

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No.306-P of 2015.

JUDGMENT

Date of hearing.....26.10.2017.....

Appellant: (Askar Abbas) By Mr. Muhammad Saleem Khan
Mardan, Advocate.

Respondents/State: By Mr. Mujahid Ali Khan, AAG, assisted by
Mr. Hussain Ali, Advocate, learned counsel for
the complainant.



QALANDAR ALI KHAN, J:- The judgment
in this criminal appeal shall also dispose of
criminal revision No.60-P/2015 titled Zikria
Hussain..Vs..Askar Abbas etc, as both the
instant appeal as well as the connected
revision petition arise out of the same
impugned judgment of the learned trial
Court/Additional Sessions Judge-V,

Peshawar, dated 25.04.2015, in case vide FIR No.726 dated 20.11.2011 under sections 302/324/34 PPC Police Station Kotwali, Peshawar.

2. The case/FIR was lodged at 17:40 hours on 20.11.2011 in the casualty of LRH by deceased Hassan Raza Khan (complainant), then injured, to the effect that he along with his father Ghulam Farooq and uncle Zikria Hussain sons of Mehfooz Ilahi and Abdur Rehman Farooqi son of Said Rehman were present in street Nadar Ali near the shop of the complainant situated in *Mohallah* Nawab Deendar, Chowk Nasir Khan, Peshawar, at 16:30 hours on the eventful day, when, in the meantime, Muhammad Hussain Hussaini son of Kala Khan, Abdul Abbas alias Mohsin and Askar Abbas sons of Muhammad Hussain Hussaini residents of the same *Mohallah* came duly armed with firearms and suddenly opened fire at the complainant and his other companions, resulting in firearm injury to the complainant on his neck and left side back,

while his father Ghulam Farooq succumbed to the injuries on his way to the hospital, and his uncle Zikria Hussain and Abdur Rehman Farooqi escaped unhurt. The motive for the occurrence was cited as dispute over property; and the occurrence was shown to have been witnessed by the complainant and his companions. According to the complainant, he was brought to the hospital for treatment by his uncle Zikria Hussain. In his report, the complainant charged all the three accused named in the FIR for causing firearm injuries to him, death of his father Ghulam Farooq and attempting at the lives of his uncle Zikria Hussain and Abdur Rehman Farooq by ineffectively firing at them. The *murasila*, drafted by Khan Abbas S.I (PW-2), was thumb impressed by the complainant and signed by Zikria Hussain. It is noteworthy that at the time of recording report of the complainant an injured child namely Salma daughter of Mifta-ud-Din aged about 10/11 years resident of *Mohallah* Nawab Deendar,

Chowk Nasir, was also brought to the hospital, and the SI prepared injury sheets of both the injured and referred them to the CMO, LRH Peshawar. The S.I further recorded a note to the effect that statement of the injured was recorded in the presence of CMO on duty.

3. The medical examination of the complainant, Hassan Raza Khan, by Doctor Nasir Ali CMO, LRH (PW-10) showed that;

“Patient was conscious having firearm entry wound on the front of the throat over the trachea and at the upper end of the sternum. The size of wound is half inch. Exit wound on the back at left side just at the mid of the medial border of the left scapula. Patient was advised chest X-Ray and referred to C.T.W, Radiology and E.N.T ward for expert opinion. Nature of injuries lateron, kind of weapon firearm injury, duration of injuries 1-2 hours.”

Hassan Raza succumbed to the injuries in the hospital, and entry to this effect was made in the daily diary of the police station at serial No.23 dated 22.11.2011.

The same CMO (PW-10) also examined injured Mst. Salma daughter of Miftah-ud-Din and found the following;

“On examination the patient was conscious having firearm entry wound on the left leg in the mid region laterally. The size of injury was ½ inch. No exit wound was detected. The patient was advised X-Ray left leg. Patient was referred to COW plus radiology ward”

The dead body of deceased Hassan Raza Khan son of Ghulam Farooq was subjected to autopsy by Naveed Alam KMC, Peshawar (PW-8) and the postmortem report was furnished as under;

External Appearance:

A young man having good built, wearing changed clothes.

P.M lividity and rigor mortis developing.

Injuries:

1. F/A wound, 3x2 cm on front of neck
(surgically manipulated).
2. F/A wound, 1.5x1.5 cm on left back chest,
6 cm from midline and 10 cm below the
base of neck. (surgically manipulated).
3. Chest intubation site on left outer chest.

Internal Injuries:

Vertebrae, spinal cord, chest walls, plurae, larynx, trachea and left lung alongwith the blood vessels were found injured.

Stomach was healthy and empty.

Opinion:

In my opinion the deceased died due to injru to the cervical spine and left lung due to firearm.

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

Time between death and PM examination.....3-6 hours.”

The postmortem examination of deceased Ghulam Farooq son of Mafooz Elahi by Doctor

Obaid Ullah (PW-6) revealed the following injuries;

- “1. F/A entry wound on right side deltoid muscle, at mid area, 1x1 cm in size, 12 cm below top of shoulder and 16 cm above elbow joint.
2. F/A exit wound in right axilla, 1x2 cm in size, at upper border of axilla.
3. F/A re-entry wound on right side of chest at lower margin of axilla 1x2 cm in size.
4. One bullet is recovered from wall of left side of chest 8 cm lateral from left nipple and 7 cm below medial (interior) margin of upper axillary border.

Thorax.

Right lung, left lung and heart were injured.

Internal injuries.

Abdomen, esophagus were injured.

Remarks.

In my opinion the deceased is died due to injuries to heart, lungs and their vessels due to firearm.

Probable time between injury and death...Immediate.

Between death and postmortem.....2 to 5 hours.”

4. Investigation in the case was entrusted to Muhammad Riaz Khan SI (PW-14), who proceeded to the spot, inspected the spot and prepared site plan (EX.PB). During spot inspection, the I.O secured blood from the places assigned in the site plan to both the deceased, Ghulam Farooq and Hassan Raza, also recovered 11 empty shells in scattered condition from point-B in the site plan, out of which five empty shells were that of Kalashnikov and the remaining six were of different bores of pistols. The I.O also noticed bullet marks in two groups at three feet height from ground level on the western wall of the General Store Shops of Zikria Hussain and Hassan Raza and also recovered two deformed spent bullets from the same place. The IO also assigned point-E in the site plan to the “disputed *Sabeeh*”. The site plan was

prepared on the pointation of Zikria Hussain and Abdur Rehman Farooqi. The blood secured through cotton from two different places assigned to both the deceased in the site plan along with blood stained garments of both the deceased were sent to the FSL, Peshawar, for chemical analysis; and the chemical examiner reported the same "was human blood". Likewise, the crime empties and crime bullet recovered from the spot were dispatched to the FSL, Peshawar, for opinion/report of the Firearms Expert, who found five crime empties of 7.62 MM bore, three crime empties of 30 bore, three crime empties of 9 MM bore, two crime bullets of 9 MM bore and one crime bullet of 30 bore.

5. The record would show that co-accused Abdul Abbas died during his captivity in Central Prison, Peshawar, in the Government Lady Reading Hospital, Peshawar, on 25.03.2015. Similarly, co-accused Muhammad Hussain Hussaini passed away in CMH, Rawalpindi on

08.09.2014 at the age of 73 years. Therefore, proceedings against the late co-accused Muhammad Hussain Hussaini stood abated on 23.09.2014; while proceedings against late co-accused Abdul Abbas stood abated on 28.03.2015. The appellant/accused, Askar Abbas and late co-accused Muhammad Hussain Hussaini were arrested on 01.12.2011, while the other late co-accused Abdul Abbas remained at large, therefore, on completion of investigation, complete challan was submitted against both the arrested accused and, at the same time, challan under section 512 Cr.P.C was submitted against the absconding co-accused, Abdul Abbas, after completion of proceedings against him under sections 204 and 87 Cr.P.C. He was arrested on 16.12.2011, and supplementary challan was submitted against him to the learned trial Court.

6. The learned trial Court formally charged all the three accused named in the FIR, firstly, under sections 302/34 PPC,

secondly, under section 324/34 PPC and, thirdly under section 337-F (iii) PPC. The accused pleaded not guilty and claimed trial. The prosecution produced the following 15 PWs;

- Constable Mohsin Khan No.1263 (PW-1), escorted the dead body of deceased Ghulam Farooq to the mortuary and after PM examination he was handed over blood stained garments of the deceased, which he, then, handed over to the I.O;
- Khan Abbas Khan S.I (Rtd) (PW-2), drafted *murasila* (EX.PA/1) on the report of deceased, then injured, Hassan Raza Khan;
- F.C Jamil Khan (PW-3), is the marginal witness to the recovery memo whereby the I.O, during spot inspection, secured blood, recovered empties and also spent bullets;

- Babar Hussain (PW-4), identified dead body of deceased Ghulam Farooq before the police as well as the doctor;
- Ijaz Hussain No.4170 (PW-5), is marginal witness to the recovery memo (EX.PW5/1) vide which blood stained garments of deceased Ghulam Farooq were taken into possession by the I.O;
- Doctor Obaid Ullah (PW-6), conducted autopsy on the dead body of the deceased Ghulam Farooq;
- Mumtaz Khan DFC (PW-7), was entrusted warrants under sections 204 and also proclamations under section 87 Cr.P.C against the absconding co-accused;
- Naveed Alam KMC, Peshawar (PW-8), conducted postmortem examination of deceased Hassan Raza Khan;

- Rehmatullah Khan Inspector (PW-9), submitted complete challan and also supplementary challan against accused Abdul Abbas;
- Doctor Nasir Ali CMO LRH (PW-10), conducted medical examination of Hassan Raza, then injured, and also medical examination of injured female child namely Mst. Salma daughter of Miftah-ud-Din;
- Ilyas Khan SI (PW-11), registered FIR (EX.PA) on the receipt of *murasila* and also prepared injury sheet (EX.PW11/1) and inquest report (EX.PW11/2) of deceased Ghulam Farooq;
- Zikria Hussain (PW-12), is brother of deceased Ghulam Farooq and uncle of deceased/complainant Hassan Raza; and furnished eyewitness account of the occurrence;

- Abdur Rehman (PW-13), is the other eyewitness;
- Muhammad Riaz Khan SI (PW-14), conducted investigation in the case; and
- Mujahid Khan FC No.2935 (PW-15), escorted dead body of deceased Hassan Raza;

7. After prosecution closed its evidence, statements of all the three accused, including the appellant and two deceased co-accused, were recorded under section 342 Cr.P.C. They, while refuting allegations levelled against them by the prosecution, declined to be examined on oath or produce defence evidence. Following arguments on behalf of both the prosecution as well as the defence, the leaned trial Court/Additional Sessions Judge-V, Peshawar, rendered the impugned judgment dated 25.04.2015, whereby, the only surviving accused i.e. the appellant, out of three accused named in the FIR, was convicted under section 302 PPC and

sentenced to life imprisonment as *Tazir* on two counts for the murder of complainant Hassan Raza and deceased Ghulam Farooq and also directed to pay Rs:200000/- each as compensation under section 544-A Cr.P.C to the legal heirs of both the deceased, failing which, to further six months S.I on each account. The accused/appellant was also convicted under section 324 PPC, and sentenced to 10 years R.I and fine of Rs:50000/- and in default to further two months S.I. The accused/appellant was further convicted under section 337-F (iii) PPC to three years R.I with fine/*daman* of Rs:50000/-, "in the absence of any medical expenditure etc, which shall be paid to the injured and in default to undergo two months simple imprisonment". Benefit of section 382-B Cr.P.C was extended to the accused/appellant; and all the aforementioned sentences were to run concurrently "as per prevailing rules and regulations"; hence the instant criminal appeal by the

convict/appellant and connected criminal revision No.60-P/2015 by Zikria Hussain for enhancement of the sentence of life imprisonment awarded to the appellant under section 302 (b) PPC.

8. Arguments of learned counsel for the convict/appellant and learned AAG, assisted by learned counsel for the complainant party heard; and record perused.

9. The unique characteristics of this case are that a father and his two sons were charged for causing fatal injuries to the deceased/complainant, Hassan Raza Khan, then injured, and his deceased father Ghulam Farooq, who reportedly succumbed to the firearm injuries on his way to the hospital, and another female child namely Mst. Salma daughter of Miftah-ud-Din aged about 10/11 years also sustained injury during the occurrence. The accused father, namely, Muhammad Hussain Hussaini passed away before conclusion of the trial and likewise his son and co-accused Abdul Abbas also died

before conclusion of trial, leaving behind the appellant to see the culmination of trial and face conviction and sentences awarded to him by the learned trial Court/Additional Sessions Judge-V, Peshawar, vide impugned judgment dated 25.04.2015. However, both the eyewitnesses mentioned in the FIR, namely, Zikria Hussain and Abdur Rehman Farooqi escaped unhurt, and did not receive a single injury in the alleged indiscriminate firing by three persons, a father and his two sons, with their deadly weapons, despite the fact that PW Zikria Hussain was brother of deceased Ghulam Farooq and, as such, uncle of deceased complainant, Hassan Raza, and motive for the occurrence was cited as dispute over property between the two parties i.e. complainant and accused.

10. The main thrust of arguments on both sides i.e. defence and prosecution, was with regard to the so-called 'dying declaration' of deceased-complainant, Hassan Raza Khan, who was brought to the casualty in LRH

Hospital, Peshawar, in injured condition and there his report was recorded in the shape of *murasila*. However, his report, carrying his thumb impression, was verified by his uncle and PW Zikria Hussain, who signed the same, instead of CMO LRH (PW-10), who simply recorded his endorsement on top of the *murasila*, without recording time under his endorsement or name of the patient, his parentage and address; and without furnishing a separate certificate regarding the fact that the injured was able to talk coherently. He voluntarily admitted in his statement before the Court that the details of time, name of the patient, his parentage and address had been mentioned by the police on the *murasila* **already written by the police**, and that he had given his endorsement. It may also be mentioned here that PW-10 only showed the patient conscious, without reporting about his faculty of speaking, and whether the injured complainant was well oriented at the time of recording his report. These glaring omissions

on the part of the medical officer assume importance in the face of firearm injuries sustained by the complainant on the front of the throat over the trachea and at the upper end of the sternum, having size of half inch and corresponding exit wound on the back at left side just at the mid of the medial border of the left scapula. The medical officer also omitted to mention regarding the airway, breathing, circulation of blood, disability, blood pressure, pulse rate, colour of face, condition of the eye-balls, how the patient was reacting at that time and the manner of his speech and the pitch of the voice specifically. It may also be pointed out here that according to the medical officer the missile was from up to downward. He agreed with the suggestion that the bullet, having caused entry and exit wounds, could injure walls, ribs, cartilages, left lung, vertebral column, blood vessels, larynx, trachea and esophagus and that it was possible that due to intensive internal bleeding there would have been pressure on vital

internal organs of the injured and further that if vertebral column was injured the patient would suffer paraplegia and that due to loss of blood, the patient could go into shock and comma. It was also admitted as correct that larynx was the organs of voice and vocal cord are also situated in front of it and that larynx was situated in front of pharynx and at the upper end of the trachea. The medical officer admitted as correct the suggestion that if trachea was choked due to foreign body or blood there would be severe cough and if it is choked at the lower end the patient will be having breathing difficulty. The graphic details furnished by the injured complainant about the occurrence, including the information about his father succumbing to the injuries on his way to the hospital, tend to raise serious questions about the authenticity of the so-called 'dying declaration'. In short, the statement of PW-10 i.e. the medical officer, who examined the complainant in injured condition, and all the aforementioned

admissions on his part, raised too serious doubts about the FIR to be treated as a 'dying declaration', more-so, when the report/*murasila* was thumb impressed by complainant, Hassan Raza, unlike rider of the *murasila* and uncle of the deceased-complainant, namely, Zikria Hussain who signed the report, without any evidence to the effect that the deceased complainant was illiterate and could not sign; and, notwithstanding the words“ ”

indicating the report also by Zikria Hussain and not as 'dying declaration' only by the complainant.

11. Apart from the fact that both the so-called eyewitnesses did not receive even a single scratch during the reported indiscriminate firing by three persons, while they were also in the firing range and not only both the deceased had received firearm injuries but the child namely Mst. Salma also sustained firearm injuries, Zikria Hussain is, admittedly, brother of deceased Ghulam

Farooq, therefore, a highly interested witness, and the other witness, namely, Abdur Rehman Farooqi, already booked under sections 420 and 468 PPC for committing cheating and forgery, hence his credibility and veracity of his statement under serious doubt. Although not a marginal witness to the recovery memos pertaining to blood secured from the spot and also empties and some bullets recovered from the spot by the I.O, yet showing his presence at the time of the said recoveries by the I.O, would also expose him as not a truthful witness and worthy of reliance. He claimed that his hands and clothes were stained with blood and that in the same clothes he accompanied the injured and Zikria Hussain to the hospital; but neither blood stains were noticed on his hands nor his blood stained clothes were taken into possession by the I.O, thus falsifying his assertion in this regard. In the same manner, Zikria Hussain (PW-12) claimed that his hands and clothes were stained with blood while picking the deceased

from the ground, but even on his hands and clothes no blood stains were noticed, neither his blood stained clothes were taken into possession by the I.O.

12. In the FIR, dispute over property was mentioned as motive for the occurrence, but neither a single document was placed on record of the case in support of the motive alleged by the injured complainant in his so-called 'dying declaration'; nor anything was brought with regard to dispute over *Sabeel* introduced, later, in the case by the I.O. The statement of Abdur Rehman (PW-13) regarding dispute between the parties pertaining to the water tank situated near the shop of the complainant also remained unsubstantiated. The motive, as such, all along remained shrouded in mystery, hence created space for doubting version of the prosecution.

13. The prosecution failed to produce injured female child, Mst. Salma, and abandoned her "being minor", without any

observation by the learned trial Court regarding her inability to record statement due to her minority; and her father Miftah-ud-Din was also abandoned, thus withholding the best available witnesses, casting shadow of doubt on the case of the prosecution.

14. In the FIR, all the three accused mentioned therein were shown armed with “ ”, without specification of the weapons of offence with which the father and his two sons were armed i.e. weapons of 7.62 bore, 30 bore and 9MM bore. However, later in their statements before the Court the factum of the accused/appellant armed with Kalashnikov was introduced by way of improvement, without anything forthcoming on the record that both the deceased and the injured female child sustained injuries due to firing from the Kalashnikov shown in possession of the accused/appellant at the time of occurrence. Neither the Kalashnikov has been recovered as weapon of offence from the accused/appellant, nor he has made

any confession in this respect so as to connect him with the commission of the offence.

15. Having scanned the record, comprising evidence of the prosecution, with valuable assistance of learned counsel for the parties, we have no second opinion that both the so-called 'dying declaration' and presence of the so-called eyewitnesses are bereft of supporting evidence, receiving corroboration from rest of the evidence adduced in the case by the prosecution. In the circumstances, there was no evidence worth reliance before the learned trial Court to render judgment of conviction of the appellant/ accused and award him the sentence of life imprisonment.

16. The appeal of the convict/appellant is, therefore, accepted; and the conviction of the appellant as well as sentences awarded to him by the learned trial Court/Additional Sessions Judge-V, Peshawar, dated 25.04.2015, are set aside. The appellant is acquitted of the charges levelled against him;

and be set free, forthwith, if not required in any other case.

17. Since appeal of the convict/appellant has been accepted and his conviction and sentences awarded to him set aside, resulting in his acquittal in the case, the criminal revision No.60-P/2015 by Zikria Hussain, having become infructuous, is dismissed, accordingly.

Announced.
26.10.2017.

J U D G E

J U D G E

M.Iqbal

*(D.B) Hon'ble Mr. Justice Lal Jan Khattak.
Hon'ble Mr. Justice Qalandar Ali Khan.*