2016 S C M R 1233

[Supreme Court of Pakistan]

Present Asif Saeed Khan Khosa, Qazi Faez Isa and Tariq Pervez, JJ

MUHAMMAD AMEER and another---Appellants

Versus

RIYAT KHAN and others---Respondents

Criminal Appeals Nos. 235 and 236 of 2010, decided on 26th April, 2016.
(Against the judgment dated 8-4-2010 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Criminal Appeal No.158 of 2006 and Murder Reference No. 486 of 2006)

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Art. 46---Qatl-i-amd---Reappraisal of evidence---Dying declaration of deceased, reliance on---Doubts with regard to the recording and truthfulness of the dying declaration---FIR lodged two days after the purported dying declaration---Doctor in-charge of deceased not supporting the factum of recording of dying declaration---Contradictory statements as to who brought the deceased to the hospital---Dying declaration could not be relied upon in such circumstances---Accused was acquitted accordingly.

Deceased purportedly made the dying declaration before the local police in an injured condition in a hospital on 24.03.2004 and this was subsequently made the basis of an FIR two days later, i.e. on 26.03.2004. Question was that if the dying declaration had actually been made by the deceased on 24.03.2004 before the police itself then why an FIR had not been chalked out on the basis of the same during the next two days. Another factor sufficient to raise an eyebrow in the context of the dying declaration was that the doctor, under whose medical care the deceased was when alive, had categorically stated before the trial court that the police had not recorded any statement of the deceased in his presence, and that the deceased had never made any statement before him about the alleged occurrence.

Deceased had categorically stated in the purported dying declaration that he was taken to the hospital in an injured condition by two prosecution witnesses but the doctor had contradicted the deceased by stating that the deceased had been brought to the hospital in an injured condition by a police constable and on that occasion no private person was accompanying the deceased.

Either the deceased in the present case had economized with the truth while making his dying declaration or the dying declaration itself was a fabricated document which had been manufactured at some subsequent stage for the purposes of implication of the

present accused and to justify availability of the so-called eye-witnesses. In such peculiar circumstances no reliance could be placed upon the dying declaration.

(b) Penal Code (XLV of 1860)---

----S.302(b)---Qatl-i-amd---Reappraisal of evidence---Benefit of doubt---Witness furnishing the ocular account related to the deceased and also a chance witness---Availability of said witness near the place of occurrence not established through any independent evidence---Alleged motive for the crime not proved---Memorandum of alleged recovery of the weapon signed by witness at police station instead of the place of recovery---Accused was acquitted in circumstances.

Ocular account was furnished by a witness, who was a first cousin of the deceased and was admittedly a chance witness who ordinarily resided about one kilometer away from the place of occurrence. The stated reason for availability of this witness near the place of occurrence had never been established through any independent evidence at all. Apart from that the said witness had demonstrated an unusual conduct because according to him he had found the deceased in an injured condition, had shifted the deceased to the deceased's house and had then gone to attend a marriage ceremony rather than taking the injured close relative to a hospital or informing the police about the incident. The said purported eye-witness had not received any independent corroboration from the motive or from the alleged recovery of the weapon of offence. No witness had been produced by the prosecution to prove the alleged motive and the memorandum of the alleged recovery of the weapon of offence had admittedly been signed by the recovery witnesses at the police station and not at the place of recovery whereat such memorandum had allegedly been prepared. Accused was acquitted of the charge of murder in such circumstances by extending him benefit of doubt.

(c) Qanun-e-Shahadat (10 of 1984)---

----Art. 46---Dying declaration, reliance on---Scope---Dying declaration was an exception to the hearsay rule and, thus, the same was to be scrutinized with due care and caution.

Bakhshish Singh alias Bakhshi and others v. Emperor AIR 1925 Lahore 549; Tawaib Khan and another v. The State PLD 1970 SC 13 and Usman Shah and others v. The State 1969 PCr.LJ 317 ref.

Sana Ullah Zahid, Advocate Supreme Court and Ejaz Muhammad Khan, Advocate-on-Record (late) for Appellants (in Cr. A. No.235 of 2010).

Syed Zulfiqar Abbas Naqvi, Advocate Supreme Court and Arshad Ali Ch., Advocate-on-Record (absent) for Appellants (in Cr. A. No.236 of 2010).

Syed Zulfiqar Abbas Naqvi, Advocate Supreme Court and Arshad Ali Ch., Advocate-on-Record (absent) for Respondent No.1 (in Cr. A. No.235 of 2010).

Ahmed Raza Gillani, Additional Prosecutor-General, Punjab for the State (in both cases).

Date of hearing: 26th April, 2016.

JUDGMENT

ASIF SAEED KHAN KHOSA, J.--

Criminal Appeal No. 236 of 2010.

At about 12.00 Noon on 24.03.2004 Riyat Khan appellant had allegedly stabbed one Muhammad Afzal on the left side of his chest in Chak Thoa Mahram Khan within the area of Police Station Saddar, Talagang, District Chakwal which injury had proved fatal and the said Muhammad Afzal died two days later, i.e. on 26.03.2004. In respect of the said murder FIR No. 33 was registered at the above mentioned Police Station on 26.03.2004 on the basis of a dying declaration allegedly made by Muhammad Afzal deceased before the local police in a hospital. After a full-dressed trial the appellant was convicted by the trial court for an offence under section 302(b), P.P.C. and was sentenced to death and to pay compensation but on appeal his sentence of death was reduced by the High Court to imprisonment for life. Hence, the present appeal by leave of this Court granted on 25.05.2010.

2. Leave to appeal had been granted in this case so as to reappraise the evidence in order to examine as to whether the prosecution had succeeded in establishing the appellant's guilt beyond reasonable doubt or not. With the assistance of the learned counsel for the parties we have gone through the record of the case minutely.

3. The linchpin of this case was a dying declaration attributed to Muhammad Afzal deceased which declaration he had allegedly made before the local police in an injured condition in a hospital on 24.03.2004 and which was subsequently made the basis of an FIR two days later, i.e. on 26.03.2004. It has been found by us to be rather intriguing that if the dying declaration had actually been made by the deceased on 24.03.2004 before the police itself then why an FIR had not been chalked out on the basis of the same during the next two days. Another factor sufficient to raise an eyebrow in the context of the dying declaration is that Dr. Nazir Ahmed (PW2), under whose medical care Muhammad Afzal deceased was when alive, had categorically stated before the trial court that the police had not recorded any statement of Muhammad Afzal deceased in his presence and he had gone on to state that Muhammad Afzal deceased had never made any statement before him about the alleged occurrence. A dying declaration is an exception to the hearsay rule and, thus, the same is to be scrutinized with due care and caution, particularly in the backdrop of the observations made by different Courts about veracity of a dying declaration in the Province of the Punjab and a reference in this respect may be made to the cases of Bakhshish Singh alias Bakhshi and others v. Emperor (AIR 1925 Lahore 549), Tawaib Khan and another v. The State (PLD 1970 SC 13) and Usman Shah and others v. The State (1969 PCr.LJ 317). In the case in hand it quite clearly appears that Muhammad Afzal deceased had no regard for the truth because he had categorically stated in the so-called dying declaration that he

was taken to the hospital in an injured condition by Ghulam Abbas (PW9) and by one Noor Muhammad but the above mentioned doctor had contradicted the deceased by stating that the deceased had been brought to the hospital in an injured condition by a police constable and on that occasion no private person was accompanying the deceased. Even Ghulam Abbas (PW9) had given a big lie to Muhammad Afzal deceased by unambiguously stating before the trial court that he had not taken Muhammad Afzal deceased to the hospital in an injured condition at all. The other person who had statedly taken Muhammad Afzal deceased to the hospital in an injured condition was Noor Muhammad but the record of the case shows that the said person, though cited in the Calendar of Witnesses, had been given up by the prosecution as unnecessary. The legal inference to be drawn in that context is that if the said witness had entered the witness-box then he would not have supported the case of the prosecution. All this shows that either Muhammad Afzal deceased had economized with the truth while making his dying declaration or the dying declaration itself was a fabricated document which had been manufactured at some subsequent stage for the purposes of implication of the present appellant and to justify availability of the so-called eye-witnesses. In these peculiar circumstances we have decided not to place any reliance upon such a document.

4. As already observed above, one of the eye-witnesses relied upon by the prosecution, i.e. Noor Muhammad had not been produced by the prosecution before the trial court and the ocular account was furnished in this case only by Ghulam Abbas (PW9). The said witness was a first cousin of Muhammad Afzal deceased and was admittedly a chance witness who ordinarily resided about one kilometer away from the place of occurrence. The stated reason for availability of this witness near the place of occurrence had never been established through any independent evidence at all. Apart from that the said witness had demonstrated an unusual conduct because according to him he had found the deceased in an injured condition, had shifted the deceased to the deceased's house and had then gone to attend a marriage ceremony rather than taking the injured close relative to a hospital or informing the police about the incident. The said so-called eye-witness had not received any independent corroboration from the motive or from the alleged recovery of the weapon of offence inasmuch as no witness had been produced by the prosecution to prove the alleged motive and the memorandum of the alleged recovery of the weapon of offence had admittedly been signed by the recovery witnesses at the police station and not at the place of recovery whereat such memorandum had allegedly been prepared.

5. For what has been discussed above a conclusion is inescapable and irresistible that the prosecution had failed to prove its case against Riyat Khan appellant beyond reasonable doubt. This appeal is, therefore, allowed, the conviction and sentence of the appellant recorded by the courts below are set aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith if not required to be detained in connection with any other case.

Criminal Appeal No. 235 of 2010

6. As respondent No. 1 namely Riyat Khan has been acquitted by this Court today upon acceptance of his Criminal Appeal No.236 of 2010, therefore, the present appeal

seeking enhancement of his sentence had lost its relevance. Dismissed.

MWA/M-20/SC Order accordingly.

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