

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE DR. SYED MUHAMMAD ANWER

JAIL CRIMINAL APPEAL NO.01-I OF 2021

MUHAMMAD FAZIL SON OF ABDUL HAMEED, CASTE
JALALZAI KAMALDINZAI, RESIDENT OF KILLI ABDUL
KAREZ, KILLA SAIFULLAH.

APPELLANT

VERSUS

THE STATE.

RESPONDENT

COUNSEL FOR THE APPELLANT	...	MR. RIAZ HUSSAIN AZAM, ADVOCATE.
COUNSEL FOR THE STATE	...	MR. AMEER HAMZA MENGAL, DEPUTY PROSECUTOR-GENERAL, BALOCHISTAN.
FOR RESPONDENT NO.2	...	IN PERSON.
FIR NO. DATE AND POLICE STATION	...	08, 24.03.2009, KILLA SAIFULLAH, DISTRICT KILLA SAIFULLAH.
DATE OF JUDGMENT OF TRIAL COURT	...	04.08.2009
DATE OF INSTITUTION OF APPEAL.	...	07.01.2021
DATE OF HEARING	...	24.03.2021 and 06.04.2021
DATE OF JUDGMENT	...	30.04.2021

JUDGMENT:

DR. SYED MUHAMMAD ANWER, J Consequent upon the conclusion of trial in case F.I.R. No.08 of 2009 registered under Section 17(4) of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979 and 324 of the Pakistan Penal Code, 1860 at Police Station Killa Saifullah, District Killa Saifullah, a learned Additional Sessions Judge, Killa Saifullah, while concluding the proof of charge against the appellant Muhammad Fazil under Section 302 of the Pakistan Penal Code, 1860 recorded conviction under the aforesaid provision of law and awarded him life imprisonment as *Tazir*. Benefit of section 382-B of the Code of Criminal Procedure 1898 was also extended in favour of the appellant.

2. By way of present appeal, the appellant has called in question vires of the said judgment, seeking acquittal while setting aside the judgment dated 4th of August, 2009.

3. The appellant earlier preferred appeal before Honourable High Court of Baluchistan, Quetta on 18.12.2019 but for want of jurisdiction, it was remitted to this Court through judgment dated 30.12.2020.

4. Accusation contained in the Crime-Report (Ex.P/9-B) is based on the dying declaration of the deceased (Muhammad Karim) recorded on 24.03.2009 at 1:25 p.m., when he was lying on his death bed in injured condition in emergency ward of Civil Hospital, Killa Saifullah. He (Muhammad Karim) stated that he resides at *Ziarat* (shrine) of *Mulla*

Nika and serves there as Malang. On 23.03.2009, when he was sitting in a room of said *Ziarat*, accused Fazil came there for *Ziarat* and stayed there. After taking dinner at night, they both slept there. At around 10:00 p.m. Fazil (accused) woke him (Muhammad Karim) up having a *Danda* in his hand and demanded Rs.8000/-, which he (Fazil) knew that this amount was in his (Muhammad Karim's) pocket. Upon his refusal, he (Fazil) inflicted a *Danda* blow on his (Muhammad Karim) head and on his right leg. When complainant fell down, the accused snatched Rs.8000/- from the pocket of complainant. This statement of injured/complainant was recorded in Civil Hospital Killa Saifullah, whereupon the F.I.R. No.08 dated 24.03.2009 was lodged in Police Station Killa Saifullah. The complainant/injured succumbed to injuries at about 10:00 p.m. on 24.03.2009.

5. Investigation ensued, as a result of which S.I./SHO, Muhammad Iqbal, P.W.9 was assigned the charge of investigation. He inspected the place of occurrence and prepared site plan (Ex.E/9-C). He also recovered blood stained *Danda* and blood stained *chaddar* of green colour of the complainant/deceased. He recorded the statements of witnesses under Section 161 Cr.P.C. of P.Ws Abdul Nafay, Muhammad Tahir, Abdul Qayoom and Maazullah. On 25.03.2009, he arrested accused who during interrogation confessed his guilt before DSP whereupon memo of disclosure was prepared (Ex.P/5-A). He also recovered Rs.7,500/- from accused (Ex.P/5-B) and prepared inquest

report (Ex.P/9-D). He sent blood stained *Danda* and chaddar to FSL for chemical analysis. After completion of investigation, police submitted report under section 173 of the Code of Criminal Procedure, 1898 requiring the accused to face trial. The report under Section 173 Cr.P.C. was forwarded to Trial Court under Section 302 PPC read with Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979.

6. The prosecution in order to prove its case, produced as many as 09 witnesses. The gist of the prosecution evidence is as under:

- i) Abdul Nafay appeared as P.W.1. He is the last seen witness. On 23.09.2009, he had dinner in the company of complainant, Maazullah and accused Muhammad Fazil at the Ziarat of Mulla Nika and thereafter according to this P.W. accused Muhammad Fazil showed his willingness to sleep in the room of the complainant/deceased. The next morning the complainant/deceased found seriously injured from the same room where they had diner on the night of 23.09.2009.
- ii) P.W.2 Tahir is a witness of dying declaration made by the complainant, who attributed inflicting *Danda* blow on his head and right leg by the accused Muhammad Fazil and snatching cash from him.
- iii) Maazullah appeared as P.W.3. He is also the last seen witness and he also had dinner on 23.09.2009 in the company of complainant, Maazullah and accused Muhammad Fazil at the Ziarat of Mulla Nika and thereafter according to this P.W. accused Muhammad Fazil showed his willingness to sleep in the room of the complainant. The next morning complainant found seriously injured from the same room.
- iv) P.W.4 is Abdul Qayoom. He is also witness to dying declaration made by the complainant saying that

accused Muhammad Fazil had caused him *Danda* blow and forcibly took cash from him.

- v) Rehmatullah, Constable, was P.W.5. He is marginal witness to memo of disclosure (Ex.P/5-A) made by accused in presence of the Investigating Officer and recovery of Rs.7500/- from accused Muhammad Fazil (Ex.P/5-B).
- vi) Dr. Jamal Abdul Nasir, appeared as P.W.6. On 24.03.2009 at 11:00 a.m. he medically examined injured / complainant Muhammad Karim and issued medical certificate (Ex.P/6-A).
- vii) Musa Jan, Constable, was P.W.7. He is marginal witness to Ex.P/7-A, whereby S.H.O. recovered one *Danda* Ex.P/7-B one blood stained green colour *chaddar* and prepared a parcel.
- viii) P.W.8 was S.I/S.H.O. Ghulam Qasim. He submitted challan (Ex.P/8-B) along with FSL report in the court.
- ix) S.I./SHO, Muhammad Iqbal, appeared as P.W.9. He was Investigating Officer of this case.

7. After closing prosecution evidence, the accused/appellant while making statements under Section 342 of the Code of Criminal Procedure, 1898, denied the whole incriminating evidence and while pleading innocence alleged his false implication. In reply to a question No.12, Do you want to say anything else in your defence?, the accused/appellant replied that "the police wrongly involved me in this case. The private witnesses restrained me not to search for stones in hilly area and that is reason they falsely implicated me in this case." The appellant while appearing as a witness under Section 340(2) Cr.P.C. deposed that incident took place on 23.03.2009 and on 24.03.2009, he left his home for bazaar where police arrested him on the allegation of

killing a *Malang*, thereafter police took him to the police station and involved him in a false case.

8. After hearing the parties, the learned Trial Court convicted and sentenced the accused/appellant as mentioned in opening paragraph of this judgment.

9. Learned counsel appearing on behalf of the pauper appellant vehemently contended that the prosecution has miserably failed to prove the case against the appellant beyond shadow of reasonable doubt. He also argued that there no is eye-witness in this case and the statements of PW-1 Abdul Nafey and PW-3 Maazullah cannot be relied upon as there are contradictions in their statements.

10. Conversely, learned Deputy Prosecutor General argued that the case mainly rests upon the dying declaration of the complainant (deceased), recorded by the deceased firstly in presence of police as well as in presence of two independent private witnesses P.W.2 and P.W.4, subsequently, same was converted into F.I.R. by S.I./SHO, Muhammad Iqbal, P.W.9. The same dying declaration is corroborated by the statements of PW-1 Abdul Nafey and PW-3 Maazullah, who are the last seen witnesses. He also contended that chain linking the commission of murder of the complainant with motive of snatching cash of Rs.8000/- from him is unbroken and consistent.

11. Heard adversaries and perused the record.

12. We have carefully considered the above mentioned contentions put forward by the defence counsel with regard to the dying declaration but are not persuaded to agree with him. It is noteworthy that the defence had not alleged that there was any previous enmity between the deceased and the appellant.

13. The whole case of prosecution is mainly relying upon the dying declaration of the deceased/complainant recorded in the hospital on his death bed in serious injured condition. The statement of the deceased/complainant firstly recorded by S.I./S.H.O. Muhammad Iqbal, PW-9 and subsequently in presence of independent private witnesses, i.e., Tahir, PW-2 and Abdul Qayoom, PW-4, is strong piece of admissible evidence within the meaning of Article 46 of the Qanun-e-Shahadat Order, 1984. This statement of victim was corroborated by the statements of PW-1 Abdul Nafay and PW-3 Maazullah, who had lastly seen the complainant/deceased in the company of the accused/appellant, when they all had dinner together a night before the occurrence of crime.

Provision of Article 46 *ibid*, enumerates eight eventualities in which statement of a person referred to in said provision becomes relevant.

We have minutely examined clause (1) of Article 46, upon which reliance was placed with vehemence, which states as:

“46. Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant.

- (1) **When it relates to cause of death.** When the statement is made by a person as to the case of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

The said provision shall apply when statement is made by a person about the cause of his death or to any of the circumstances resulting in death.

14. The objection raised by the defence about the manner in which the dying declaration was made is also irrelevant because there is no special mode of recording dying declaration. Reference “NIAZ-UD-DIN and another Vs. THE STATE” (2011 SCMR 725).

15. In order to treat any statement as “Dying Declaration”, it must be proved that declaration was made in extremity, at the point of death, having no hope of this world, compelling the maker to speak truth and nothing but the truth “NIAZ-UD-DIN and another v. THE STATE and another” (2011 SCMR 725) and “MUSHTAQ AHMAD AND ANOTHER v. THE STATE” (1973 PCr.L.J. 1075). In “SIRAJUDDIN v. THE STATE” (1990 SCMR 588), the deceased himself lodged F.I.R., which was treated as dying declaration after his death. Similar is the situation in the case of “NIAZ AHMAD v. THE STATE” (PLD

2003 SC 635). In addition to these citations, there are certain judgments of the Apex Court in which it is held that dying declaration is a substantive piece of evidence, if court is satisfied about its genuineness, it can be acted upon without any corroboration, however, some of the tests for determining its veracity are that whether it intrinsically rings true; whether there is no chance of mistaken on the part of dying man in identifying or naming his assailant; whether it is free from prompting any outside quarter and whether it is consistent with other evidence and circumstances of the case, Reference: "Mst. AMINA and another Vs. The STATE" (2013 PCr.L.J 962). This aspect of evaluating dying declaration is also discussed in "HAZOOR BUX and 5 others Vs. S.I.O. POLICE STATION KHANPUR MAHAR and 3 others" (2011 PCr.L.J. 1454) [Karachi] and "SHAHBAN BHERI Vs. The STATE" (2014 MLD 663) [Sindh]. These supportive aspects which may also be considered alongwith the dying declaration are also considered by us as follows:

- a) Viewed from whichever angle, statement of the deceased/complainant can be fully treated as "Dying Declaration". The deceased/complainant has given a very simple and straightforward version of the incident and he had no motive to falsely implicate the appellant. Moreover,

his story is supported by the medical evidence inasmuch as *danda* blows inflicted on his head and his right leg, which were noticed during medical examination conducted by Dr. Jamal Abdul Nasir/PW-6

- b) Secondly, the dying declaration was recorded in presence of witnesses; hence, left no space of doubt. The contents of the dying declaration are also supported by the statements of Tahir (P.W.2) and Abdul Qayoom (P.W.4). Both are private independent witnesses.
- c) Thirdly, Abdul Nafay (P.W.1) and Maazullah (P.W.3) are last seen witnesses of company of the deceased/complainant and the accused/appellant.
- d) Fourthly, there is also recovery of blood stained *Danda* from the room in which the crime was committed and the blood stained *chaddar* of the deceased *Malang* from the same room; and
- e) Fifthly, the report of Forensic Science Laboratory in affirmative regarding the blood stained on the *Danda* allegedly used in hitting the fatal blow upon the deceased and the green coloured *chaddar* of the *Malang* deceased stained with his blood.

16. Before parting with the judgment, we feel it inevitable to correct the impugned judgment to the extent of application of relevant clause of Section 302 PPC. Admittedly, the trial Court has awarded life

imprisonment under Section 302 PPC but without mentioning the particular applicable clause. The trial Court did not propose normal penalty for viable rea/sons stated in the operative portion of the impugned judgment, therefore, for all intents and purposes, the sentence awarded shall be deemed and treated to be one under Section 302(b) PPC. With this correction, the judgment dated 04.08.2009 passed by the trial Court is upheld. The conviction and sentence of life imprisonment awarded to the appellant-convict is maintained.

17. Appeal being without force is hereby dismissed.

JUSTICE DR. SYED MUHAMMAD ANWER

JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

Announced in Open Court
On 30.04.2021 at Islamabad.
*Mubashir**