

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Manzoor Ahmad Malik
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Qazi Muhammad Amin Ahmed

Criminal Appeals No.3-P & 4-P/2014

(On appeal from the judgment dated 02.10.2012 passed by the Peshawar High Court, Peshawar in Criminal Appeal No.698 of 2011).

Somaid

(in CrI.A.3-P/2014)

Ali Gohar @ Gohar Zaman

(in CrI.A.4-P/2014)

...Appellant(s)

VERSUS

Ali Gohar @ Gohar Zaman & another

(in CrI.A.3-P/2014)

The State & another

(in CrI.A.4-P/2014)

...Respondent(s)

For the Appellant(s)

: Mr. Astaghfirullah, ASC
Mr. Muhammad Ajmal Khan, AOR
(in CrI.A.3-P/2014)

Mr. Ghulam Mohyuddin Malik, ASC
Mr. Muhammad Zahoor Qureshi, AOR
(in CrI.A.4-P/2014)

For the State

: Barrister Qasim Wadud,
Additional Advocate General,
Khyber Pakhtunkhwa
Along with Respondent No.1
in CrI.A.3-P/2014

Date of Hearing

: 30.04.2019

JUDGMENT

Qazi Muhammad Amin Ahmed, J.- Criminal Appeal No.3-P/2014 and Criminal Appeal No.4-P/2014, by the complainant's son and convict respectively, through leave of the Court, arisen out of incident dated 22.9.2005 within the remit of Police Station Zaida, District Swabi; with a common thread, are being decided through this single judgment.

2. Prosecution case is structured on the statement of Haji Muhammad Zamin Khan, deceased; he was on way back after attending a condolence meeting when Ali Gohar, appellant fired upon him, as result whereof he sustained four entry wounds with two exits. After making statement to the police; he succumbed to the injuries; the accused absconded; arrested belatedly he was put to trial; when indicted, claimed trial, resulting into his conviction under Section 302 of Pakistan Penal Code, 1860; he was sentenced to death as *tazir vide* judgment dated 2.12.2011; the learned Peshawar High Court maintained conviction under clause (b) of the Section *ibid*, however altered penalty of death into imprisonment for life with a direction to pay Rs.600,000/- as compensation to the legal heirs; benefit under Section 382-B of the Code of Criminal Procedure, 1898 was extended to the appellant.

3. Learned counsel for the complainant contends that in the absence of any judicially recognized mitigating circumstance, there was no occasion for the learned High Court to alter penalty of death into imprisonment for life, whereas learned counsel for the convict has questioned the *vires* of impugned conviction on the ground that case being founded primarily on a dying declaration, the prosecution miserably failed as to who recorded deceased's last words and thus it would be unsafe to maintain the conviction.

4. Fate of prosecution case is hinged upon dying declaration, purportedly made by the declarant at the police station, converted into first information report. According to the statement of Munawar Khan, PW-6, he received the injured and recorded his statement, however in the next breath, he ascribed first information report to Khan Ghalib Khan statedly recorded on his dictation. The latter is examined as PW-13; he denies to have recorded the first information report, Exhibit PA and thus as to who recorded deceased's last words, is shrouded into mystery. Dying declaration, in legislative wisdom, is an exception to general rule of direct evidence; it is admitted to the detriment of an accused without opportunity of cross examination upon the declarant under the belief that a person, face to face with God, would tell nothing but the whole truth. Sanctimonious hypothesis

notwithstanding before conviction is based upon such a declaration, prosecution must demonstrate beyond shadow of doubt that it comprises of the words of declarant alone without extraneous prompting or additions; the person who records dying declaration is therefore a most important witness to verify veracity thereof. He is conspicuously missing in the array of witnesses and thus declaration, Exhibit PA, cannot be relied upon without potential risk of error. It would be grievously unsafe to maintain the conviction, therefore by extending benefit of the doubt to the appellant, Criminal Appeal No.4-P/2014 is allowed, impugned judgment dated 2.10.2012 is set aside; he shall be released forthwith, if not required in any other case; as a natural corollary Criminal Appeal 3-P/2014 is dismissed.

JUDGE

JUDGE

JUDGE

Peshawar, the
30th of April, 2019
Ghulam Raza/*