benefit of section 382-B Cr.P.C., has been extended to him.

2. Through the instant appeal, the appellant-convict has questioned his conviction and sentence, whereas, through connected Cr.R. No.123-P/2017, Mst. Lal Pari Jan

*Roohul Amin*

(widow of the deceased), is seeking enhancement of sentence of the convict from life imprisonment to normal penalty of death, as provided for the offence of murder.

3. Since, both the matters are arising from one and the same judgment of the learned trial Court dated 18.09.2017, therefore, we, propose to decide the same through this single judgment.

4. The prosecution case as unfolded in First Information Report ("FIR") Exh.PA is that on 23.06.2014 at 20.00 hours, Sultan Sharif deceased then injured, fully conscious, in presence of his brother Rehman Sharif (PW.7) and Dr. Mukamil Khan CMO (PW.10), reported to Mukhtiar Khan SI (PW.14), in Casualty of District Headquarter (DHQ) hospital, Swabi, to the effect that on the fateful day he was present in *Masizai* street near the house of Hasham Khan when at 1830 hours, Nawab Khan (the appellant), duly armed with pistol came there and fired at him, as a result, he got hit and injured. after commission of the offence, the appellant decamped from the spot. An oral altercation between Said Sharif, father of the deceased then injured and the appellant, a day prior to the occurrence, has been advanced as a motive behind the occurrence. Report of the deceased then injured was recorded in the shape of Murasila Exh.PA/1 by Mukhtiar Khan SI (PW.14), which was thumb impressed by the deceased then injured, signed by Rehman Sharif (brother of

*Rehman Sharif*

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the deceased) as a verifier, and its author as well as attested by Dr. Mukamil Khan CMO (PW.10). Mukhtiar Khan SI (PW.14) prepared injury sheet Exh.PW.14/1 of the deceased then injured and referred him for medical examination. He sent the Murasila to Police Station on the basis of which FIR Exh.PA was registered against the appellant.

5. Dr. Mukamil Khan (PW.10) examined the deceased then injured on 23.06.2014 at 08.05 p.m. vide medico legal report Exh.PW.10/1, and observed the following:-

**Patient was conscious and oriented in time and space.** He was having severe pain in the wound and bleeding. There was 1 x 1.5 cm entry wound on front of right side of his chest near right axilla. Surgeon was called, who referred him to LRH, Peshawar for further management, however, the injured succumbed to injury in DHQ hospital Swabi and Dr. Imtiaz Khan (PW.9) conducted autopsy on his dead body on 24.06.2014 at 12.30 a.m, who noticed the same wound on the person of the deceased then injured as observed by (PW.10), with no exit. During post mortem a bullet was extracted from the dead body of the deceased which was put in a phial and handed over to police.

6. Rab Nawaz Khan ASI (PW.15), conducted investigation in the case, who proceeded to the spot and

*Yousaf Sami*

prepared site plan Exh.PB, on the pointation of alleged eyewitness Habib ur Rehman (PW.6). Vide recovery memo Exh.PW.3/1, he took into possession a phial containing bullet Exh.P.1, Similarly, through recovery memo Exh.PW.2/1 he took into possession the last worn bloodstained garments of the deceased, recorded statements of the PWs under section 161 Cr.P.C., sent the bloodstained clothes to the FSL, initiated proceedings under sections 204 and 87 Cr.P.C., against the appellant and after completion of investigation handed over case file to the SHO, who submitted challan under section 512 Cr.P.C. against the appellant.

7. Appellant was arrested by Ibrahim Shah SHO on 28.07.2015 vide arrest Card Exh.PW.12/1 and handed over to Manzoor Alam SI (PW.12), who interrogated him. During interrogation the appellant disclosed that the crime pistol has been recovered from possession of his son by the police against whom vide FIR No.137 dated 17.12.2014 under section 15 KP Arms Act, 2013, has been registered. The said pistol was produced by Moharrir of PS IDS to Manzoor Alam SI along with 05 live rounds Exh.P.4, who took the same into possession vide memo Exh.PW.11/1. Vide application; he sent the pistol along with bullet extracted from the body of the deceased to the FSL, report whereof is Exh.PW.12/6. After completion of

*Manzoor Alam SI*

investigation, supplementary challan was submitted against the appellant before the learned trial Court.

8. On receipt of *challan* by the learned trial Court, the appellant was formally charge sheeted to which he pleaded not guilty and claimed trial. To establish the guilt of the appellant, the prosecution examined as many as fifteen witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegation and professed innocence. He, however, neither wished to be examined on oath under section 340(2) Cr.P.C., nor opted 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.

9. We have heard the exhaustive arguments of learned counsel for the parties and perused the record with their able assistance.

10. It appears from record that it is a case of dying declaration as the deceased then injured Sultan Sharif, after making report Exh.PA/1 and getting first aid, succumbed to his injury in DHQ hospital Swabi after an hour or two.

In cases of a dying declaration, the Courts always put emphasis for the proof/evidence with regard to consciousness, orientation in time and space as well as ability and capability of the injured to make lucid statement. In this case, the dying declaration of the

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deceased then injured has been recorded by Mukhtiar Khan S.I (PW.14) in the shape of Murasila Exh.PA/1, wherein it has been categorically mentioned that the deceased then injured was in full senses at the time of report. Mukhtiar Khan SI while appearing as PW.14 confirmed the aforesaid fact by deposing that at the time of making report Exh.PA/1, Sultan Sharif the deceased then injured was in full senses. He further deposed that he recorded his report/dying declaration in presence of Rehman Sharif (brother of the deceased) and Casualty Medical Officer Mukamil Khan (PW.10). Dying declaration of the deceased then injured, besides his thumb impression bear the signatures of Mukhtiar Khan and Rehman Sharif (verifier). Similarly, it also bears the endorsement/certificate/attestation of the casualty medical Officer. Rehman Sharif while appearing as PW.7, deposed that report/dying declaration of the deceased was scribed by PW.14 in his and presence of CMO, in the casualty of DHQ hospital Swabi and at the time of report/declaration, the deceased then injured was fully conscious. Dr. Mukamil Khan CMO DHQ hospital Swabi while appearing as PW.10 deposed that on 23.06.2014 at 8.05 p.m, he examined the deceased then injured in casualty of DHQ hospital Swabi, who was fully conscious and oriented in time and space. He exhibited medico legal report as Exh.Pw.10/1 and injury sheet Exh.PW.10/2.

*Kashif Sarwar*

11. The above named three witnesses, namely, Mukhtiar Khan SI (PW.14) who is the author, Rehman Sharif (PW.7), who is verifier, and Dr. Mukamil Khan CMO (PW.10), who is attester of the dying declaration, have been subjected to taxing cross-examination by the defence, but nothing favourable to defence could be extracted from their mouths. The defence failed to shatter their testimony to the effect that the deceased was not capable to make statement. All of them are consistent with each other on the point of consciousness, orientation in time and space as well as capability of the deceased then injured at the time of making report. As per medico legal report, the deceased then injured has sustained a solitary firearm entry wound on front of right side of his chest near right axilla and in the Post mortem report the probable time between injury and death has been given as 3 to 4 hours. In this view of the matter, we are of the considered view that the deceased then injured was fully conscious, well oriented in time and space and capable to make statement/report. An iota of evidence has not been brought by the defence to show remotely that the deceased then injured was influenced by any one at the time of report. No infirmity could be pointed out in the dying declaration. The deceased then injured has furnished true account of the occurrence. He has directly and singularly charged the appellant for commission of the offence. The occurrence

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has taken place in the month of June at 06.30 p.m. i.e. in a broad daylight, therefore, question of mistaken identity does not arise, particularly, when the appellant and the deceased being co-villagers, were already known to each other. Medical evidence furnished by Dr. Mukamil Khan (PW.10) and Dr. Imtiaz Khan (PW.9), is in consonance with the version in the dying declaration. No reason and circumstance has been brought on record by the defence so as to remotely suggest substitution and false implication of the appellant in the case. Admittedly, substitution of real culprit charged directly and singularly is a rare phenomenon in the system of criminal justice. Reference in this regard can be made to case titled, **“Allah Ditta Vs the State” (PLD 2002 Supreme Court 52)** and case titled, **“Muhammad Iqbal Vs the State” (PLD 2001 Supreme Court 222)**. Positive Serologist report Exh.PL, with regard to last wearing bloodstained garments of the deceased, corroborates the dying declaration. Besides, absconsion of the appellant soon after the occurrence till his arrest without any explanation much less plausible, is yet another circumstance which speaks about his guilty conscious.

12. As regards recovery of 30 bore pistol No.9066 (crime weapon) from son of the appellant against whom FIR No.137 dated 17.12.2014 under section 15 KP Arms Act, PS IDS, was registered, we, do not consider it safe to take this piece of evidence in aid of the prosecution case

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because in the FSL Exh.PW.12/6 it has not been opined that the bullet extracted from the body of the deceased was fired from the said pistol. The opinion of the Fire Arms Expert is reproduced below:-

“Examination of the case has revealed that deformed crime bullet marked B is that of 30 bore, lacks sufficient identifiable data for examination and comparison, hence, no opinion can be expressed as to whether or not it was fired from 30 bore pistol No.9066 in question. The 30 bore pistol No.9066 is proper working order in its present condition.”

13. During the course of arguments, learned counsel for the appellant emphasized on the testimony of alleged eyewitness Habib ur Rehman (PW.6), and deposed that he has totally contradicted the version of the deceased then injured in his statement. Learned counsel added that he (PW.6) has introduced quite a new story of the occurrence so much so that he has disclosed a different place of occurrence.

14. We have gone through the statement of Habib ur Rehman (PW.6). Admittedly, his name does not appear as eyewitness in the dying declaration, however, for the sake of discussion his statement may be referred. He deposed that on the eventful day he along with Naeem Ullah were proceeding near the house of one Azam Khan, at that time deceased Sultan Sharif was also proceeding a little ahead of them; that accused facing trial Nawab made firing upon deceased Sultan Sharif with pistol from the roof of (Dewri)

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of one Zar said, with which he got hit and injured; that he and PW Naeem Ullah witnessed the occurrence; that he pointed out the spot to the investigating Officer; that the occurrence took place at about 6.30 p.m. In cross-examination he stated that deceased was the son of his Aunt. Somebody brought the cot and put the injured on the cot and somebody might have conveyed the information for the vehicle that came there. He further deposed that the injured was taken by them upto the Adda but he did not accompany the deceased then injured to the hospital. The unnatural conduct of PW Habib ur Rehman i.e. not informing the family members of the deceased not taking any interest in arranging the Cot or vehicle as well as not accompanying the deceased then injured to the hospital, is sufficient to make doubtful his presence at the spot. Had PW Habib ur Rehman present at the spot, he being the maternal cousin, the deceased then injured must have mentioned his name as an eyewitness or his alleged role. In this view of the matter, we, straight away discard his testimony. In case titled, "Rashid Ahmad Vs Muhammad Nawaz and others", (SCMR 1152) the Hon'ble Supreme Court has held that:-

*"testimony of the prosecution witness not mentioned in the FIR, but introduced subsequently, had no evidentiary value".*

15. In view of the above discourse, even if the testimony of the PW Habib ur Rehman as corroborative

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pieces of evidence is ousted from consideration, even then, the dying declaration of the deceased then injured being trustworthy and proved through cogent and confidence inspiring evidence, would alone be sufficient for recording conviction. The honesty and truthfulness of the dying declaration of the deceased can be determined from the fact that the report has been signed by Rehman Sharif (PW.7) as a verifier, who is the brother of the deceased, but even then the deceased then injured did not mention his name as an eyewitness. In case titled, "Farmanullah vs Qadeem Khan and another" (2001 SCMR 1474), it has been ruled by the Hon'ble Supreme Court of Pakistan that:-

**"Dying declaration once believed is not legally required to be supported by independent corroboration, especially in the absence of allegation of the substitution of real culprit with the accused."**

This Court in case titled, "Parvez vs Farhad Ali and another" (PLD 2005 Peshawar 172) while placing reliance on the judgment (supra) of the apex Court as well as judgments of this Court and others has held that:-

"No doubt, sometimes a dying declaration alone cannot be made a basis of conviction and as a matter of abundant caution the superior courts ask for its corroboration but it is not a rule of law, but requirement of prudence, and if it is proved that it is influence free or does not suffer from any infirmity, it becomes a substantive piece of evidence and it alone can become a basis of conviction. In this connection,

*Kashif Sani*

reliance can be placed on 1996 P Cr L J 1989 (Quetta), 1999 P Cr L J 1305 (Peshawar), 2001 P Cr L J SC (AJ&K) 286 and 2001 SCMR 1474.”

16. Deriving wisdom, guidance and placing reliance on the judgments (supra), we believe the dying declaration of the deceased then injured as the truthful account of the occurrence, therefore, held the appellant guilty of the offence.

17. Now the moot question would be the quantum of sentence to be awarded to the appellant to meet the ends of justice. In the case of **Israr Ali vs. The State reported in 2007 SCMR 525**, it was ruled by the Hon’able bench that question of sentence demands utmost care on part of the Court dealing with life and liberties of people and that accused person (s) are also entitled to extenuating benefit of doubt on the question of sentence. Again, in the case of **Muhammad Riaz and another vs the State and another reported in 2007 SCMR 1413**, it was observed by the Hon’able Supreme Court that no doubt, normal penalty for an act of commission of Qatl-i-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case.

18. In this case, the motive alleged has not been proved. Similarly, the deceased has sustained a solitary

*Justice*

firearm entrance wound. There is no repetition of fire on the part of the appellant despite that the deceased was at his mercy. Thus considering the above aspects as mitigating circumstances, we, concur with the learned trial Court in the matter of sentence.

19. For what has been discussed above, this appeal and the connected Cr.R. No.123-P/2017, titled, "Sultan Sharif vs Nawab:", are hereby dismissed.

**Announced:**

**05.03.2020**

*M.Siraj Afridi PS*

*Rooh Amin*

**JUDGE**

**JUDGE**

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